CLAIM NO: 00734

UNDER The Weathertight Homes Resolution Services Act 2002

IN THE MATTER OF an adjudication

BETWEEN **JOHN MONTGOMERY HENG AND ANNE ELIZABETH HENG**

Claimants

AND **CHRISTOPHER WALSHAW AND MARGARET ANNE WALSHAW**

First respondents

(Intituling continued next page)

Appearances:

Scott Galloway, counsel for the claimants
Chris Walshaw, for the first respondents
Tim Cleary, counsel for the second respondent
John Morrison, counsel for the third respondent
Chris Jurgeleit, counsel for the fourth & fifth respondents
Paul Robertson, counsel for the sixth respondent
Doug Smith, for the seventh respondent
Gary Still, for the eighth respondent
Phil Drummond, counsel for the ninth respondent

Interim Determination: 30 January 2008

INTERIM DETERMINATION OF ADJUDICATOR

AND **PETER LEO VINING**

Second respondent

AND **WARREN & MAHONEY LIMITED**

Third respondent

AND **P K BIDLAKE PAINTERS LIMITED**

Fourth respondent

AND **PETER KENETH BIDLAKE**

Fifth respondent

AND **PALMERSTON NORTH CITY COUNCIL**

Sixth respondent

AND **DOUG SMITH LIMITED**

Seventh respondent

AND **EQUUS INDUSTRIES LIMITED**

Eighth respondent

AND **CENTRAL TILE DISTRIBUTORS LIMITED**

Ninth respondent

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INTRODUCTION

[1] This is a claim concerning a "leaky building" as defined under section 5 of the Weathertight Homes Resolution Services Act 2002 (**the Act**).

[2] The claimants, John & Anne Heng, are the owners (**the Owners**) of a dwellinghouse located at 51 The Strand, Palmerston North, (**the property**) and it is the Owners' dwellinghouse that is the subject of these proceedings.

[3] The first respondents, Christopher and Margaret Walshaw (**the Walshaws**), are the former owners of the property. The Walshaws arranged for the construction of the dwellinghouse on the property by Vining and Harrall Ltd, now in liquidation. They sold the property to the Owners pursuant to an undated agreement for sale and purchase in 1999.

[4] The second respondent, Peter Leo Vining, was a director and shareholder of Vining & Harrall Ltd (now in liquidation) and was personally involved in the construction of the dwelling.

[5] The third respondent, Warren & Mahoney, is the firm of architects that designed the dwelling, and observed and inspected the dwelling from time to time during the course of its construction (**the Architect**).

[6] The fourth respondent, P K Bidlake Painters Limited (**BPL**), was the company that carried out the cladding work on the dwelling.

[7] The fifth respondent, Peter Bidlake, was the person who undertook and controlled the work undertaken by P K Bidlake Painters Limited, on the Owners' dwelling.

[8] The sixth respondent, Palmerston North City Council, (**the Council**) was the Local Authority that issued a building consent, carried out certain inspections of the building works during the construction process, and ultimately issued a code compliance certificate for the Owners' dwellinghouse under the Building Act 1991.

[9] The seventh respondent, Doug Smith Limited (**DSL**), was engaged by the Owners to provide certain project management services in respect of the construction of the dwelling.

[10] The eighth respondent, Equus Industries Limited (**Equus**) was the manufacturer of the material used to waterproof the roof, the decks, and the window sills, and Equus was the manufacturer of the cladding material.

[11] The ninth respondent, Central Tile Distributors Limited (**Central Tile**), was the company that supplied and laid tiles for the dwelling, including the sill tiles and the Hinuera paving to the exterior of the dwelling. The ninth respondent was joined by the fourth and fifth respondents

MATERIAL FACTS

[12] Distilling the situation as best I can, the relevant material facts are these:

[13] In or about June 1995, the Walshaws purchased the land at 51 The Strand, Palmerston North, for the purpose of constructing a large superior home of good design and with quality fittings and features, to take advantage of the unique north facing site with extensive views over the city.

[14] The Walshaws had seen examples of Warren & Mahoney's work, including that of Roy Wilson, a principal architect in that firm, which they particularly liked. They proceeded to arrange for Warren & Mahoney to design their new home and oversee the construction of the building work. Warren & Mahoney prepared plans, specifications and documents for that purpose.

[15] Because the Architect was based in Wellington with limited knowledge of the 'local building scene', the Walshaws, at the request of, or at least, with the concurrence of the Architect, approached a local building consultant, Doug Smith, of DSL, to see if he would assist with the tender process and to have an ongoing role assisting the Architect during the construction process.

[16] DSL agreed to provide consultancy services to the Walshaws on an as-needed basis. On 11 October 1995, DSL applied to the Council for a building consent on behalf of the Owners.

[17] DSL sought tenders for the building work between September and December 1995. By letter dated 5 December 1995, the Architect advised the builder that its tender was accepted in the adjusted amount of $485,121.25.

[18] The site works were undertaken by an independent contractor arranged by DSL and the building work commenced shortly after

the building consent was issued by the Council on 7 December 1995.

[19] During the course of construction, the cladding was changed from solid plaster to Equus Thermexx EIFS cladding. The cladding was completed in a 'Tuscan style' without a sealer coat or paint to achieve a natural weathered patina.

[20] The Walshaws occupied the house in June 1996 notwithstanding that there was a substantial amount of work yet to be completed by the builder.

[21] Practical completion of the building work was achieved by the builder on 12 August 1996.

[22] On 27 September 1996, the Council carried out a final inspection of the building work and by letter of even date, advised the Walshaws that certain aspects of the building work did not comply with the building code. The Council advised the Walshaws that they needed to fit restrictor stays to certain windows, reduce the opening between the treads of exterior stairs to a maximum of 100mm, install further pool fencing, and to lower ground levels in some areas. The Walshaws were advised to submit a schedule for correcting and completing the work within 14 days to avoid being issued with a Notice to Rectify.

[23] On 14 November 1996, the Architect wrote to the Walshaws advising them inter alia, that the ground levels should be lowered.

[24] On 2 December 1996, the Architect undertook a 'maintenance inspection' of the property. The Architect issued a maintenance list

to the builder dated 9 December 1996, and noted, amongst a long list of items that required attention, that both bay windows in the living area leaked at the head and should be checked and sealed with Clearseal as necessary.

[25] There were further inspections and discussions between the Architect, Mr Vining, and Mr Smith, during 1996, 1997 and 1998, as there was a long list of matters that still required attention by the builder.

[26] On 18 February 1998 there was a meeting at the property attended by Roy Wilson, Peter Vining, and Mr Walshaw, to discuss outstanding maintenance work. Following that meeting, Mr Walshaw wrote to the Architect on 9 March 1998 confirming that there was a leak in the north west living room window when there was driving rain and water in the downstairs ensuite bathroom. He advised the Architect that he would telephone Peter Vining when this next occurred so that it could be rectified.

[27] The Council undertook a further final inspection on 3 April 1998. It then issued a Notice to Rectify on 25 May 1998, in respect of inadequate ground clearances and lack of a swimming pool fence.

[28] On 26 May 1998, the Architect wrote to the Walshaws advising that the garden outside the lounge should be lowered.

[29] In late 1998 or early 1999, the Walshaws decided to sell their property and marketed their property for sale by public auction on 26 March 1999 through Property Brokers Ltd.

[30] On 4 March 1999, the Council issued a further Notice to Rectify when it became aware that the dwelling had been placed on the market by the Walshaws and the items in the earlier Notice had not been completed.

[31] On 26 March 1999, the property was put to auction. The Owners were the highest bidders at $625,000.00. The property did not sell 'under the hammer', however the Owners' offer was accepted by the Walshaws the day after the auction and the Owners and the Walshaws entered into an agreement for sale and purchase in the ADLS standard form Sixth Edition. Settlement date and possession date were stated to be 29 November 1999, or such earlier date as the purchasers may require, being no less than one month from the date of written notice of such requirement.

[32] Shortly after their offer was accepted, the Owners visited the property to show their children. During their visit he Walshaws explained that the house was not painted and that it should not be painted to preserve the weathered appearance that was a design feature.

[33] As it happened, the Owners wished to settle early, and therefore had their solicitor write to the Walshaws on 4 October 1999, to notify them of their requirement for early settlement on 5 November 1999. I note, although nothing substantive turns on the matter, that most unusually, the Owners and the Walshaws were represented by the same firm of Solicitors in respect of the sale and purchase of the property, although different solicitors within the firm acted for the respective parties.

[34] The Walshaws agreed to the early settlement, and in doing so, advised the Owners' solicitor that there was an outstanding issue in relation to the pool fencing that needed to be completed to comply with the Council's requirements. The Walshaws offered to complete the fencing work prior to settlement, or to deduct the cost of the fencing from the purchase price and the Owners could then erect a fence of their choice to meet the Council requirements.

[35] By letter dated 6 October 1999, the Owners' solicitor wrote to the Council advising that the Owners were to purchase the property on 5 November 1999, and requesting details of any outstanding requisitions still to be satisfied in respect of the property.

[36] By letter dated 11 October 1999, the Council advised the Owners' solicitor that there were four matters that needed to be addressed before a Code Compliance Certificate (**CCC**) would be issued. The only matter material to this claim involved the floor level of the lounge which was stated to be too low (less than 225mm above finished ground level). The letter explained that an alternative solution was required to be provided to the Council to ensure that the dwelling was protected from surface water penetration and possible flooding. The Council proffered that an acceptable solution would be to construct a trench around the affected area and to concrete the base and the upstand of the trench. The other outstanding matters related to the installation of restrictor stays on windows, the installation of a backflow preventer on the taps which can be used to fill the pool, and fencing of the pool.

[37] By letter dated 14 October 1999, the Owners' solicitor advised them of the reasons why the Council had not issued a CCC, and on 14 October 1999, she advised the solicitor acting for the Walshaws

that the matters would need to be completed and a CCC issued before the settlement date of 5 November 1999.

[38] The Owners made it clear to their solicitor that they would not settle without a CCC.

[39] The CCC was issued to Chris Walshaw, by the Council, on 4 November 1999.

[40] The Owners settled the sale of the property on 5 November 1999, and took possession and moved into the house on the same day.

[41] In December 1999, the Owners noticed water coming in through the French doors in the lounge when it rained heavily. They secured the help of a local builder who installed an aluminium angle over the door head to divert water runoff from above and to act as a drip edge. He also lowered the ground level and paved the south side of the property external to the laundry and garage areas. Door seals were also fitted by Mr Heng at this time.

[42] The Owners contacted the Master Builders Association in early 2000 to enquire about maintenance requirements for the property because the Walshaws had not left any instructions manuals or plans, or anything else, regarding the maintenance of the property.

[43] In or about May 2000, the Owners noticed that the windows were leaking in certain wind and rain conditions and water began dripping through the ceiling of the window seat in the family room.

[44] The Owners contacted the Master Builders Association, which in turn, advised them that they should contact the Council. The

Owners contacted the Council and an inspection of the property was arranged.

[45] On 10 October 2000, representatives of the Council visited the property to view the leaks that were concerning the Owners. The Council recommended that the Owners contact Mr Vining who they suggested would be able to fix the problems.

[46] Shortly thereafter, the Owners contacted Mr Vining, who suggested that he should inspect the property with Mr Smith of DSL.

[47] The Owners agreed to Mr Vining's proposal, and soon after that, Mr Vining and Mr Smith visited the property. Neither Mr Vining, nor Mr Smith, offered any solution, or any advice as to what the Owners should do to remedy the problem.

[48] When nothing happened after the visit in October 2000, the Owners made repeated phone calls to Mr Vining during late 2000 and 2001 to follow up his visit and to try and make some progress towards resolving the matter.

[49] Finally, a year after the site visit, the Owners received a letter from DSL dated 8 November 2001, enclosing a copy of a letter of even date to Mr Vining. Mr Smith advised the Owners, inter alia, that the builder was responsible for defective construction of the window sills and waterproofing of the exterior of games room that was permitting water to enter the dwelling. Mr Smith also set out in some detail, the extent of DSL's involvement with the project. Mr Smith further advised that he trusted that the builder would acknowledge its responsibility and rapidly address the problems with water ingress.

[50] By letter dated 8 November 2001, Mr Smith advised the builder that DSL could not identify any obvious defect or point of entry for water, but water was clearly penetrating the exterior envelope through the proprietary cladding, or through the window units, or through the junction between the windows and the cladding. Mr Smith advised Mr Vining that it was the builder's responsibility to take all necessary steps to investigate and locate the leaks around the window sills with its subcontractors, for whose work it was responsible, and that the party, or parties, at fault, should then take immediate steps to ensure the house was permanently waterproofed and all water related damage made good to the original standard. Mr Smith advised Mr Vining that VHL was also responsible for ensuring the games room was entirely waterproof and that it appeared that waterproofing was either omitted or not carried out in a manner that ensured that the base of the timber wall framing remained waterproof. Mr Smith advised that he could see no simple solution for the problem and that significant reconstruction appeared to be necessary to achieve a satisfactory result. Mr Smith further advised that he did not consider the builder responsible for water ingress at the laundry door head which appeared to be a design defect, in that no provision was made to collect, or divert water runoff, at the door head from the two storey wall above, that faced the prevailing wind.

[51] By letter dated 29 November 2001, copied to the Owners, Mr Vining advised DSL that VHL's insurer had advised that the Owners should contact their insurer to get an assessor to pinpoint the problem, which could be a design fault by the Architect. Mr Vining further advised that VHL would not touch anything until the problem was pinpointed. In respect of the games room, Mr Vining asserted that the waterproofing to blockwork had been applied in accordance

with the specification, that a toe-drain had been installed around three sides of the games room, and that if that drain was blocked off by landscaping work, VHL would have no responsibility for the problem.

[52] In March 2002, the Owners saw an article in the New Zealand Herald about leaky homes in Auckland, and the article suggested that concerned homeowners should contact the Building Research Association (**Branz**). The owners contacted Branz and were referred to Joyce Group Ltd, a firm of building consultants.

[53] Mr Tribe from Joyce Group Ltd (**JGL**), inspected the Owners' house on 9 April 2002, and shortly afterward provided a report dated April 2002, that confirmed the house was a 'leaky home'.

[54] In or about June 2002, the Owners' solicitor contacted Mr Walshaw who advised that he would be prepared to co-operate with the Owners in bringing a claim against others, so long as they did not bring a claim against him.

[55] The Owners' solicitor advised the Owners to engage the services of a specialist construction law firm, Hazelton law, which they did in June 2002.

[56] The owners decided to bring court proceedings in relation to the matter. Mr Tribe of JGL was retiring at that stage, and as the Owners had noticed new and further evidence of water ingress, it was decided that a further inspection should be carried out and a new report prepared by Mr O'Connor of JGL.

[57] In or about October 2002, the Owners became apprised of the Government's plans to introduce the Weathertight Homes Resolution Service (**WHRS**). The Owners say they were then given legal advice not to carry out remedial work so that the WHRS Assessor could inspect the dwelling and provide a report.

[58] By letter dated 4 December 2002, Mr O'Connor of JGL, provided the Owners with supplementary comments in relation to the earlier report and included a number of photos taken during the course of his inspection of the property. Mr O'Connor explained that he had not written up his inspection as a report because it was intended that he would prepare an affidavit for the court action.

[59] By a further letter dated 10 December 2002, Mr O'Connor advised the Owners that the likely cost of the necessary remedial work would be in the order of $160,000.00.

[60] On or about 24 February 2003, the Owners submitted their application to use the WHRS.

[61] The WHRS Assessor inspected the Owners' property on three occasions in December 2003, and on 14 June 2004, the Owners received a copy of the Assessor's report wherein he recommended inter alia, that the dwelling needed to be reclad, and he estimated the cost of the remedial works at $178,130.00.

[62] In the intervening period, the Owners had noticed evidence of further leaks in the downstairs bathroom, the garage walls, the ceiling in the family room near the stairwell, and the kitchen.

[63] On 7 July 2004, the Owners were advised by the WHRS that their claim was an eligible claim.

[64] In or about late July/early August 2005, the Owners engaged Mr Russell Cooney, a building consultant, to advise them on matters relating to the water leaks, the damage, the necessary remedial work, and the cost of the remedial work. Mr Cooney inspected the Owners' property for the first time on 4 August 2005. A second inspection followed on 5 September 2005.

[65] On 6 September 2005, the parties to the claim participated in a mediation but the matter did not settle.

[66] On 4 October 2005, Mr Cooney undertook a further inspection of the Owners' dwelling involving water testing and destructive investigation.

[67] In December 2005, the claim was referred to adjudication.

[68] On 12 May 2006, Mr Cooney carried out a fourth inspection of the Owner's dwelling that involved destructive examination of external wall cavities.

[69] In August 2006, Mr Cooney prepared a schedule of work that he considered necessary to repair the leaks and the damage to the Owners' dwelling and submitted that schedule to a firm of quantity surveyors, Ortus International Ltd, and requested an estimate of the cost of that scheduled work. Ortus' estimate was in the amount of $340,100.00 exclusive of GST, temporary accommodation and relocation costs, replacement of carpets, professional supervision fees, and remedial works inside the line of the external walls. Not

including those other heads of cost, the estimated cost of repair was now more than twice the earlier estimates provided by JGL and the WHRS Assessor.

[70] The claim, in the aggregate amount of $414,000.00 proceeded to a defended hearing at Palmerston North on 16, 17 &18 October 2006. The parties' experts participated in a separate and concurrent technical conference convened for the purpose of the production of an agreed statement of common positions, or each expert's differing position on the cause(s) of water penetration, the damage in relation to each instance of water ingress, and the scope, nature, and cost, of the necessary remedial work in relation to each instance of water penetration. The experts' technical conference was chaired by Mr Cooney. The hearing was adjourned to allow the parties' experts to confer further in relation to the scope of the remedial work and the cost of that work.

[71] The technical conference resulted in the production of a joint schedule of cause, damage, and remedial work, for 36 separate leak locations, a further schedule comprising the experts views in respect of 12 possible causes in relation to each of 20 windows that were tested, and an estimate of cost for remedial work in respect of each of the locations and comprising 344 items which resulted in estimates for targeted repairs ranging between $143,000.00 and $158,000.00 excluding GST.

[72] On 26 October 2006, Mr Cooney filed a supplementary brief of evidence wherein he deposed inter alia, that because of time and technical constraints at the conclusion of the meeting on 18 October 2006, the quantities and rates used to prepare the schedule of costs for repair were not able to be checked by all of the experts,

that certain of the quantities and rates were grossly low, and that the cost estimates for targeted repairs needed further work and refinement. Moreover, Mr Cooney stated that he remained of the view expressed in his original brief of evidence, that targeted repairs are just not feasible and that it will be necessary to fully re-clad the Owners' dwelling in order to repair the damage and to make the dwelling watertight. Unsurprisingly, a number of parties took exception to what they considered to be Mr Cooney's resiling from an earlier agreed and common position in respect of targeted repairs.

[73] By Memorandum dated 2 November 2006, I requested the parties' experts to confer further in relation to the cost estimate for targeted repairs to see whether consensus could be reached, and I requested the claimants to confirm the quantum in relation to their claim for remedial work involving a complete re-clad of the dwelling. I proposed that the hearing be re-convened to allow cross-examination of Mr Cooney and the presentation and testing of any further evidence in relation to quantum if necessary, and closing submissions to be filed thereafter.

[74] A further meeting of the experts was convened by telephone on 13 December 2006

[75] In late December 2006, after the further deliberations of the experts, Mr White, the Owners' quantity surveyor, provided a report dated 20 December 2006, identifying the principal areas of difference and a revised estimate of cost for targeted repairs dated 21 December 2006, which resulted in estimates for targeted repairs ranging between $140,163.00 and $166,513.00 excluding GST.

[76] A telephone conference was convened on 27 February 2007, to discuss the further conduct of the claim, and particularly, whether any of the parties required the hearing to be re-convened. Mr Galloway, counsel for the Owners, confirmed that the Owners claimed the aggregate amount of $449,500.00 for remedial work involving a total reclad of the dwelling, and including claims for consequential losses and general damages. It was agreed that there was no requirement to re-convene the hearing, but that the respondent parties could file any further evidence in response to Mr Cooney's evidence, the claimants could file evidence in reply, and the parties would then file closing submissions including copies of all authorities relied upon.

[77] Supplementary briefs of evidence were filed by John Bannatyne, Peter Bidlake, and Geoffrey Bayley, in late March 2007, and a brief in response was filed by Russell Cooney on 11 April 2007.

[78] Closing submissions and submissions in reply were subsequently filed by the parties.

THE HEARING

[79] The hearing of this claim was convened at 2.00pm on 16 October 2006 at the Kingsgate Hotel, 110 Fitzherbert Avenue, Palmerston North. The hearing continued on 17 & 18 October 2006.

[80] All parties, with the exception of the seventh and eighth respondents, were represented by counsel at the hearing.

[81] The witnesses (who gave sworn or affirmed evidence) in support of the claim were:

- Mr John Heng (Mr Heng is one of the claimants in this matter).
- Mrs Anne Elizabeth Heng (Mrs Heng is one of the claimants in this matter).
- Mr Russell Cooney (Mr Cooney is a building consultant).
- Mr James Vincent White (Mr White is a quantity surveyor)

[82] The witnesses (who all gave sworn or affirmed evidence) to defend the claim were:

- Mr Christopher Walshaw (Mr Walshaw is one of the first respondents in this matter, and together with Margaret Walshaw, was a former owner of the claimants' property).
- Mrs Margaret Walshaw (Mrs Walshaw is one of the first respondents in this matter, and together with Christopher Walshaw, was a former owner of the claimants' property).
- Mr Peter Leo Vining (Mr Vining is a trade qualified builder, a company director, and was a co-director of Vining & Harrall Ltd (now in liquidation), the building company that was engaged by the first respondents to construct the Owners' dwelling).

- Mr John MacArthur (Mr MacArthur is an expert in relation to the application of plastering systems in the New Zealand construction industry and he was engaged in relation to this claim by Mr Vining).

- Mr Roy Wilson (Mr Wilson is a director of the third respondent, Warren & Mahoney and was the architect who undertook the commission to design the Owners' home for the first respondents, the Walshaws)

- Mr John Bannatyne (Mr Bannatyne is an Architect who provides consultancy services and advice in relation to building failures including weathertightness issues and was engaged in relation to this claim by Warren & Mahoney).

- Mr Peter Kenneth Bidlake (Mr Bidlake is a painter and plasterer by trade. Mr Bidlake is the fifth respondent in this matter and is the managing director of the fourth respondent, P K Bidlake Painters Ltd. Mr Bidlake controlled the activities of the fourth respondent and personally undertook certain of the cladding work on the Owners' dwelling).

- Mr Geoffrey Robert Bayley (Mr Bayley is a quantity surveyor and building consultant and was engaged in relation to this claim by P K Bidlake Painters Ltd and Peter Bidlake).

- Mr Brian Kenneth Sheridan (Mr Sheridan is a building consultant on contract to the sixth respondent, Palmerston North City Council. Mr Sheridan was the council inspector who undertook the majority of the building inspections during the construction of the Owners' dwelling).

- Mr Ronald Douglas Smith (Mr Smith is a project manager and the managing director of the seventh respondent, Doug Smith Ltd. Mr Smith was engaged by the Walshaws to undertake certain project management activities in relation to the construction of the Owners' dwelling).

- Mr Gary Still (Mr Still is the National Compliance Manager for the eighth respondent, Equus Industries Ltd).

- Mr Tom Pirie (Mr Pirie is a tiler and is a director of the ninth respondent, Central Tile Distributors Ltd. Mr Pirie oversaw the tiling work undertaken on the Owners' property by the ninth respondent).

[83] I undertook a site visit and inspection of the Owners' dwelling on the morning of 16 October 2006, prior to convening the formal hearing, in the presence of representatives of all the parties.

[84] Following the close of the hearing, all parties presented helpful and detailed closing submissions and copies of authorities relied upon. I believe those submissions helpfully canvass all of the relevant issues and matters in dispute.

THE OWNERS' CLAIMS

[85] The Owners claim their house contains a number of defects that have led to water penetration and resulted in substantial damage to the dwelling. They say that the major areas of failure result from using an exterior cladding different to that shown in the architect's plans without proper consideration of the consequential design

changes needed to interface between the exterior cladding and the window joinery. They say there are also issues in relation to ground clearance and incorrect window installation. The Owners claim the following amounts against each of the respondents:

- Repair costs in the amount of $399,600.00 inclusive of GST.
- The costs of alternative accommodation during the undertaking of the repair work in the amount of $10,400.00 inclusive of GST
- The costs of removal of the Owners' possessions in the amount of $4,000.00 inclusive of GST
- The costs of storage of the Owners' possessions in the amount of $3,900.00.
- The costs of reinstalling the Owner's possessions in the amount of $1,000.00 inclusive of GST
- The costs of storage handling in the amount of $600.00.
- General damages in the amount of $30,000.00.

[86] The aggregate amount of the Owners' claim is $449,500.00 inclusive of GST and general damages.

[87] All amounts referred to in this determination are inclusive of GST unless specifically noted otherwise.

Case against the first respondents, the Walshaws

[88] The Owners claim against the Walshaws in contract for breach of vendor warranties contained in the agreement for sale and purchase (**the Agreement**). The Owners say the Walshaws owed them direct and express contractual duties as set out in clauses 6.1(8) and (9) of the Agreement, which the Walshaws breached because the dwelling was not constructed in accordance with the building consent and it did not comply with clauses E2 and B2 of the regulations made under the Building Act 1991.

[89] The Owners say the Walshaws are liable pursuant to the vendor warranties in the agreement for sale and purchase and are therefore liable to them to the full extent of their loss in the amount of $449,500.00.

Case against the second respondent, Peter Vining

[90] The Owners claim against the second respondent in negligence. The Owners say that Peter Vining owed them a duty of care to exercise reasonable care and skill in the construction of the dwelling and he is liable in his personal capacity because he personally undertook the building work, he made decisions about methods of construction and the materials to be used, and because he had a leading or supervisory role in the construction of the dwelling.

[91] The Owners say Peter Vining breached the duty of care that he owed them by: failing to properly supervise construction of the dwelling so that he could ensure compliance with the building code; using an exterior cladding different from that shown in the

architect's plans without allowing for consequential changes; failing to construct adequate flashings/seals and drip edges for door heads and soffits; failing to properly construct the cladding around the pergola columns; failing to ensure adequate clearances between the lower edge of the wall cladding and the paving and balcony surfaces; failing to properly inspect or arrange proper inspection of the defects in the dwelling; and, by failing to ensure that defective works were remedied once he became aware of them.

[92] The Owners say Peter Vining is liable to them for breach of the duty of care to the full extent of their loss in the amount of $449,500.00.

Case against the third respondent, Warren & Mahoney

[93] The Owners claim against the third respondent is also in negligence. It is based upon its acts and omissions in designing the dwelling and observing and inspecting its construction.

[94] The Owners say the third respondent, as a professional architect, owed a duty of care to them as subsequent owners of the dwelling, which it breached by: preparing deficient plans; failing to produce amended documentation to allow for proper construction following the change in cladding; failing to provide sealing and flashing detail once the cladding system was changed; failing to alert the Walshaws or other respondents that consequential changes would be needed; failing to alert the Walshaws that there was a possibility that the cladding would deteriorate if it were not sealed; failing to check with Doug Smith or Mr Vining as to whether or not the Council had been notified of the change in cladding; failing to identify the reason for the leaks in the bay windows and inappropriately recommending the use of Clearseal; failing to

address the other leaks in the dwelling once it became aware of them; and, for certifying practical completion when there was no reasonable grounds for believing that the building work had been carried out in accordance with the building code.

[95] The Owners say the third respondent is liable to them for breach of the duty of care to the full extent of their loss in the amount of $449,500.00.

Case against the fourth respondent, P K Bidlake Painters Ltd

[96] The Owners claim against the fourth respondent is also in negligence.

[97] The Owners say the fourth respondent owed a duty of care to them as subsequent owners of the dwelling to exercise reasonable care and skill to ensure that the dwelling was clad, plastered, and flashed, in a proper and workmanlike manner using appropriate materials and in accordance with the Building Act 1991 and the building code.

[98] The owners say the fourth respondent breached the duty of care by: failing to ensure window and door openings were properly sealed; failing to alert the builder or the Architect about the issue with wall cladding not overlapping the walls to the games room; failing to consult with the Architect about how to finish off the lower edge of the wall cladding above the patios and failing to ensure there was sufficient clearance between the base of the plaster and paving preventing proper drainage of the plaster coating; and by failing to alert the Walshaws to the possibility that the plaster could deteriorate if it remained unsealed.

[99] The Owners say the fourth respondent is liable to them for breach of the duty of care to the full extent of their loss in the amount of $449,500.00.

Case against the fifth respondent, Peter Bidlake

[100] The Owners claim against the fifth respondent is also in negligence.

[101] The Owners say that although the fourth respondent was the company contracted to install the cladding system, the fifth respondent owed a duty of care to them personally, as subsequent owners of the dwelling, to exercise reasonable care and skill to ensure that the window sill construction complied with the Building Act 1991 and the building code.

[102] The Owners say the fifth respondent breached the duty of care by: personally designing and constructing the detail for the sill flashings when he was not qualified to do so; using a liquid applied membrane flashing which was inappropriate; failing to properly consult the Architect with regard to the sill and flashing design; and by his participation in the recommendation to omit the sealer coat to the cladding despite the Equus specification.

[103] The Owners say the fifth respondent is liable to them for breach of the duty of care to the full extent of their loss in the amount of $449,500.00.

Case against the sixth respondent, Palmerston North City Council

[104] The Owners claim against the sixth respondent is also in negligence.

[105] The Owners say that the Council owed them a duty of care to take reasonable care and skill in performing the functions set out in sections 24 and 76(1) of the Building Act 1991, namely to administer the Act and regulations, to receive and consider, approve or reject building consents, to enforce the provisions of the building code and regulations, and to issue CCC's.

[106] The Owners say the Council breached its duty of care to them by: issuing the building consent on inadequately and defectively detailed plans; failing to require amended plans and details when it became aware the cladding was being changed from that consented to; failing to properly inspect ground clearances, the cladding sitting on the masonry wall, the sill flashing, and the lack of sealing to the pergola columns; failing to inspect the construction with sufficient frequency. or at appropriate times, stages, or intervals, to ensure compliance with the building code; failing to issue a Notice to Rectify in respect of the defects scheduled in the Statement of Claim; and, by issuing a code compliance certificate when there were no reasonable grounds for believing the building work complied with the building code.

[107] The Owners say the sixth respondent is liable to them for breach of the duty of care to the full extent of their loss in the amount of $449,500.00.

Case against the seventh respondent, Doug Smith Ltd

[108] The Owners claim against the seventh respondent is also in negligence.

[109] The Owners say the seventh respondent owed a duty of care to them, as subsequent owners of the dwelling, to exercise reasonable care and skill in undertaking the project management for the construction of the dwelling to prevent defects and damage occurring to the building work.

[110] The Owners say the seventh respondent breached the duty of care by: failing to properly supervise the contractors and subcontractors during construction; failing to inspect those features of the dwelling with the defects described in the Statement of Claim; allowing the use of an exterior cladding different to that shown in the Architect's plans without allowing for proper consequential changes; and, by failing to ensure that the defective work was rectified by the contractor and subcontractors responsible.

[111] The Owners say the seventh respondent is liable to them for breach of the duty of care to the full extent of their loss in the amount of $449,500.00.

Case against the eighth respondent, Equus Industries Ltd

[112] The Owners claim against the eighth respondent is also in negligence.

[113] The Owners say the eighth respondent owed a duty of care to them as subsequent owners of the dwelling, to exercise reasonable care

and skill in ensuring that its products are fit for purpose and/or providing specifications that made it clear what the product was to be used for.

[114] The Owners say the eighth respondent breached the duty of care by: providing specifications for the Equus Thermexx Insulated Cladding System (**Thermexx**) which did not contain adequate construction detail as to how to seal around window and door joinery; providing specifications for Thermexx which did not contain adequate construction details in relation to ground clearances; providing a Producer Statement for Thermexx which did not deal with these matters; and by failing to publish limitations on the use of Equus Chevaline Dexx waterproofing membrane warning against constructions which would trap moisture on the upper surface of the membrane.

[115] The Owners say the eighth respondent is liable to them for breach of the duty of care to the full extent of their loss in the amount of $449,500.00.

Case against the ninth respondent, Central Tile Distributors Ltd

[116] The Owners make no claim against the ninth respondent. The ninth respondent was joined at the request of the fourth and fifth respondents, whose cross-claims are for indemnity/contribution in the event that either the fourth or fifth respondents are determined to be liable to the claimants.

[117] The fourth and fifth respondents assert that the ninth respondent owed the Owners a duty to take care that the application of the tiles

to the windowsills did not compromise or undermine the watertightness of the sills constructed by the fourth respondent.

[118] The fourth and fifth respondents say the ninth respondent breached the duty of care by: (with the approval of the second respondent) fixing tiles to the sills using a method and materials which allowed water to enter and compromise the watertightness of the sills.

[119] The fourth and fifth respondents claim from the ninth respondent such amount (if any) as may be awarded in damages against them, or either of them, in respect of any loss caused by the ingress of water through the sills.

THE DEFENCE FOR THE FIRST RESPONDENTS, THE WALSHAWS

[120] The Walshaws deny liability for the Owners' losses and say they did fully comply with their obligations under the Building Act 1991 at the settlement date and moreover, that the issue of a CCC on 4 November 1999, by the Council, was a conclusive and unqualified statement of compliance by the first respondents that the building work did comply with the building code and the Building Act 1991 and upon which they were entitled to, and did, rely, and did thereby meet their obligations under clause 6.1(9) of the contract with the Owners.

[121] The Walshaws further deny liability upon application of the principle of *caveat emptor*. The Walshaws contend that the sale agreement, by clause 3.8, permitted an inspection by the Owners prior to settlement, and the onus was on the Owners to satisfy themselves

of the state of the property prior to settlement and evidently they were so satisfied and they did complete settlement on the agreed date of 5 November 1999.

[122] The Walshaws further assert that there was a lacuna in pleading, namely as to whether the claim was brought for breach of clause 6.1(9) only, which refers to those obligations imposed on a vendor under the Building Act 1991, or whether it was brought for breach of clause 6.1(9) and clause 6.1(8) which requires a consideration of the permit, and a comparison between the work permitted and the work actually carried out. The Walshaws submit that the Owners have failed to plead and adequately address, or prove, in what particular respects there was a departure from permitted works which was causative of their loss.

[123] The Walshaws say that if they are found liable in contract to the claimants or in tort to any other respondent then they are entitled to an indemnity from all other respondents found liable.

[124] The Walshaws deny that they are liable for any losses for which any of the other respondents may be found liable. There are cross claims by the second and third respondents founded on allegations that the Walshaws failed to paint, or apply protective coating, to the cladding; failed to follow up leaking joinery or insufficient ground clearances with appropriate parties; failed to undertake basic maintenance on the property; and, in respect of the third respondent, approved the change of cladding without reference to them and/or assumed project management responsibilities.

[125] The Walshaws join with the other respondents and claim that the Owners have contributed to their losses by failing to maintain the

dwelling and for failing to make any consistent or concerted endeavour to find and fix the problems.

[126] The Walshaws claim costs against all other parties found liable to them in contract or tort, to be paid, and then apportioned, on the same basis as the damages.

THE DEFENCE FOR THE SECOND RESPONDENT, PETER VINING

[127] In essence, Mr Vining denies liability for the Owners' losses. He says he was employed by Vining & Harrall Ltd as a builder, he owed no personal duty of care to the Owners as subsequent purchasers, if a duty was owed there was no breach, and if there was a breach, it caused no loss.

[128] To the extent that Mr Vining may be found liable, he claims against all other respondents as joint tortfeasors given their specialist roles in the construction/design/approval of the dwelling, and claims against the first respondents on the ground that the Walshaws were aware the dwelling was leaking but nothing was done by them to alert Mr Vining to this and had the problems associated with leaking been closely monitored by the Walshaws, it is unlikely the extent of damage would be where it is today.

[129] Mr Vining submits that any award of damages should be reduced on account first, of contributory negligence on the part of the Owners for failing to obtain or carry out a proper inspection of the property prior to purchase, secondly, on account of their failure to mitigate the loss due to lack of maintenance and delay in carrying

out the remedial work, and thirdly, on account of betterment, the dwelling now being 11 years old and due for significant refurbishment internally and externally.

[130] Mr Vining disputes the quantum of the Owners' claim. Mr Vining disputes the alleged requirement for a full-reclad and submits that targeted repairs are both feasible and appropriate in the circumstances.

THE DEFENCE FOR THE THIRD RESPONDENT, WARREN & MAHONEY – THE ARCHITECT

[131] The third respondent accepts that it owed contractual duties to the first respondents and that an architect owes a duty of care to owners and subsequent owners of dwellinghouses to exercise reasonable care and skill in the discharge of its functions and duties in respect of design when engaged to design, and in respect of contract administration and observation when so engaged, according to the standards of a normally competent architect at the time, but the third respondent denies that it breached its contractual obligations, or the duty of care, in the present case.

[132] To the extent that the third respondent may be found negligent, it submits any loss should be reduced on the ground that the Owners and/or the Walshaws contributed to the damage to the dwelling and the loss by insufficient or inadequate maintenance, failing to protect the dwelling from deterioration when leaks became apparent, and failing to undertake remedial works in a timely manner.

[133] Further or alternatively to para [132] above, the third respondent submits that insofar as the Owners have suffered the losses alleged, those losses were caused or contributed to by the Owners, by; failing to undertake or commission an inspection of the property before purchase; failing to stipulate as a condition of purchase that such defects as were reasonably ascertainable from such inspection be remedied before settlement; failing to otherwise adjust the purchase price or terms of purchase to take account of the state of repair of the property; and, purchasing the property in the knowledge that some remedial work was (or might be) necessary, but not ascertaining the extent of that, and thereby accepting the risk of the resultant cost.

[134] To the extent that the third respondent may be found liable in tort, it claims contribution from such other respondents as may also be found liable for the same damage and for that purpose relies upon the allegations of the Owners and/or upon the allegations of the fourth respondent against the ninth respondent.

[135] The third respondent disputes the quantum of the Owners' claim and submits that targeted repairs are feasible and appropriate.

THE DEFENCE FOR THE FOURTH RESPONDENT, P K BIDLAKE PAINTERS LTD

[136] The fourth respondent denies that it owed a duty of care to the Owners and denies any liability for the leaks and damage that have occurred. The fourth respondent submits that the recognised categories of relationship that give rise to a duty of care do not include the relationship between a subcontractor and a subsequent

purchaser, and there are no particular facts that warrant imposing a duty of care on the fourth respondent in this case.

[137] The fourth respondent submits that the second respondent approved the sill construction method and instructed the fourth respondent to use it on the sills throughout the house.

[138] The fourth respondent disputes the quantum of the Owners' claim and submits that a full re-clad of the house is not warranted and the house can be properly and effectively rendered watertight by carrying out specific and isolated repairs. The fourth respondent further submits that there are aspects of the claim that amount to betterment.

[139] The fourth respondent says that in the event that it is found to have breached any duty of care to the claimants, the fourth respondent claims contribution from the Owners on the grounds that they failed to mitigate their losses, and/or by their negligence they contributed to their losses, and/or the fourth respondent claims contribution from the second, and/or the eighth, and/or the ninth respondents, as joint tortfeasors in respect of the same damage they may be found liable for.

THE DEFENCE FOR THE FIFTH RESPONDENT, PETER BIDLAKE

[140] The fifth respondent denies that he owed a duty of care to the Owners and denies any liability for the leaks and damage that have occurred on the basis that he undertook the construction of the window sills in his capacity as an officer and servant of the fourth

respondent and he assumed no personal responsibility for the construction of the window sills.

[141] The fifth respondent submits that the second respondent approved the sill construction method and instructed the fourth respondent to use it on the sills throughout the house.

[142] The fifth respondent disputes the quantum of the Owners' claim, and submits that a full re-clad of the house is not warranted and the house can be properly and effectively rendered watertight by carrying out specific and isolated repairs. The fifth respondent further submits that there are aspects of the claim that amount to betterment.

[143] The fifth respondent says that in the event that he is found to have breached any duty of care to the claimants, the fifth respondent claims contribution from the Owners on the grounds that they failed to mitigate their losses, and/or by their negligence they contributed to their losses, and/or the fourth respondent claims contribution from the second, and/or the eighth, and/or the ninth respondents, as joint tortfeasors in respect of the same damage they may be found liable for.

THE DEFENCE FOR THE SIXTH RESPONDENT, PALMERSTON NORTH CITY COUNCIL

[144] The Council denies that it owed a duty of care to the Owners as the owners are not within the category of individuals that the New Zealand Courts have historically said are owed common law

obligations by councils on the issue of consents and on inspection of domestic dwellings during construction.

[145] The Council denies that it owed the Owners any common law obligation in respect of the issue of the CCC, or in respect of failing to issue a notice to rectify, on the ground that there are no case authorities to support the imposition of a duty of care.

[146] The Council submits that its involvement with the Owner's property was of a standard typical at the time the property was constructed in 1996, and as a result, the Council's involvement with the property did not fall below a reasonable standard.

[147] The Council submits that even if it were found to owe a duty of care to the Owners of the nature alleged, they have not been breached in this case, and even if they are found to have been breached, they are not causative of the Owners' loss.

[148] The Council submits that the Owners' failure to arrange an inspection by a competent building consultant or pre-purchase inspection prior to committing themselves to the purchase of the property in November 1999, amounts to a voluntary assumption of risk and/or contributory negligence, and the Owners' failure to investigate/rectify the alleged defects amounts to a failure to mitigate their loss. The Council submits that any loss should therefore be reduced accordingly.

[149] The Council submits that the Owners' loss should be reduced to the extent that is reasonable to reflect any betterment that may accrue to the Owners in the event that the remedial works, as intended, are carried out.

[150] The Council submits that its liability (which is denied) should not exceed 10% of the Owners' losses. The Council claims contribution and/or indemnity from each of the other respondents pursuant to section 29(2) of the Act, or under section 17(1)(c) of the Law Reform Act 1936, or under common law.

THE DEFENCE FOR THE SEVENTH RESPONDENT, DOUG SMITH LTD

[151] The seventh respondent denies that it owed a duty of care to the Owners to exercise reasonable care and skill in undertaking the project management for the construction of the dwelling.

[152] The seventh respondent submits that even if it were found to owe a duty of care to the Owners of the nature alleged, it has not been breached in this case, and even if it were found to have been breached, the alleged breaches are not causative of the Owners' loss.

[153] The seventh respondent disputes the quantum of the Owners' claim.

[154] The seventh respondent claims all costs incurred in the defence of the claim from the Owners.

THE DEFENCE FOR THE EIGHTH RESPONDENT, EQUUS INDUSTRIES LTD

[155] The eighth respondent appears to accept that it owed a duty of care to the Owners to exercise reasonable care and skill in ensuring that: its products are fit for purpose; and/or providing specifications that made it clear what the product was to be used for; and/or in relation to the preparation of a Producer Statement. However, the eighth respondent denies that it breached such duties, or that its services and/or products were causative of the Owners' losses.

[156] The eighth respondent claims all costs incurred in the defence of the claim from the Owners and the fourth and fifth respondents.

THE DEFENCE FOR THE NINTH RESPONDENT, CENTRAL TILE DISTRIBUTERS LTD

[157] The ninth respondent denies that it was negligent in either the supply or the laying of the tiles at the Owners' property or that it owed the second, fourth, or fifth, respondents, a duty of care.

[158] In the event of any liability, the ninth respondent submits that it is entitled to complete indemnity or contribution from the second, fourth and fifth respondents in terms of justice and equity, or pursuant to section 29(2) of the Act, or under section 17(1)(c) of the Law Reform Act 1936.

[159] The ninth respondent further submits, that if it were held liable for any loss to the claimant, or second, fourth and/or fifth respondents, then it claims that the second, fourth, and fifth respondents, were contributorily negligent, and have contributed to that loss by the design and/or construction of the sills, and that the fourth and fifth respondents have contributed to that loss by failing to apply a

waterproof plaster system to the house, and failing to provide plaster sills at sufficient height to enable the sill tiles to be affixed under the window frame.

[160] The ninth respondent further submits that in the event of any liability for contribution, any contribution should be minimal in terms of justice and equity having regard to the fact that the water ingress in the window sill area is primarily design and construction related. In terms of any repair, the ninth respondent submits the sills are likely to have to be reconstructed in any event to a watertight standard and the costs of which should not be visited on the ninth respondent and this factor should be taken into consideration when assessing any level of contribution.

THE DAMAGE TO THE OWNERS' DWELLING

[161] There is no denying that the Owners' dwelling is a leaky home and that it contains a number of defects that have lead to water ingress and resulted in substantial damage to the dwelling.

[162] There was initially substantial disagreement among the parties about the locations where water was penetrating the dwelling, the causes of the water penetration at the various locations, the extent of the damage and the necessary remedial work, and not unsurprisingly, who was responsible for the damage.

[163] The experts' technical conference convened concurrently with the hearing, resulted in the helpful production of a joint leak schedule which set out the location, cause, damage, and remedial work, for 36 separate leak locations, the production of a further schedule

comprising the experts views in respect of 12 possible causes in relation to each of 20 windows that were tested by one or more of the experts, and an estimate of cost for remedial work in respect of each of the locations. The experts were specifically instructed not to discuss or consider liability during the course of their discussions.

Leak locations

[164] The experts' leak schedule comprises 36 specific leak locations which were identified by the experts and which were also marked–up on the elevation drawings. The locations of the leaks were identified and described by the experts as follows:

Location	Description
1.	Bay windows east & west walls
2.	Base of games room north wall including curved wall adjacent to external stairs
3.	Ceiling to south wall of games room beneath W7
4.	Ceiling to the south wall directly beneath the bookcase
5.	Lower east wall of stair to games room adjacent to W28
6.	Perimeter of framing around terrace paving to upper level north wall outside kitchen
7.	East end of entrance hall terrace area abuts the wall cladding
8.	Exterior east wall to the Drawing room both sides of bifold D13
9.	Pergola columns
10.	Store window W30
11.	Store window W28
12.	Store Window 29

13. Study bay window W27
14. Dining room window W17
15. Landing window W18
16. Base of wall between NW external corner of house adjacent to W17 to the NW corner of garage
17. Interior head of garage door
18. Roofing plywood to garage
19. Base of the west garage wall
20. Crack to RHS of gas meter enclosure and between fence and garage
21. Bedroom 3 W19
22. Junction between garage roof parapet and house wall to south eastern corner
23. External parapet top to the south eastern corner of the garage
24. Garage W3
25. Garage bulkhead light to the east wall
26. Particle board lining below the south eastern internal corner of garage parapet
27. Water stained particle board lining to base of garage side wall between garage and bathroom
28. Ground floor bathroom W4
29. Ground floor bedroom W5
30. Laundry window W6
31. Wall at base of wall adjacent to inside laundry door D7
32. Breakfast area window W7 at head of stairs to games room
33. Bedroom 3 window W20
34. Bedroom 2 window W21
35. Ensuite W22
36. Balcony balustrade post penetrates balustrade

Causes of water penetration

[165] In response to my directions, the experts deliberated as to the cause, or causes, of water penetration at each location, and assessed the causative effect of the defects they identified, and recorded the causative effect of each defect in the leak schedule as a percentage accordingly to their view on how likely it was that a particular cause contributed to the leak.

[166] In respect of the windows, the experts developed a further schedule of 12 generic defects. The generic defects were described as being possible causes of water penetration around the windows that the experts say were likely to be typical or common to each of the window installations.

[167] There then followed an exchange of briefs, notably a supplementary brief of evidence of Mr Cooney dated 26 October 2006, a supplementary brief of evidence of Mr Bayley dated 30 March 2007, and a brief in response of evidence of Mr Cooney dated 4 April 2007, in relation to, inter alia, the scope of the remedial work and certain aspects of the recorded findings as to causation. In relation to causation, Mr Bayley challenged the percentages ascribed to some of the possible leak causes identified in the earlier technical conference on the basis that his deliberations with Mr White on quantum during the experts' conference prevented him fully participating in the apportionment discussions and the allocation of the percentage contribution for each leak cause. Mr Cooney held to his earlier views.

[168] I have carefully considered the extensive evidence in this regard and of the competing views and the inconsistent evidence, I have

no difficulty in accepting, as being convincing on the balance of probabilities, the evidence of Mr Cooney as to causation, and for reasons that will follow in my discussion on the windows in particular, in my view his evidence is simply more objective and on point.

[169] In short however, the evidence has established that the predominant causes of leaks to the Owners' dwelling fall into two broad categories, those associated with the window and door installations, and those associated with ground clearances.

Ground clearances

[170] The issues in relation to ground clearances are relatively straightforward. Those in relation to the proximity of the unprotected/unpaved ground surfaces to the cladding and wall framing were largely picked up by the Council during the course of its inspections and there is really no contest in regard to those.

[171] In relation to the paved surfaces, Mr Wilson acknowledged in his evidence that the detailing could have been better, but in short, it is fair to say that the step-downs detailed were potentially inadequate to accommodate the finished paved surfaces, to allow for the door sills and the cladding to be effectively installed, and for reasons that are to follow in relation to the windows, the Traffigard acrylic flashings detailed at the junctions of the paved surfaces and the external walls would in all likelihood have failed, had they been installed as detailed.

The windows

[172] This issue occupied a significant proportion of the evidence. There are 20 windows identified as leaking. The evidence has established that the most common point of water penetration has occurred at window and door openings, and more particularly, at the sills of the windows and doors.

[173] Generally, the windows and doors are fitted into deep rebates formed in the timber framing, a design effect that has proven to be far more problematic than the more commonplace, face fixed windows, typically present, particularly because of; the depth of the sill, jambs, and heads; the difficulties associated with flashing/sealing the openings and the windows; and, the narrow width of the timber reveal which made fixing the windows through that reveal (the typical method of fixing windows into an opening) almost impossible.

[174] It is fair to say that this issue has presented plenty of difficulties for the experts from the outset. The matter was complicated because the cladding material was changed from stucco to EIFS during the course of construction without any accompanying amendments to the architectural plans, or any specific architectural, and/or proprietary construction details, produced or provided by any person involved in the design/approval process, to disclose how the joinery units were to be fitted into the openings and how the junction between the units and the cladding was to be constructed to prevent water penetrating the dwelling.

[175] Further complications arose as a result of the use of a liquid applied waterproofing membrane to the sills, and the fixing of ceramic tiles

over the sill sections of the cladding which served to add another layer of material to the sills and to further obscure the sill area construction from scrutiny. The sill tiles were variously set at heights below and above the bottom flange of the windows, the tiles did not return under the window flange, and instead, an open, or mortared, or partly mortared cavity, was created between the back of the tile and the upstand of the sill flashing that could trap and hold moisture. The construction allowed the build up of water behind the upper edge of the tiles and against the upstand of the sill flashing without much clearance between the top surface of the tiles and the top of the upstand. (Cooney Statement of Evidence at paras 58 & 59).

[176] In short, Mr Cooney opines that the windows are leaking because of inappropriately constructed sill flashings, inadequate seals between the window and door jambs and the cladding system, a lack of head flashings, water getting over the top edge of the upstand of the sill flashing and/or through the sill flashing, and through unsealed and/or unused fixing (screw) holes for the joinery units made outside of the glazing line and under the glazing bead. Mr Cooney said in evidence, that given the ease with which water entered the dwelling when he tested the sills by pouring coloured water along the mortared joint between the back edge of the sill tiles and the window frame, the most probable reasons were that water was damming up behind the top edges of the sill tiles and overflowing the top edge of the membrane upstand, or moving through the sill membrane which may have softened and degraded, or passed through pinhole defects in the membrane, or passed around the lower edge or ends of the sill membrane. Mr Cooney inspected the property on four occasions, 4 August 2005, 5 September 2005, 4 October 2005 and 12 May 2006. Mr Cooney undertook

invasive/destructive testing on the last three visits including water testing and destructive examination of the window sill construction of the window to wall cladding junctions of the bay windows in bedroom one and the family room, the window in the east wall of the garage, and the window in the south wall of the ensuite to bedroom one.

[177] Against that, Mr Bayley deposed that his investigations disclosed that the sill membrane was properly constructed, that the jamb flashings were well constructed and adequately overlapped the sill flashing, that the sealant joints had been properly formed and were fully bonded, and that the principle cause of water penetration was through unsealed holes for joinery fixings and lining fixings that penetrated the membrane from the inside of the sill. Mr Bayley inspected the property on 21 and 22 July 2006 and undertook water tests on one window and destructive inspections of two windows (Statement of Evidence of G R Bayley dated 8 September 2006)

[178] It is common ground, and the evidence has clearly established, that internal lining fixings have penetrated the waterproofing membrane in the garage window W3, and that at some locations, window fixings have not been sealed and have caused water penetration. It is notable in respect of this issue that the Architect's specification specifically provided at section 8.3:

> Where possible direct fixing through the channel of the frame shall be avoided so as to avoid the likelihood of weather penetrating at the fixing and where such fixings are unavoidable they shall be fully and effectively sealed.

[179] However, whilst the window fixing penetrations allowed water to penetrate the dwelling behind the line of the flashing upstand, Mr

Cooney gave evidence that when the fixings were in place they may have been reasonably well sealed and the leaks around them considerably less than when they were removed and tested during the investigation process, which seems to me, to make eminent sense. But more importantly, Mr Cooney stated that he dye tested the sill flashings of window W4 and window W20 and tested the bay windows with sills, in front of the flashing upstands and that caused water to enter the dwelling in a short period of time which clearly indicated there was a defect with the flashing *per se,* and that water had got over the top edge of the flashing, behind the window sill frame, and/or through the sill flashing.

[180] I am satisfied that it is a reasonable and logical conclusion to be drawn by Mr Cooney from the results of his investigations, that there was some defect or defects, other than the window fixings that were common to all joinery installations and that have significantly caused the widespread water penetration observed in the Owners' dwelling.

[181] It is common ground that water is able to accumulate in the cavity behind the sill tiles, but the question that remains is how, or by what means, that water was able to penetrate the dwelling, when Mr Bidlake, supported by Mr Bayley, gave evidence that he carefully and properly flashed the sill areas with Equus Chevaline Dexx, liquid applied, fibreglass reinforced, acrylic waterproofing membrane.

[182] It is really no great step in the circumstances to conclude that the water must have passed through, or around, the membrane sill flashing. I accept Mr Cooney's evidence as persuasive that it is possible that some water may have spilled, or been driven over, the

top of the flashing upstands, particularly if the Dexx flashing was not taken to the top of the rebate packer, and/or the fibreglass reinforcing was not properly embedded in the acrylic paste at the outer (upper) edge of the flashing, and/or the window unit was set high on the sill, and/or the upper edge of the rear of the tile was set above the bottom of the window flange, all as have been suggested at some stage during the hearing of this claim, but as Mr Bayley opined, it would take some wind pressure/turbulence to lift the trapped water behind the tiles, and/or wind blown water flowing over the sills, over the flashing upstands.

[183] I accept as compelling however, Mr Cooney's evidence of his observations, namely that; sealant beads applied beneath the plaster on the sills were not fully adhered to the polystyrene and to the flashing upstands; there was a gap at either end of the sill construction where the bead of sealant changed direction and returned up the jambs; sealant beads at the jambs of windows had become detached; and that all of these defects were potential areas of weakness where water could enter and get behind the plaster. I also accept as compelling, Mr Cooney's evidence that the membrane he observed beneath the window in the breakfast area was incomplete and porous. His photographs 7 & 8 provide graphic evidence of the issue he has highlighted. His observations in that regard were corroborated by the WHRS Assessor, Mr Lewis, who reported the fabric flashing not turned up at the ends and whose photograph No.16 shows the fibreglass strands at the end of the flashing that were not embedded in the acrylic paste.

[184] Contrary to the recommended construction process, Mr Bidlake gave evidence that he applied sealant beads around the joinery after the first coat of Thermexx Bedding plaster and before the

application of the coloured Thermexx topcoat (instead of over the topcoat) so that the bead would be protected and not be seen, and would not detract from the appearance of the coloured plaster finish. The result of Mr Bidlake's construction methodology was to obscure the sealant bead from view for all time with plaster, and accordingly it would not be possible to see whether, or when, it failed to bond to the adjacent surfaces to create a waterproof seal. If the seal failed, as Mr Cooney has deposed it has, water trapped behind the tiles, or indeed running down the face of the windows and over the sill, would pass between the Thermexx plaster and the upstand of the sill flashing, through any gaps between the sealant and the upstand of the sill membrane or polystyrene sill packer, and would accumulate in the void occupied by the polystyrene wedge shaped sill former below the Thermexx plaster and above the sill membrane. There were also issues raised about the appropriateness of using polystyrene sheets that were not pre-wrapped with Thermexx Binder and Thermexx Glass prior to fixing the sheets against flashings and recessed joinery, and the appropriateness of applying Dexx directly to an unprimed/unsealed polystyrene substrate, neither of which installation techniques are recommended by Equus in its standard specifications for Thermexx and Dexx.

[185] Mr Cooney gave evidence that he observed that water was trapped behind the plaster and that the sill flashing underneath the polystyrene sill packer at the garage window and was wet and soft. He said that this water was trapped and the only possible exit places were at the ends and lower edge between the wall cladding plaster and polystyrene, or through any defects or damage in the sill membrane.

[186] It was Mr Bannatyne's evidence that water trapped at the window sills could not escape and has led to the failure of the acrylic coating forming part of the liquid applied membrane.

[187] When asked by me during the hearing about the effect on Dexx of immersion in water, or prolonged exposure to water, Mr Still stated that ideally Dexx should be free draining, i.e. a roof or deck membrane, that exposed fibres (in the fibreglass reinforcing mat) will wick up moisture and will break down over time and the Dexx will become 'mushy'. Mr Still said that he could not say how long it would take for this process to cause the membrane to fail because there had been no testing done on this matter.

[188] Mr Cooney's evidence that he found the sill membrane wet and soft where water was trapped under the plaster is consistent therefore with Mr Still's evidence as to the expected effect on the acrylic membrane after prolonged exposure to moisture.

[189] In the end, I am driven to conclude on the balance of probabilities, that water was entering the dwelling at the windows and doors through the water degraded membrane and/or through improperly applied membrane or sealant.

[190] At the end of the day, whilst I accept the generic schedule of window defects lists the possible causes of water penetration around the windows, it does not fix or apportion the contribution of the various defects listed. I have carefully considered the evidence of all the experts and I have come to the inescapable conclusion that the principle cause of water penetration around the windows and doors was a result of the design and installation of inappropriate and defective seals and flashings, contributed to by

the cavity formed by the laying of the sill tiles which trapped water at the sill. In the circumstances I am satisfied that the justice of the matter will be served if I fix and apportion the causative effect of the defective sill flashing at 85% for the reasons stated above, and the causative effect of non-specific unsealed window fastenings and the other defects at 15%

The causes of water penetration of the dwelling

[191] I have carefully considered the views expressed by all of the experts and I am satisfied that the cause of the leaks and the causative effect of the various defects is largely as identified and described in the leak schedule prepared by the experts at the technical conference in October 2006, namely:

Ref. No.	Leak location	Leak cause	Contribution
1a	Bay windows W8,W9,W23,W24	Head flashing does not overhang the head flange of the window but returns behind it leaving a gap at the head of the window	55%
1b		Unsealed screw holes through the channel of the fixed glazed window frames	5%
1c		Gap between the tiles and the sill flange of the window contributing to water accumulation behind the top edge of the tiles	3%
1d		Sill tiles finish short of the window frame face contributing to water accumulation behind the top edge of the tiles	2%
1e		End of the roof flashing to the bay window terminates behind the wall cladding	5%

1h		Interface between the aluminium window jambs and the exterior wall cladding	30%
2a/c	Base of games room	Concrete and paving to the terrace is too high	20%
2b		Water draining down from leaking bay windows above	80%
3	Ceiling beneath W7	See W7	
4b	Ceiling beneath bookcase at head of games room stairs	Cladding projects 8mm beyond the top of the concrete wall	50%
4c	Ceiling to south wall at had of games room stairs	Initial high ground levels	50%
5a	Lower east wall of stair to games room adjacent to W28	Ponding caused by vegetation growth in gutter and rainwaterhead	5%
5b		Window sill	75%
5c		Capillary action at base of cladding not overlapping the top of the concrete masonry wall	20%
6	Perimeter of framing around terrace outside kitchen	No clearance at underside of cladding to terrace paving	100%
7a	East end of entrance hall terrace area abuts wall cladding	Gap between door jamb and column interface	80%
7b		No clearance at underside of cladding to terrace paving	15%
7c		Failure of sealing around downpipe at head of columns	5%
8a	Exterior drawing room both sides of bifold door D13	Historical leak at head of bifold door	50%
8b		No clearance at underside of paving to terrace paving	48%
8c	Parapet above Lounge W25	Exposed mesh to plaster at top of parapet	2%

9a	Pergola columns	Base of columns in contact with paving	70%
9b		Metal fixings through top of columns	30%
10	Store window W30	Generic faults	100%
11a	Store window W28	Generic faults	95%
11b		Crack between back of chimney and parapet above window	5%
12	Store window W29	Generic faults	100%
13	Study bay window W27	Faulty mitre joint	100%
14	Dining room window W17	Generic faults	100%
15	Landing window W18	Generic faults	100%
16	Base of wall adjacent to W17 to the NW external corner of garage	Tarseal level in contact with bottom edge of wall cladding	100%
17	Interior head of garage door	Cause unknown, possibly linked to 18	100%
18	Roofing plywood top garage	Delamination of specific area of roof membrane	100%
19	Base of west garage wall	Garden built up to high to cladding	100%
20	Crack to RHS of gas meter	Crack in cladding from corner of meter box to corner of masonry wall	100%
21	Bedroom 3 window W19	Generic faults	100%
22a	Junction between garage roof parapet and house wall	Crack to parapet/external wall junction	95%
22d		Cladding hard down to parapet	5%
23	External parapet top to SE corner of garage	Crack to parapet	100%
24a	Garage window W3	Generic faults	70%
24b		Unsealed screw holes and holes to membrane caused by excessive length	30%

		fixings to interior linings	
25	Garage bulkhead light	Covered in item 18	100%
26	Particle board lining below south east internal corner of garage parapet	Crack across parapet top	100%
27	Water stained particle board lining to base of wall between garage and bathroom	Crack across parapet top	100%
28a	Ground floor bathroom window W4	Generic window faults	95%
28b		Unsealed vent above window	5%
29	Ground floor Bedroom window W5	Generic window faults	100%
30	Laundry window W6	Generic window faults	100%
31a	Wall lining at base of wall adjacent to laundry door D7	Gaps between door frame and door jamb	5%
31b		Bulkhead light above door	5%
31c		No head flashing to door in conjunction with parapet crack	50%
31d		Crack to parapet top	40%
32	Breakfast area window W7	Generic window faults	100%
33	Bedroom 3 window W20	Generic window faults	100%
34	Bedroom 2 window W21	Generic window faults	100%
35	Ensuite window W22	Generic window faults	100%
36	Balcony balustrade post penetrates balustrade	WHRS Assessor recorded 22% adjacent to support	100%

The appropriate remedial work – total re-clad or targeted repairs

[192] From the outset, there was disagreement between the experts as to the extent and nature of the proper remedial work necessary to render the dwelling waterproof and to repair the damage that resulted from the water penetration. The Owners, supported by Mr Cooney, claimed a total re-clad was necessary. The respondents, supported by Mr Bannatyne, Mr Bayley, Mr MacArthur, and Mr Sheridan, asserted that targeted repairs were both feasible and appropriate.

[193] The experts' technical conference resulted in the production of a joint leak schedule which set out the location, cause, damage, and remedial work, for 36 separate leak locations, the production of a further schedule comprising the experts views in respect of 12 possible causes in relation to each of 20 leaking windows that were identified by one or more of the experts, and a schedule of costs comprising 344 items which resulted in estimates for targeted repairs ranging between $143,000.00 and $158,000.00 excluding GST.

[194] I acknowledge that the schedule was prepared at my direction on the basis that the experts were asked to identify each incidence of water ingress, the resultant damage, and the cost to repair each incidence of water penetration and associated damage, to assist with attribution of responsibility and liability for the Owners' losses, and ultimately apportionment and contribution in respect of those losses between the parties *inter se*. However, it was always open to the experts to agree after identifying each leak, that the leaks were so widespread and the extent of the resultant damage so extensive,

that a full re-clad was necessary to properly remediate the dwelling. But, save for Mr Cooney, they did not, even when prompted to reconsider that point on the grounds set out in Mr Cooney's subsequent supplementary brief of evidence prepared and directed exclusively to that point following the provision by Mr White of the leak schedule and cost estimate following the experts' technical conference on 16 – 18 October 2006, and again following their participation in a further technical conference on 13 December 2006.

[195] Following the experts' telephone conference on 13 December 2006, a further schedule was produced by Mr White which resulted in estimates for targeted repairs ranging between $140,163.00 and $166,513.00 excluding GST.

[196] Save for relatively minor disagreements (in the order of 10%) between some of the respondents' experts as to the extent and cost of certain of the remedial work, all of the respondents' experts agree that targeted repairs are both feasible and appropriate. They do not accept that the leaks are so widespread, and/or that the damage is so extensive, that a full re-clad is necessary or will be required by the Council in the circumstances, save for in relation to the bay windows.

[197] Against that, the Owners, supported by Mr Cooney, maintain their claim for remedial work involving a total re-clad and costing $355,200.00 plus GST.

[198] In essence, the Owners claim is posited on the basis of Mr Cooney's opinion that the only practical and reliable way to address the numerous defects and substantial damage to the dwelling is to

totally remove all of the wall cladding and much of the interior linings of the external walls so that all damaged framing, flooring, and other members, are exposed to allow for the identification, removal, and replacement of all damaged materials, and to re-clad the dwelling. Mr Cooney's reasons for reaching this conclusion were stated to be:

- Leaks and decay were found beneath at least one window in every wall elevation;

- He considered that every window with sill tiles was leaking;

- There were extensive areas of decay around and beneath many windows;

- Even if targeted repairs were feasible in some places, there were some walls which needed complete replacement and a drained cavity installed as part of the building consent and it is impractical to abut a cavity system to a non-cavity system;

- Because of the complexity of the design of the house, there may well be other areas where leaks and damage have occurred and these will only be identified by complete removal of the cladding system;

- It was unlikely that given the nature and extent of damage to this house, that the Council would agree to a building consent other than for a complete re-clad; and,

- In today's climate it was unlikely that a prudent, competent builder would agree to carry out targeted remedial works to this house.

[199] In response to a request by me at the hearing for an unequivocal answer on the cavity issue, Mr Sheridan stated that the Council would issue a building consent for the targeted repairs proposed in respect of the Owners' dwelling and would not require the installation of a cavity to the cladding. I am in no doubt that Mr Sheridan's evidence in that regard was material to the respondents' experts' approach to the remedial work. Mr Sheridan's evidence was confirmed by Mr Robertson, counsel for the Council, in his closing submissions at para 5. wherein Mr Robertson stated: "That was the evidence of Mr Sheridan, and it remains the position of the Council. Mr Cooney's reservations are noted. However, this is a regulatory issue for the Council, and, ultimately, Mr Cooney's professional opinion is not relevant".

[200] It is indeed an understatement to say that the issue of whether a re-clad is required is a significant and material factor to be taken into account when assessing the extent and nature of the remedial work to the Owner's property – the additional scope of work and the costs submitted by the Owners for that extent of work, speak for themselves, and it is to this point that I shall later return.

[201] Considerable evidence has been presented in respect of the alleged failure of the cladding, and more particularly, in relation to the absence of a sealer coat or paint to protect the cladding, but in the end there is simply no evidence that the decision by the Walshaws to forgo the application of a sealer coat or paint in pursuit of the 'Tuscan', 'weathered or distressed' patina they sought to

emulate in their new home, has been causative of any water penetration or damage such that it should be replaced.

[202] In response to the contention by the Owners, supported by Mr Cooney, that it is difficult to properly and fully assess the extent of the damage to the dwelling before remedial work is undertaken, and therefore complete removal and replacement of the cladding is necessary, it must be said that in this particular case, no less than twelve builders, building professionals, and expert building consultants have crawled over the dwelling over an eleven year period, cut away, removed, and tested, as much of the cladding, linings, and other materials as they wished, including joint inspections carried out during the course of the technical conference, and I am satisfied that the picture that has emerged from that degree of scrutiny and the combined deliberation and input of the experts at the technical conferences is about as good as it can get in these circumstances.

[203] After considering the extensive evidence regarding whether the dwelling should be totally re-clad, I have reached the conclusion that a total re-clad is not required and that targeted repairs are feasible and appropriate for two principle reasons. First, because the Owners have not established, even hesitantly, that there has been any widespread or general failure of the cladding material, or any inherent difficulty in achieving sound and watertight junctions with the existing material at the location of targeted repairs such that might occur with materials other than EIFS claddings, that would require or justify its entire replacement. To the contrary, the evidence of Mr Bidlake (See Supplementary Statement of Evidence of Peter Bidlake dated 30 March 2007) was that targeted repairs are easily and routinely undertaken in respect of accidental damage

and cracks on EIFS clad dwellings, and the joins are undetectable provided a building has been properly maintained. Secondly, and above all critically, because the Council has stated that a re-clad complete with a ventilated cavity will not be necessary or required as a condition of a building consent to repair the Owners dwelling, or prevent the issue of a CCC on completion of that work.

[204] That does not mean that the Owners must undertake targeted repairs. They are of course free to fully re-clad their house if they wish to, but the cost of targeted repairs must be the starting point for assessing damages.

[205] Accordingly, I determine that targeted repairs are feasible and appropriate and I now turn to consider the scope and proper cost of that remedial work.

The scope of the remedial work

[206] I am satisfied that the scope of the necessary remedial work is that work set out in the experts' joint leak schedule. In essence, the remedial work involves inter alia:

- The preparation of plans and specifications;
- Obtaining a building consent and compliance with other related regulatory and contractual requirements including insurances and obtaining a CCC;
- The removal of cladding including sections of parapet;
- The removal of internal wall linings and insulation;

- The removal of decayed timber framing and particle board flooring;

- The removal of window and door units;

- Cutting terrace paving and installing a slot drain to junction between paving and cladding;

- Clean, prime and paint steel columns to pergola;

- Remove particle board linings in garage;

- Remove sections of roofing, roofing membrane and plywood and replace;

- Lower garden and install permanent paving at lower level to base of the west garage wall;

- Form and pour a nib around the base of the pergola columns;

- Replace and reconstruct and/or treat timber framing;

- Replace wall linings, insulation, and EIFS cladding, trim, and mouldings;

- Waterproof/flash openings in cladding and reinstall joinery units and fittings;

- Stop, paint and/or seal and/or make good or replace all internal and external surfaces;

[207] There are of course strident cries from the respondents of betterment, viz. that the Owners will be advantaged or receive a windfall as a result of the proposed remedial work because of the age of the dwelling (being 11 ½ years now) and the lack of maintenance over the intervening years. The owners acknowledge that there has been little or no maintenance undertaken, the surface finishes and floor coverings have reached the end of their functional and economic lives to the extent they are almost fully amortised, and in the circumstances, I am driven to find certain of the respondents' arguments in relation to betterment persuasive. I will deal with the issue of betterment in the following section in this determination on quantum, and I will do so on the same basis that has been adopted in a number of earlier determinations, namely that certain items of remedial work will be valued according to the additional work that is required over and above what would have been required to be undertaken by the Owners in the course of normal maintenance.

Quantum – the value of the remedial work

[208] Following the experts' telephone conference on 13 December 2006, a further schedule was produced by Mr White dated 21 December 2006 which resulted in estimates for targeted repairs ranging between $140,163.00 and $166,513.00 excluding GST.

[209] In a supplementary brief of evidence dated 30 March 2007, Mr Bayley contested the values ascribed to certain of the remedial works by Mr White in that further schedule. I indicated in my Memorandum dated 2 November 2006, that I saw issues with certain of the built up rates and methodologies that resulted in the composition of the October 2006 estimate of costs, and for the

purpose of assessing damages, I am satisfied that Mr White's Revised Estimate v2 – Amended dated 21 December 2006 is the proper starting point for assessing the cost of repair.

[210] Of the inconsistent figures, vis-à-vis Messrs Bayley and White, I prefer on balance Mr Whites estimates. I do not apprehend that Mr White has overstated the unit cost of the works and there is no compelling evidence to the contrary.

[211] In the circumstances, I am satisfied that the Owners should not have to bear the risk that a lesser amount calculated on the basis of certain built–up rates posited by the respondents' experts will enable them to seek competitive prices in the current marketplace for a scope of works ultimately defined as a result of this adjudication process, for what is generally regarded as challenging, testing, and undesirable building work, and for works that will likely be costed or calculated on the basis of anything but built-up rates.

[212] Of course there is an element of conjecture and speculation regarding the scope of the work, the degree of difficulty of the execution of the works in the circumstances, and the likely market cost, but on this issue, I prefer the evidence of Mr White who has had considerable experience in residential estimating and in estimating WHRS claims and is a person whom I found to be careful and considered in his approach and responses. I uphold his estimate in the amount of $166,513.00 plus GST as the starting point for the assessment of the proper cost of repair.

Challenges to calculation of quantum

[213] The principle differences between Mr Bayley's figures and Mr White's figures in the final schedule are said to arise from the inclusion in Mr White's estimate of items 325 to 327 inclusive, totalling $16,150.00 plus GST, that Mr Bayley says were not previously included, and in particular, the provision for a temporary wall, disruption to in-wall services, and replacement of carpet (Bayley supplementary brief of evidence at paras 40-43 – closing submissions on behalf of the fourth and fifth respondents at para 122).

[214] These matter may be dealt with in relatively short order however because it would seem that Mr Bayley's criticisms arose out of a preliminary document/schedule prepared for the benefit of, and for the purpose of, the further discussions and deliberations of the experts in December 2006, and that to a large measure, his concerns have been largely resolved or ameliorated by the final version of the schedule dated 21 December 2006 in which item 325 (protection of property/temporary walls) in the amount of $4,500.00 plus GST was deleted entirely, and item 326 (disruption to in-wall services) was reduced in value from $7,000.00 to $2,000.00 plus GST. The allowance for replacement of carpet remains the same at $4,650.00 plus GST.

Disruption to in-wall services

[215] Insofar as the allowance for disruption of in-wall services is concerned, I accept Mr White's allowance for the item is both sensible and justified on the basis that it is more likely than not, that there will be a need for specialist attendances on in-wall services, there being no means of ascertaining precisely where contractors will have run those services at this stage, or the actual extent of

attendances on those services. I also accept that Mr Bayley's criticism of the initial allowance of $7,000.00 plus GST was justified in the circumstances having regard to the location of the leaks and the likelihood of disruption to services occasioned by the proposed targeted repairs. In the end, the amount of $2,000.00 plus GST now allocated to this item seems to me, on balance, to be a fair and justifiable sum.

Replacement of damaged carpet

[216] Insofar as the allowance for replacement of damaged carpet is concerned, Mr White allowed for the removal and replacement of existing damaged carpet based on an amortised allowance of 60% for 9 years out of a 15 year life expectancy. Mr Bayley asserts that the usual amortisation rate for carpet is based on a 12 year life expectancy, and as the house was approximately 11 years old at the time he prepared his supplementary brief of evidence on 30 March 2007, he says the carpet would have needed to be replaced anyway, and as such, no allowance should be made for carpet replacement in any assessment of the cost of the remedial work when the costs would normally have been borne by the Owners.

[217] Of the competing views, I accept Mr Bayley has correctly stated the position as regards the life expectancy of carpet. The issue has been dealt with in a number of earlier WHRS determinations, notably Ponsonby Gardens, and Claim No. 01514 – McKinney, in which the Adjudicator determined that the realistic life expectancy for carpet was 12 years having had the benefit of extensive expert opinion.

[218] The Owner's dwelling is rapidly approaching its 12th anniversary of construction, and in the circumstances, I am satisfied that no allowance should be made in the assessment of the proper cost of the remedial work for carpet replacement. The scheduled value of the remedial work is reduced by $4,650.00 plus GST accordingly.

P&G, contractor's profit and margin

[219] Of the competing views as to P&G and contractor's profit and margin, I prefer on balance the amounts fixed by Mr White. It would seem to me that the respondents have sought to understate the amounts to be allowed for these items in respect of what is often described as undesirable and high risk building work, and in the present case, of work that is of modest value by industry standards.

Contingency sum

[220] The respondents challenge the need to include a contingency sum (or at least one to the extent that has been allowed) in the assessment of the extent and value of the necessary remedial work, given the known parameters of repair.

[221] I accept that it is appropriate to include a contingency sum in any assessment of the scope and value of the remedial work to cover work that has not been specifically identified by the investigation process, but is work reasonably contemplated in the circumstances of any particular claim as being required by reference to the source and nature of the water penetration, the damage identified by the investigation process, and the nature of the dwelling.

[222] Mr White has included an allowance of $25,000.00 plus GST to remove and replace 15% of the residual (non-specified) wall areas. It is Mr Bayley's assessment and uncontested evidence that the specific targeted repair work identified as necessary, and as scheduled, affects only 20% of the wall area of the dwelling and 46% of the windows (19 out of 41 windows).

[223] The evidence has established that the method of flashing the windows is inherently flawed, and accordingly, it is an inescapable conclusion to be drawn in the circumstances, that at least on balance, indeed to a higher standard even, each window that has been flashed with Dexx and trimmed with a tiled sill will need replacement - the conclusion being that the "cladding system" has failed to that extent, and will require replacement. Even by Mr Bayley's assessment, the average cost to repair each of the 14 recessed windows identified to date amounts to $1,779.51, although I accept that there is no evidence of consequential damage at all other window locations. There is also the issue of increased costs over the 12 months since the date of the estimate.

[224] Accordingly I am driven to conclude that Mr White's contingency sum allowance is entirely reasonable and appropriate in the circumstances of this claim and will in all likelihood be expended to the full extent. I see nothing of a potential windfall as a result of the inclusion of the extant contingency sum allowance in the present case.

Betterment

[225] This issue may be dealt with in short order.

[226] The principles upon which an allowance for betterment should be made are set out in the judgment of Fisher J in *J & B Caldwell Ltd v Logan House Retirement Home Ltd* [1999] 2 NZLR 99. After reviewing the authorities, he concluded at page 108:

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

[227] The Owners have not challenged the legitimacy of the respondents' assertions that the cost of repainting and/or sealing the dwelling some 12 years after construction is a cost that would in all the circumstances have properly fallen on the Owners as part of the routine maintenance of the dwelling.

[228] The evidence has established that the Owners have not undertaken any refurbishment of the interior of the dwelling whilst they have owned the property, and they gave evidence that they were specifically instructed by the Walshaws that the plaster finish to the exterior of the dwelling did not require sealing or painting.

[229] I am satisfied that the respondents have established that betterment will occur as result of painting the dwelling as part of the proposed remediation work.

[230] In the present case however, there is an obvious disadvantage to the Owners in the nature of more extensive preparation and additional coating work associated with the involuntary nature of applying a complete paint system over new interior surfaces (replacement), as opposed to the work that would ordinarily be

required for a ‘repaint’ (the investment for which allowance ought to be made). (*J & B Caldwell Ltd v Logan House Retirement Home Ltd*, per Fisher J).

[231] Accordingly, I see no good reason to depart from the established practice adopted by Adjudicators in other WHRS claims of valuing that additional work at 55% of the total cost of painting the dwelling, and discounting the claimed cost of painting by 45% to reflect the reasonable cost of a ‘repaint’ and the degree of betterment obtained by an Owner in circumstances where routine repainting/maintenance of the subject property has been delayed or fallen out of sync with normal maintenance cycles due to the property being a leaky building. The question of interest on monies expended prematurely does not arise in the circumstances.

[232] The schedule of costs records an aggregate amount of $1,380.00 plus GST in relation to exterior painting. As the Owners’ dwelling has never been painted, such work would clearly amount to betterment in its entirety and accordingly I am satisfied that no allowance should be made in the assessment of the proper cost of the remedial work for exterior painting. The scheduled value of the remedial work is reduced by $1,380.00 plus GST accordingly.

[233] The schedule of cost records an aggregate amount of $1,624.00 plus GST in relation to interior painting. As the painted surfaces have not been recoated since the dwelling was constructed, I accept that they have been fully amortised, and therefore I uphold the claim for the painting work to the extent of 55% to reflect the cost of the additional work required. I am satisfied that the justice of the matter will be served if I set the amount that the Owners’ claim

should be reduced on account of betterment for painting at $730.80 plus GST, being 45% of $1,624.00.

Summary of the cost of the remedial work

[234] To summarise the position therefore, I determine that the proper cost of the remedial work is **$178,142.96** calculated as follows:

Scheduled summary of element costs		$117,195.00
Less:		
Allowance for carpet (see para 218)	$ 4,650.00	
Allowance for ext. painting (see para 232)	$ 1,380.00	
Allowance for betterment in respect of interior painting (see para 233)	$ 730.80	
	$ 6,760.80	($6,760.80)
Subtotal		$110,434.20
Add P&G @ 5%		$ 5,521.71
Subtotal		$115,955.91
Add Contractor's margin @ 15%		$ 17,393.39
Subtotal		$133,349.30
Add contingency sum		$ 25,000.00
Subtotal		$158,349.30
Add GST		$ 19,793.66
Total		**$178,142.96**

OTHER LOSSES

[235] The Owners claim they will suffer further losses in the aggregate amount of $19,900.00 as a result of the water penetration and physical damage to their dwelling. The Owners say they will incur the following additional and consequential costs as a result of, and in the course of, undertaking the necessary remedial work:

• Temporary accommodation	$10,400.00
• Cost of removal of furniture and possessions	$ 4,000.00
• Cost of storage of furniture and possessions	$ 3,900.00
• Cost of reinstallation of furniture	$ 1,000.00
• Cost of store handling	$ 600.00
	_____
	$19,900.00

[236] I have carefully considered the Owners' claims for accommodation and storage of their furniture and possessions during the course of the remedial work. There has been no serious challenge, certainly none that would withstand scrutiny, as to the necessity for the Owners to move out of their dwelling during the remedial work and to remove their furniture and possessions notwithstanding the respondents' experts' views that the whole of the cladding does not require removal.

[237] I accept without hesitation, the Owners' assertion that they will need to move out of their home and place their furniture and possessions in storage offsite until the work is completed. There are the obvious issues of security; protection of property from damage; loss of amenity, inconvenience and privacy; and physical danger to the

family during the course of the remedial work. I uphold the claim to the full extent of $19,900.00.

GENERAL DAMAGES

[238] The Owners jointly claimed general damages in the amount of $30,000.00 for stress, relationship pressures, inconvenience and loss of enjoyment of their property as a result of their home being a leaky building and the repair work that is yet to be undertaken.

[239] In closing submissions, Ms Jurgeleit, counsel for the fourth and fifth respondents, submitted that the High Court has ruled in *Hartley v Balemi & Ors* (Unrep. CIV 2006-404-002589, Auckland Registry, 29 March 2007, Stevens J at paras 155-177) that an Adjudicator under the Act has no jurisdiction to make an award of general damages for stress, mental anxiety etc. in a claim under the Act and therefore general damages are not available to the claimants here as a matter of law.

[240] Prior to the *Hartley* decision, WHRS Adjudicators had regularly awarded general damages, where appropriate, for stress, anxiety, and inconvenience in relation to leaky building claims brought under the Act in reliance on the District Court decision of Judge McElrea on appeal from a determination of an Adjudicator under the Act, in *Waitakere City Council v Sean Smith* (Unrep. CIV 2004-090-1757, Auckland District Court, 28 January 2005). The Council appealed the determination on the grounds, inter alia, that there was no jurisdiction to award general damages under the Act. Judge McElrea, dismissing the appeal, held that the purpose and intent of the Act was not inconsistent with a power to award general

damages and that the Act should be interpreted in a way that allows it to afford the fullest possible relief to deserving claimants.

[241] Finally, the position regarding general damages was clarified by the Weathertight Homes Resolution Services (Remedies) Act 2007. The purpose of the WHRSRA07 was to amend the principal Act (WHRSA06) so that a claimant could bring a claim for general damages in relation to an eligible claim. Pursuant to section 5, the amendments apply to claims under the WHRSA02 that were initiated before 1 May 2007 and were not withdrawn, terminated, or otherwise disposed of, before 28 August 2007.

[242] The Owners filed their claim in February 2003. The claim was not disposed of before 28 August 2007 and accordingly, the Owners are entitled to claim for general damages as a remedy in this adjudication.

[243] I accept in principle that general damages can be awarded for stress, anxiety, disturbance and general inconvenience that was foreseeable in the event of a breach of a contract where the object of the contract was to bring about pleasure, enjoyment, relaxation, peace of mind, or freedom from distress, and the contract concerns one's personal, family, or social interests, or, for stress, anxiety, disturbance, and general inconvenience, that was a reasonably foreseeable or contemplated consequence of a respondent's breach of a duty of care owed to a claimant i.e. in a negligence cause of action.

[244] Mrs Heng gave evidence that the family is living in a house with rotten walls, and water dripping, or pouring in, from the ceilings, windows, and doors, during heavy rain. She said she is terrified in

storms and earthquakes as to the stability of the house given its rotten structure, that the family has suffered from respiratory related health issues although she acknowledges that she cannot say for sure what has caused those, and the matter has taken a huge toll on their lives and their marriage. In her own words, “It is a huge inescapable weight that hangs over me every day. The scars of walls ripped open and rotting timber are the first things I see when I wake up every morning and the last thing I see each night”.

[245] Mrs Heng said that she is ashamed to bring people into her home. She said holes have been made in the walls all over her home and any pleasure or pride she had in her home was destroyed years ago. Moreover, it was her evidence that they cannot sell their home, nor would they wish for anyone else to go through the horror of living with this house in its current state, and they feel trapped in this situation.

[246] I accept without hesitation, Mr and Mrs Heng’s evidence that they have both suffered considerable stress, anxiety, inconvenience and disruption as a result of their family home (which they understood to be new, well built and relatively maintenance free) being a leaky building.

[247] Accordingly, in the context of a long line of New Zealand property cases where awards for distress and anxiety have been made including inter alia: *Stieller v Porirua City Council* [1986] 1 NZLR 84(CA), *Rollands v Collow* [1992] 1 NZLR 178, *Chase v De Groot* [1994] 1 NZLR 613, *A-G v Niania* [1994] 3 NZLR106 at 113, *Snodgrass v Hammington* CA 254/93 22 December 1995, *Battersby v Foundation Engineering Ltd* HC AK CP 26/97 5 July 1999, *Stevenson Precast Systems Ltd v Kelland* (High Court Auckland,

CP 303-SD01, 9 August 2001, *Dicks v Hobson Swan Construction Ltd (In liquidation) And Ors* HC AK CIV 2004-404-1065 [22 December 2006]), it is my view that the Owners should each be able to recover distress damages from a respondent, or respondents, found liable for breach of contract, or breach of the duty of care.

[248] A detailed examination of the authorities to which I have referred, discloses that the approach of the courts has generally been to award a modest amount for distress damages to compensate the stress and anxiety brought about by the breach, and not the anxiety brought about by the litigation itself.

[249] Awards of the order of $15,000.00 - $22,500.00 have been made by the Courts in the comparable cases referred to above. A review of the fifteen WHRS determinations in respect of which awards of general damages have been made to date, discloses that awards have been made within the range of $2,000.00 - $18,000.00 for any one claimant. I am satisfied that an award of general damages in the amount of $15,000.00 for each of the Owners in this matter falls within the established parameters for awards in relation to leaky building claims and recognises the degree of stress, anxiety, inconvenience, and the loss of enjoyment of the property, that I apprehend the owners have suffered to date, and will continue to suffer during the further remedial work in this case. Accordingly, I uphold the claim for general damages to the full extent of $30,000.00.

SUMMARY OF DAMAGES

[250] To summarise the position therefore, I determine that the Owners have suffered loss and damage as a result of their dwelling being a leaky building in the amount of **$228,042.96** calculated as follows:

Cost of repairs (See para 234)	$ 178,142.96
Consequential losses (See para 237)	$ 19,900.00
General damages (See para 249)	$ 30,000.00
Total damages	$ 228,042.96

LIABILITY FOR THE OWNERS' LOSSES

[251] The Owners' house contains a number of defects that have led to water ingress and resulted in substantial damage to the dwelling. The Owners submit that the evidence of the respondents is indicative of total abdication of responsibility.

[252] The Owners say this is a case where there was an architect, a project manager, a head contractor, a specialist subcontractor, and a local authority, and in such a case it is reasonable to expect that appropriate consideration would be given to matters of design and construction with significant weathertightness implications. Instead they say, the involvement of all these parties appears to have had the effect of each of them abdicating responsibility, content to rely upon the involvement of the others without the most cursory attempt to check what those other parties might have done. The overall position is that the reliance of each of the respondents on others, in the absence of any reasonable grounds for doing so, has led to a fundamental issue of design and construction falling between the gaps. This they say, is inexcusable.

[253] The Owners have brought claims against the:

- Previous Owners – Christopher and Margaret Walshaw;
- Builder – Peter Vining;
- Architects – Warren & Mahoney;
- Cladding Contractor – P K Bidlake Painters Ltd and Peter Bidlake;
- Territorial Authority – Palmerston North City Council;
- Project Manager – Doug Smith Ltd;
- The supplier of the flashing and cladding material – Equus Industries Ltd.
- The Tiler – Central Tile distributors Ltd was joined by the fourth and fifth respondents.

[254] Pursuant to s29 of the Act, the Adjudicator is to determine the liability of any of the parties to the claimants and any respondent to any other respondent.

The liability of the first respondents, the Walshaws, in contract

[255] The Walshaws' contractual liability is said to arise out of warranties contained in the Agreement for Sale and Purchase made between the Owners' as purchasers of the property on one hand, and the Walshaws, as vendor on the other.

[256] The Owners say the Walshaws owed them direct and express contractual duties as set out in clauses 6.1(8) and (9) of the Agreement, which the Walshaws breached, because the dwelling was not constructed in accordance with the building consent and it did not comply with clauses E2 and B2 of the regulations made under the Building Act 1991.

[257] The Walshaws deny liability for the Owners' losses and say they did fully comply with their obligations under the Building Act 1991 at the settlement date, and moreover, that the issue of a CCC on 4 November 1999 by the Council, was a conclusive and unqualified statement of compliance by the first respondents that the building work did comply with the building code and the Building Act 1991, and upon which they were entitled to, and did, rely, and did thereby meet their obligations under clause 6.1(9) of the contract with the Owners.

[258] The Walshaws further deny liability upon application of the principle of *caveat emptor*. The Walshaws contend that the sale agreement, by clause 3.8, permitted an inspection by the Owners prior to settlement, and the onus was on the Owners to satisfy themselves of the state of the property prior to settlement, and evidently they were so satisfied and they did complete settlement on the agreed date of 5 November 1999.

[259] The Walshaws further assert there was a lacuna in pleading, namely as to whether the claim was brought for breach of clause 6.1(9) only, which refers to those obligations imposed on a vendor under the Building Act 1991, or whether it was brought for breach of clause 6.1(9) and clause 6.1(8) which requires a consideration of the permit and a comparison between the work permitted and the

work actually carried out. The Walshaws submit that the Owners have failed to plead, and adequately address or prove, in what particular respects there was a departure from permitted works which was causative of their loss.

Lacuna in the pleadings

[260] The pleading issue may be dealt with in short order. The WHRS is not a pleadings based jurisdiction so there cannot be a technical defence on the ground of a 'lacuna in the pleadings'. The issue therefore is one of natural justice, and whether the parties are sufficiently apprised of the claims and the basis for the claims against them, such that they can fairly respond to and rebut those claims.

[261] In the present case, the Owners did file a Statement of Claim in common form that 'pleaded' breach of clause 6.1(9) of the Agreement. However, Mr Walshaw has quite properly acknowledged that the solicitors for the Owners made it clear during their opening submissions that reliance was also made on clause 6.1(8). Mr Walshaw filed comprehensive closing submissions addressing the construction and effect of both clauses.

[262] In the circumstances therefore, I am satisfied that Mr Walshaw, who was a solicitor in New Zealand before he moved to Germany, was sufficiently apprised of the claims that were made against him and Mrs Walshaw, and that no breach of natural justice has occurred.

Caveat Emptor

[263] I accept that there is no general obligation upon a vendor to disclose anything concerning the quality of his or her property, and the principle of *caveat emptor* (let the buyer beware) applies. The Sale and Purchase Agreement is not of a kind requiring the utmost good faith by the vendor to the purchaser and accordingly there is no fiduciary duty by the vendor to the purchaser in respect of matters of quality - the vendor is only liable in respect of the express provisions of the contract (See – Blanchard, *A Handbook on Agreements for Sale and Purchase of Land* (4th ed, 1988) at pp 97-98, para 706).

[264] Mr Walshaw submits that the Agreement, by clause 3.8, permitted an inspection by the Owners prior to settlement to satisfy themselves as to the state of the property and that evidently they were satisfied because they completed settlement on the agreed date of 5 November 1999.

[265] Clause 3.8 provides:

> If the property is sold with vacant possession the vendor shall permit the purchaser or any person authorised by the purchaser in writing, upon reasonable notice in writing, to enter the property on one occasion prior to the settlement date for the purpose of examining the property and chattels and fixtures which are included in the sale, and ascertaining the state of repair of the property and the chattels and fixtures, and on notice to re-enter the property to confirm compliance by the vendor with any agreement made by the vendor to carry out any work on the property and the chattels and the fixtures.

[266] Mr and Mrs Walshaw gave evidence that the dwelling was not leaking, or more particularly, that there was no evidence of it leaking when they sold it to the Owners. I accept the Walshaws'

evidence in that regard and it follows *a fortiori*: that any inspection of the property would not have revealed that the dwelling was a leaky building. The problem is therefore one of a latent defect (not a patent and/or a qualitative defect going to the state of repair of the property) in respect of which the Owners say they relied on the CCC and would not have settled without it. To that extent, they say they relied on the contractual warranties in the agreement, and the risk of non-compliance with the building code was apportioned between them in their contract.

Vendor warranties

[267] The claim against the Walshaws is for breach of the express provisions of the contract, namely clauses 6.1(8) and 6.1(9), and is based on their failure to comply with all the obligations imposed on them under the Building Act 1991.

[268] Mr Walshaw submits the claim depends on the correct construction of those warranties.

[269] Pursuant to clauses 6.1(8) and 6.1(9) the Walshaws warranted and undertook with the Owners that:

> (8) Where the vendor has done or caused or permitted to be done on the property any works for which a permit or building consent was required by law, such permits or consent was obtained for those works and they were completed in compliance with that permit or consent and where appropriate a code compliance certificate was issued for those works.
>
> (9) All obligations imposed on the vendor under the Building Act 1991 ("Act") shall be fully complied with at the settlement date,

and without limiting the generality of the forgoing, the vendor further warrants and undertakes that:

(a) the vendor has fully complied with the requirements specified in any compliance schedule issued by a territorial authority under section 44 of the Act in respect of any building on the property,

(b) any building on the property which is the subject of a compliance schedule issued by a territorial authority under section 44 of the Act has a current building warrant of fitness supplied under section 45 of the Act and the vendor is not aware of any reason, that the vendor has not disclosed in writing to the purchaser, which would prevent a building warrant of fitness complying with section 45 of the Act from being supplied to the territorial authority when the building warrant of fitness is next due; and

(c) the territorial authority has not issued any notice under section 45(4) of the Act to the vendor or to any agent of the vendor which has not been remedied by the vendor; and the vendor is not aware of any reason, that the vendor has not disclosed in writing to the purchaser; which could entitle the territorial authority to issue such a notice.

[270] The Owners submit that the building work was not completed in accordance with the building consent because the cladding was changed from that consented to without any amended application for a building consent and it was that change, and the defects and failures associated with that change, that have led to most of the weathertightness problems that the house faces.

[271] The Owners further submit that the remainder of the problems are a result of the house not having been built in accordance with the building code and that is a breach of clause 6.1(9) in that the Walshaws warranted that all obligations imposed under the Building Act 1991 were fully complied with, when they were not. In particular, section 7 of the Building Act 1991 requires all building work to comply with the building code, whether or not a building consent is required in respect of the building work.

[272] Mr Walshaw submits that there is a distinction between the obligations which must be met by those carrying out the building work on the one hand, and those which must be met by the owner on the other hand. Mr Walshaw contends that the first respondents did meet their obligations as owners, in particular, they met the requirements of the territorial authority at the settlement date.

[273] Mr Walshaw says that the Owners allege the warranty was that **all** obligations imposed under the Building Act were fully complied with but that is not what the clause says in the Sixth Edition, these are the terms used in the Seventh Edition (3) July 1999 and subsequent editions to meet what was perceived to be a gap or undue restriction on the vendor's obligations.

[274] I do not think that is correct. The Agreement (Document 4 attached to the Brief of Evidence of Anne Elizabeth Heng) is the form of the Real Estate Institute of New Zealand and the ADLS Sixth Edition (2) May 1995 and clause 6.1(9) states inter alia: "***All*** *obligations imposed on the vendor under the Building Act 1991 ("Act") shall be fully complied with at the settlement date and without limiting the generality of the foregoing, the vendor warrants and undertakes that:…"* (emphasis added).

[275] So what were the obligations imposed on the vendor under the Building Act 1991 (**BA91**)? BA91 does not refer to a vendor, rather it refers to the obligations of an owner to obtain a building consent, a CCC, a compliance schedule and an annual building warrant of fitness where appropriate.

[276] Pursuant to section 7(1) BA91, all building work is required to comply with the building code. Under section 42, the territorial authority may issue a Notice to Rectify to the owner or the person undertaking any building work, and under section 80, either the owner or the person undertaking the building work may be prosecuted. The Building Act 1991 does not distinguish between the owner and the person undertaking the work as to the obligation to undertake the building work in accordance with the building code.

[277] It follows that under the Agreement, the obligations imposed on a vendor who has done, or caused, or permitted to be done on the property, any building work in relation to the construction of a single residential dwelling, are first, that a building consent was obtained for the building works, secondly, that all building work is completed in accordance with the building consent and the building code, and thirdly, that a CCC has been obtained in respect of the building works.

[278] The Owners' dwelling is a leaky building. Therefore it follows that the building work does not comply with clauses E2 External Moisture, B1 Structure, and B2 Durability, of the building code, and accordingly, the Owners have established a prima facie case that the Walshaws were in breach of the vendor warranties in the Agreement. I do not need to decide whether the building consent was amended expressly or impliedly in respect of the cladding

change for the present purposes because even if it were, the overarching obligation on the part of the Walshaws was to carry out, or to have carried out, the building works, in accordance with the building code (clause 7.1 BA91), and they did not.

[279] The Owners have established that the first respondents breached an express provision of the contract, namely the vendor warranty at clause 6.1(9) of the Agreement, and accordingly the first respondents are liable to the Owners to the full extent of their losses in the amount of $228,042.96 (Refer to the Schedule of Defects and Loss annexed hereto).

[280] The Walshaws say that if they are found liable in contract to the claimants, or in tort to any other respondent, then they are entitled to an indemnity from all other respondents found liable, and there are cross claims by the second and third respondents against the Walshaws. I shall deal with those matters in the sections to follow.

The liability of the second respondent, Peter Vining, in tort

[281] The Owners claim against the second respondent in negligence. They claim that Peter Vining owed them a duty of care to exercise reasonable care and skill in the construction of the dwelling and that he is liable in his personal capacity because he personally undertook the building work, he made decisions about methods of construction and the materials to be used, and because he had a leading or supervisory role in the construction of the dwelling, and that he breached that duty causing loss and damage.

[282] Against that, the second respondent submits that he was employed by Vining & Harrall Ltd as a builder, that he owed no personal duty

of care to the Owners as subsequent purchasers, if a duty was owed there was no breach, and if there was a breach, it caused no loss.

[283] The liability of a building contractor in tort to a subsequent owner of a domestic dwelling for defects in such dwellings has been a feature of New Zealand case law since *Bowen & Anor v Paramount Builders (Hamilton) Limited & Anor* [1977] 2 NZLR 394 (CA). This position was upheld by the Privy Council in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 in relation to a council although it is assumed that the liability of a builder would be no less extensive (*Rolls-Royce NZ Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA)). The position was recently affirmed in *Dicks v Hobson Swan Construction Ltd (In liquidation) and Ors* HC AK CIV 2004-404-1065 [22 December 2006].

[284] In essence, the decisions in these cases and many other New Zealand building cases over the intervening years, including notably, *Mt Albert Borough Council v Johnson* (CA) [1979] 2 NZLR 234, *Morton v Douglas Homes Limited* [1984] 2 NZLR 548, *Brown v Heathcote County Council* [1986] 1 NZLR 84, *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA), *Lester v White* [1992] 2 NZLR 483, *Chase v de Groot* [1994] 1 NZLR 613, *Riddell v Porteous* [1999] 1 NZLR 1, 12 (CA) are authority for the application of the principle that those who build owe a non-delegable duty of care to owners and subsequent owners of a domestic dwellinghouse to build the dwellinghouse in accordance with the building consent and the building code and to take reasonable care in carrying out and overseeing building operations to avoid foreseeable losses to others arising out of defective construction. The liability of a builder

to a subsequent owner of a domestic dwelling has also been upheld in Australia (See: *Bryan v Maloney* (1995) 182 CLR 690).

[285] It is accepted by the Owners that the party contracted by the Walshaws to carry out the building work on the Owners' dwelling was Vining & Harrall Ltd (In liquidation) (**VHL**). VHL was jointly owned by Peter Vining and Peter Harrall who were both builders and co-directors and shareholder-employees of the company. VHL was wound up in 2002 through voluntary liquidation when Peter Harrall moved to Tauranga and VHL ceased trading. Peter Vining remained in Palmerston North and established a new trading company in its place, Vining & Harrall (1998) Ltd.

[286] The evidence has established that the building work does not comply with the building code and accordingly the Owners would have had a prima facie case against VHL had it not been wound up. Therefore the question that arises in this case, is whether Mr Vining is also liable personally in negligence for the defects which have caused water ingress and damage.

The personal liability of a director in tort

[287] The debate as to whether or not directors of building companies should be personally liable in tort to others arising out of defective construction has raged over recent years in the leaky building context.

[288] The Owners submit that *Salomon v Salomon* [1897] AC 22 is the starting point in deciding whether a director of a company can be held personally liable for the tortious acts of the company because in *Salomon* it was established that a company is a legal personality

entirely separate for those who operate through it and on its behalf. Counsel submits that means that the liability of directors should be assessed separately from the liability of the company – it does not mean that directors are immune.

[289] Two recent High Court decisions have been helpful in resolving the debate, at least thus far. The first was the decision of Baragwanath J in *Dicks v Hobson Swan Construction Limited (In Liquidation) & Ors* HC AK CIV 2004-404-1065 [22 December 2006], the second was the decision of Stevens J in *Hartley v Balemi And Ors* HC AK CIV 2006-404-002589 [29 March 2007].

[290] Counsel for the claimants, Mr Galloway, submits that any controversy is now resolved by the decision of Baragwanath J in *Dicks* and the consistent findings of Stevens J in *Hartley* with its helpful discussion about the competing views as to personal liability at paras 80 to 94. In *Hartley,* Stevens J upheld the finding of a WHRS Adjudicator imposing personal liability on Mr Balemi, the director of a building company, who had a direct role in the construction process and control of the construction process as manager of the building project.

[291] In *Dicks,* the Court found McDonald, the sole director and shareholder of Hobson Swan Construction Ltd, the building company that undertook the construction work for the plaintiff, Mrs Dicks, personally liable to the plaintiff in tort on the ground that he directed and performed the construction of the house and was personally responsible for the omission of seals to the windows. Baragwanath J referred to various essays and judgments bearing on the issue of director liability, reviewed the competing factors pointing toward and away from liability, and concluded at para [62]:

> The point can be argued either way. While a New Zealand appellate court might choose a different approach, *Morton v Douglas Homes* has stood for two decades. It cannot be said that the decision is so lacking in principle that litigants should be subjected to inconsistent judgments at first instance. I have therefore decided to follow *Morton v Douglas Homes* on the present point. It applies *a fortiori*: Mr McDonald did not merely direct but actually performed the construction of the house and was personally responsible for the omission of the seals. His carelessness is, on the *Morton v Douglas Homes* analysis, a breach of a duty of care owed by him to Mrs Dicks. He is therefore personally a tortfeasor (as well as having his conduct attributed to Hobson Swan as its tort).

[292] In *Morton v Douglas Homes* [1984] 2 NZLR 548*,* Hardie Boys J found the directors of a building company personally liable because of the control they exercised over the building work. Whilst they did not personally undertake or perform the building work found to have caused the plaintiff's loss (defective foundations in that case), they each had, and exercised, control over the building operations, and they each made decisions and gave, or failed to give, directions concerning the proper extent of the necessary foundation and piling work and the manner in which that work was to be undertaken. He reasoned:

> 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 the subject of a duty of care. It is not the fact that he is a director that creates the control, but rather 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 those with whom the company deals insofar as that dealing is subject to his control.

[293] It is notable that in the earlier and much publicised case of *Callaghan v Robert Ronanye Ltd* (1979) 1 NZCPR 98, Speight J found the directors of the building/development company, who were airline pilots, not builders, not liable for the owner's losses as a result of defective building work because they were not actual tortfeasors. At p25 he said:

> There has been no proof here of any individual acts of neglect. The defective work was in all cases done by workmen or subcontractors employed by the company. Had there been evidence of **personal control and instruction** by one or more of the individual second respondents, then in respect of such failure by him in the role of controller which might be proved which has led to defects, then liability might have been established (**emphasis added**)

[294] In *Hartley,* Stevens J discussed at length the relevant legal principles to be applied in cases where the personal liability of persons involved with the builder, whether as a director or a project manager, are at issue. Stevens J concluded at para 89, that in the context of leaky building adjudications and disputes, of the two tests, the assumption of responsibility test outlined in *Trevor Ivory v Anderson* [1992] 2 NZLR 517 or the actual control test outlined in *Morton*, the observations of the Court of appeal in *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 are important and it therefore seems entirely appropriate for decision makers to apply, where appropriate, the degree of control test articulated by Hardie Boys J in *Morton*.

[295] To my mind these cases and the principles derived from them are entirely consistent with the common law principle that emerged from *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, namely that an employee owes a duty of care in relation to physical

damage to those who may foreseeably be affected by his or her conduct including those contracting with his or her employer as fellow employees or customers. In that case, the employer, Romford Ice and Cold Storage, successfully claimed an indemnity against its negligent employee, Lister junior, in respect of its vicarious liability to the fellow employee, Lister senior, who was injured by the negligent driving of his son. The vicarious liability of the employer was said to rest on the personal liability of the employee as a tortfeasor. The fact that the company may be vicariously liable for the negligence of its employees/agents does not relieve those employees/agents from personal liability if the appropriate level of care is established and that person is shown to have acted negligently (*Callaghan* supra).

[296] In the end, the matter seems quite straightforward. Following *Dicks* and *Hartley*, a director, or any other employee of a building company, may be personally liable in tort to owners and subsequent owners of dwellinghouses in relation to defective construction, where it can be demonstrated that his or her personal carelessness in undertaking or directing building operations caused foreseeable damage insofar as the act or omission said to have caused the loss was conduct subject to his or her control. The duty of care arises as a result of the control the person exercises over the said conduct and the liability arises **not** because the person is a director, but because the person breaches the duty of care and is an actual tortfeasor.

[297] It follows that a director (or a mere employee) of a building company will be personally liable where he or she has actually carried out defective building works, and/or has carelessly exercised control over the building operations, and/or carelessly

given directions that have caused defective work to be undertaken by others. In the case of a one man building company it will be an almost insuperable hurdle for a director to avoid personal liability for defective building work as the issue of control is one of mere physical control rather than control being removed from the company or exercised inconsistently with the director's routine involvement in the company.

Mr Vining's role

[298] The Owners' case for the liability of Mr Vining is first, that he personally undertook the building work, and secondly, that he had a leading and supervisory role in the construction of their dwelling.

[299] Mr Vining has sought to downplay his role in this matter in these proceedings. Counsel for Mr Vining submits that his role was more akin to that of one of the directors in *Callaghan* who was on site and oversaw the work. He submits that:

- VHL was a long standing and reputable privately held building company owned equally by its shareholders Peter Vining and Peter Harrall, both also the only directors; and,

- Neither director was designated as managing director; and,

- VHL was incorporated in 1973 and struck off in 2002 following Mr Harrall's departure for Tauranga in 1998; and,

- Sometimes Mr Vining would manage the administration of a project and at other times Mr Harrall would do so. Both would be engaged in building work from time to time; and,

- Mr Vining took care of organising the subcontractors for 51 The Strand, and liaised with different personnel including the Architect and project manager. He also undertook some hands-on work but was busy for the most part managing the building administration side of things; and,

- The company employed various numbers of employees over the years and at the time of building 51 The Strand employed four permanent builders including Mr Vining and Mr Harrall.

[300] Quite a different picture however emerges from the evidence of Mr Walshaw, Mr Bidlake, Mr Wilson, and to a large measure, from Mr Vining's own evidence, namely:

- Mr Vining says that he prepared the tender price;

- He was the builder for the project and he acknowledges that he was responsible for the day to day running of the project. In response to a question from counsel during the course of the hearing regarding his role, Mr Vining stated: "I was basically running the job";

- He organised, co-ordinated and supervised the work undertaken by subcontractors;

- He ordered the materials for the project;

- He recommended the new cladding system to the Walshaws and obtained a quotation from BPL for that purpose;

- He discussed and approved the design for the construction of the window sills and co-ordinated the work associated with the installation of the windows and the cladding;

- He instructed the tiler in relation to laying the tiles on the window sills;

- He had responsibility for quality control in respect of the building work of VHL and of its subcontractors;

- He made decisions about methods of construction, the materials to be used and the sequencing of the works;

- He dealt with the Architect regarding the maintenance items.

[301] The force of the evidence is strongly against the submissions of the second respondent on this point. Of the inconsistent evidence regarding Mr Vining's role, I prefer on balance, the evidence of the other respondents. Mr Vining was initially equivocal about his role regarding the change of cladding, but when cross examined on this point by counsel for the claimants, he changed his evidence and admitted that it was he who had introduced the product to the Walshaws and not the Walshaws who informed him that there was to be a change to the planned cladding system.

[302] In the end however, I am satisfied that the weight of evidence has overwhelmingly established that Mr Vining personally undertook the building work and/or he controlled the building work undertaken by other of VHL's employees, and secondly, that he had a leading and supervisory role on the project and personally managed, controlled

and directed all of the persons engaged by VHL for the purpose of the construction of the Owner's dwelling.

[303] There is simply no evidence that Mr Harrall or either of VHL's two employees at the time, had any supervisory or controlling role whatsoever in relation to this project of VHL's – that role was clearly assumed by Mr Vining and he acknowledged that was the case in his evidence when he stated: "I was basically running the job". In common parlance he was as close to being the 'project manager' for the construction of the Owners' dwelling as it is possible to get and was certainly on all fours with Mr Balemi in *Hartley*.

[304] Accordingly, applying the 'degree of control test' articulated by Hardie Boys J in *Morton* (See *Hartley* supra) it is no great step to conclude that Mr Vining owed the Owners and the Walshaws a personal duty of care to exercise reasonable care and skill in the construction of the dwelling to build the dwellinghouse in accordance with the building consent and the building code and to take reasonable care in carrying out and overseeing building operations to avoid foreseeable losses to others arising out of defective construction.

Did Mr Vining breach the duty of care and if so was there loss?

[305] The owners allege Mr Vining breached the duty of care by:

- Failing to properly supervise construction or to arrange supervision of construction so that he could ensure compliance with the building code. In particular he failed to supervise:

- The window manufacturer/installer who incorrectly installed the windows;

- The cladding subcontractor who used incorrect materials for the sill flashings and did not adequately seal :

    - Between all windows and door jambs and the cladding system;

    - Behind the flanges referred to in the Equus technical specification:

    - The balustrade handrail supports;

    - The electrical cable penetrations behind the bulkhead lights.

- Using exterior cladding different to that shown in the Architect's plans without allowing for proper consequential changes;

- Failing to construct adequate flashings/seals and drip edges for the door heads and soffits;

- Failing to properly construct the cladding around the pergola columns in particular, not adequately sealing the pergola bracket supports allowing water to enter the top of the columns and get under and up behind the bottom edge of the cladding;

- Failing to ensure adequate clearances between the lower edge of the wall cladding and the paving/balcony/ground surfaces at a number of locations allowing water ingress by capillary action to occur;

- Failing to properly inspect or arrange proper inspection of those features of the dwelling described in paragraphs 22-63 of the Statement of Claim;

- Failing to ensure defective works were remedied once he became aware of them.

[306] Mr Galloway submits that it is clear from the evidence that the construction did not meet the requirements of the building code and that Mr Vining failed to exercise reasonable care and skill in construction of the dwelling, in particular in relation to the construction of the sills.

[307] Mr Galloway further submits that Mr Vining had knowledge of the potential consequences at the cladding/joinery interface, that he was aware that something needed to happen to the interface between the cladding and the window junctions because it was not a standard design, yet despite his concern, he did not:

- Request new drawings or details to accommodate the change;

- Take any proactive steps to ensure BPL dealt appropriately with the issue;

- Where the Equus specification or the Architects drawings were silent or sparse on details, he chose to overcome that by making design decisions that were incorrect;

- He discussed and approved the design of the sills with Mr Bidlake;

- He did not inform the Council of the change;

- He never requested a warranty from Equus;

- He failed to install the Inseal strips as per the Equus specification;

- He decided not to make any recommendations to the Owners in 2001 as to what needed to be done to rectify the defects or prevent further damage.

[308] Mr Galloway submits that it would be difficult to find a clearer example of a builder coming within the principles of the *Dicks* case and says that Mr Vining's careless acts and omissions are a breach of his duty of care to the Hengs, and that he is personally liable for these failures.

[309] Mr Vining accepts that the standard of care required of a builder in performing services is the care reasonably to be expected of skilled and informed members of his trade judged at the time the work was done. But Mr Vining denies that there was any lack of reasonable care and skill in the construction of 51 The Strand on his part because the overwhelming majority of the dwelling's leaks over which he might otherwise have had some control relate to failure of

a cladding system on which he ought reasonably to have relied as being sufficient to withstand water ingress.

[310] Mr Vining submits he was off-site when the ground levels were established around the pool and terrace area and cannot be responsible for this aspect of the works.

[311] Mr Vining further submits that the contract was governed by an Architect with the additional involvement of a project manager, that the involvement of the Architect went beyond design and planning into observation, which is relevant to his personal liability. He claims he relied on the competence of the Architect who endorsed the Walshaws' decision to change the cladding, the various specialists to carry out contracted aspects of the works, as well as the Council to competently assess the building as to the then prevailing standards under the Building Act 1991.

[312] I have carefully considered the competing arguments, but in the end I am not persuaded that Mr Vining exercised reasonable care and skill in the execution and delivery of the building works. I have reached that conclusion, which is largely supported by Mr Vining's own evidence, on the basis that he was in charge of all building operations on site - he was the 'project manager' for VHL. He was also the hands on builder who personally undertook, and/or supervised VHL's employees to undertake, defective building work in relation to the fitting of the head flashings.

[313] Mr Vining says repeatedly throughout his evidence that once the cladding was changed from stucco to the Equus system that change "meant that the control over the whole of the cladding aspect, including in and around the joinery, pergola and other

places, shifted to the authorised applicator"…and "VHL relied on the integrity of the EIFS system and its applicator, and was entitled to do so in the circumstances." and in respect of the tiling contractor, Mr Vining says he instructed Mr Pirie on how the work was to be done, but he did not check on his work which "was overseen by the tiler".

[314] There could not be a more misconceived or clearer abdication of responsibility on the part of a builder/project manager and I am driven to conclude that Mr Vining took that approach entirely at his own peril.

Ground levels

[315] This matter may be dealt with in short order. I accept Mr Vining's evidence as supported by other deponents, that the datum and ground levels were fixed by the Architect on the plans and that they were formed by contractors employed by the Walshaws' under the direction of DSL. Mr Vining can have no liability in relation to fixing those, however he failed to install or to ensure that the Traffigard waterproofing membrane flashing detailed on the drawings between the concrete tile substrate and the wall framing was installed by VHL's waterproofing subcontractor, and accordingly there was nothing to protect the bottom plate from water penetration by capillary action and/or wicking due to its close proximity with the exterior paved surfaces. Mr Bidlake says he warned Mr Vining that there was a problem with regard to the cover of the cladding over the bottom plate and its proximity to the finished surfaces – Mr Vining does not deny that he was given that advice but it is clear that he failed to act upon it. The failure to ensure the installation of the waterproofing membrane, or to take some other appropriate

steps in the circumstances when he had specific knowledge of the defect is a breach of the duty owed by Mr Vining to the Owners and the Walshaws and he will be liable for the loss associated with that failure/breach.

The cladding and windows

[316] I am satisfied the evidence has established that:

- Mr Vining persuaded the Walshaws to change the cladding system from stucco to Equus and obtained prices from BPL for that work.

- Mr Vining did not consult the Architect about his proposal for the change until the Architect came to site at the commencement of the installation of the cladding.

- Mr Vining failed to advise the Council of the proposed change in cladding system before instructing BPL to undertake the work and he failed or neglected to apply for an amendment of the building consent to incorporate the change of the cladding system

- Mr Vining thought the Equus cladding system was BRANZ appraised and was surprised to find out at the hearing that it was not.

- Mr Vining had no specification or construction details for the proper installation of the product at any time. He acknowledged that he was aware of the need for "something special" around the windows and says he understood Mr

Bidlake installed proprietary plastic flashings and that the Dexx bandage was an additional precaution when there were no proprietary flashings available from any cladding system manufacturer at the time for deeply recessed windows and that much would have been clear from Equus' technical information. Mr Vining reposed his support for the Equus cladding system on his understanding and knowledge of the technical literature and construction details of a competitor cladding company, Plaster Systems Ltd.

- Mr Vining failed to request revised drawings from the Architect for the significant change in cladding and flashing systems from that specified.

- Mr Vining discussed and approved the construction of the sills with Mr Bidlake by particular reference to a mock up sill that Mr Bidlake constructed for that purpose.

- Mr Vining simply abrogated his project management and quality assurance responsibilities in relation to the installation of the windows and the cladding work in the misplaced belief that control of that work was in the hands of the subcontractors upon whom he could rely. Of course he was entitled to do just that, but he did so at his peril because he was the person on the site responsible for managing the building work, supervising the subcontractors, and approving the work for VHL.

- Mr Vining says he instructed the tiler how to fit the sill tiles below the flange of the window so as not to impede the drainage system, and to leave drainage channels at the ends

of the sills, but he failed to carry out even a cursory examination (which would have immediately disclosed that Mr Pirie had not followed his alleged instruction) of the completed tiling work. Instead he said that he assumed everything was OK and that the tiler had done everything right.

- Mr Vining failed to request a warranty from Equus for its product and cladding system when a warranty was available and any refusal on the part of Equus at that time would have put all parties on notice regarding the inadequate detailing at the window junctions and at such time as prompt remedial action would likely have avoided substantial consequential damage.

[317] I accept that there was nothing untoward in Mr Vining persuading the Owners to change the cladding system from stucco to Equus if he thought it was a better product. I hasten to add, that there is no evidence that the Equus system *per se* would have failed if installed properly. Whilst there was much debate reading the absence of the sealer coat, in the end that issue proved to be of little moment. The real difficulty that presented in this case was the deeply recessed windows for which there was no proprietary flashing system designed. Mr Vining's failure to appreciate the significance of this issue led him to make decisions about the flashing system and to approve the flashing system and sill construction detail when he was not qualified to do so. Moreover, having granted that approval, he failed to properly supervise the installation of the window joinery and the cladding and tiling work.

[318] I am satisfied that Mr Vining's failure to obtain proper expert advice in relation to the design of the sill and flashing construction and his failure to properly supervise the work of the contractors he instructed when he said he was aware of the need for something "special around the windows" is a breach of the duty owed by Mr Vining to the Owners and the Walshaws and he will be liable for the loss associated with that failure/breach.

Sundry defects

[319] I am satisfied that the evidence has established that Mr Vining failed to properly install head flashings to windows and doors, or to supervise the installation of the head flashings by VHL's employees, in particular over the bay windows, the laundry door and the living room doors, or to properly construct the wall framing to ensure the cladding overlapped the exterior building element below in the north east corner of the dwelling ,and those failures constitute breaches of the duty owed by Mr Vining to the Owners and the Walshaws and he will be liable for the losses associated with those failures/breaches.

[320] I am not persuaded that the evidence has established that Mr Vining ought to have, or even could have, observed all of the defects complained of in the course of his supervisory role whilst he was on site and accordingly I find that he did not breach any duty owed to the Owners and the Walshaws in relation to matters involving:

- ponding caused by vegetation in the rainwater head;
- cracks in the plaster or parapets;

- tarseal levels;
- delamination of the roof membrane;
- gardens built up too high;
- holes in the membrane caused by excessive length fixings in the garage
- unsealed vents, light fittings, pergola brackets and downpipes.

and is not liable for any losses in relation to those matters, namely items numbered 3, 4c, 5a, 7c, 8c, 9b, 11c, 16, 18, 19, 20, 22a, 23, 24m, 25, 26, 27, 28b, 30m, 30n, 31b, and 31d, in the Schedule of Defects and Loss annexed hereto.

Duty to remedy

[321] I am not persuaded that Mr Vining owed a duty of care to ensure defective works were remedied once he became aware of them as contended for by the Owners. Counsel have not cited any authority for that proposition. In *Rolls-Royce NZ Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) the Court of Appeal held that there is no duty in tort to take reasonable care to perform a contract. At most there is a duty to take reasonable care in or while performing the contract, which is quite a different concept. In essence, any awareness of the defective works is a consequence of the water ingress and not a cause, and in a tortious context, any failure by a tortfeasor to remedy a negligently constructed defect once that

person becomes aware of the defect simply goes to the extent and nature of the loss suffered by the claimant. A builder's failure to advise or act in respect of a remedy in a timely manner would be a powerful defence to any countervailing claim of contributory negligence/failure to mitigate on the part of the claimant, but does not give rise to a separate duty and liability in the event of breach.

Summary of second respondent's liability

[322] Therefore to summarise the position, I find the second respondent, Mr Vining, breached the duty of care that he owed the Owners and the Walshaws, and by reason of the said breaches, he is liable to them for loss and damages in the aggregate amount of $189,982.60 (Refer the Schedule of Defects and Losses annexed hereto)

The liability of the third respondent, Warren & Mahoney in tort

[323] The Owners' claim against the third respondent is also in negligence and is based upon its acts and omissions in designing the dwelling and observing and inspecting its construction.

The architect's duty of care

[324] The Owners submit that an architect owes a duty of care to subsequent purchasers to exercise reasonable care and skill in designing buildings and where the architect is also engaged to supervise the carrying out of work, it will be liable for negligent supervision if foreseeable loss results from that.

[325] The Owners further submit that *Bowen v Paramount Builders (Hamilton) Ltd* 1977 1 NZLR 394 is authority for the proposition that an architect cannot defend a claim in negligence made against him by a third person by saying that he was working under a contract for the owner of the land and his contractual duties to the owner sets a limit to the duty of care which he owes to third parties.

[326] The law is well settled in New Zealand that an architect or an engineer owes a duty of care to persons whom the architect or engineer should reasonably expect to be affected by their work and may arise out of either negligent design or negligent supervision of the contract works. That position was made clear by the Court of Appeal in *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394, and was subsequently followed in a number of other professional negligence cases including inter alia, *Young v Tomlinson* [1979] 2 NZLR 441, *Warren and Mahoney v Dynes* Unreported 26 October 1988, CA49/88, and *Rowlands v Collow* [1992] 1 NZLR 178. The duty of an architect in tort is founded in the principles derived from the decision in *Hedley Byrne & Co v Heller & Partners Limited* [1964] AC 465, namely that in circumstances where a person is called upon to exercise judgment, or skill, or to make careful enquiry, and he or she knows that another person will place reliance upon it, a duty of care will arise where he or she gives such information or advice or allows that information or advice to be passed on to another person.

[327] The extent of an architect's duty to third parties in tort is encapsulated in the passage in the judgment of Richardson P in the Court of Appeal decision in *Bowen* at 407:

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

[328] That passage was subsequently cited with approval by Potter J in *Body Corporate 114424 v Glossop Chan Partnership Ltd & Anor* (unreported, Auckland High Court 22.9.97) in which case the Judge held that the duty of care of the architect to the plaintiff is a limited duty, circumscribed by the task it was contracted to perform.

[329] The third respondent quite properly acknowledged that an architect owes duties of care to subsequent owners in respect of design,

when engaged to design, and in respect of contract administration and observation, when so engaged, according to the standards of a normally competent architect at the time.

[330] It is common ground that the standard of competence, care, and skill that an architect is required to discharge in relation to the execution of his or her duties in any particular circumstance, is that of the reasonably competent practitioner prevailing at the time the services were performed.

[331] In *Eckersley v Binnie & Partners* [1955-1995] P.N.L.R. 348, Lord Bingham stated at para 17.34:

> The standard is that of the reasonably average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet. In deciding whether a professional man has fallen short of the standards observed by ordinarily skilled and competent members of his profession, it is the standards prevailing at the time of his acts or omissions which provide the relevant yardstick.

[332] The Third respondent also acknowledged that those standards cannot be avoided or diminished as against subsequent owners by contract (*Bowen*), but counsel submits that *Bowen* is <u>not</u> authority for the proposition that an architect is required to perform functions additional to those contracted for.

[333] I do not think that is strictly so and in my view, counsel for the Owners has correctly identified that *Bowen* is authority for the proposition that the contract <u>does not set limits</u> on the duty of care owed to subsequent purchasers.

[334] The real question that arises in the context of the cladding issues in the present case however, is whether the Architect's duty of care extended to producing amended documentation or warning the Walshaws and others involved in the construction process that the plans it had provided were insufficiently detailed and/or that more design work was required as a result of the Walshaws' decision to change the cladding system from stucco to EIFS.

[335] The Queensland Supreme Court decision of Dutney J, in *Brian Geaney & Anor v Close Constructions Pty Ltd & Ors* [2003] QSC 393 (21 September 2003) dealt with just this issue holding that an architect should warn an owner if the plans provided are insufficiently detailed or more design work is required.

[336] In the *Brian Geaney* case, the architect was engaged by the owner on a limited retainer for the production of plans sufficient to obtain council approval for a commercial building. The architect designed a building including, specifically, the foundations and floor slabs for stud frame construction. Subsequently, the architect was engaged separately by the builder (selected by the owner after the original tender process), to produce a further set of plans sufficient to obtain building approval and incorporating a number of changes to the original design intended to save costs, including notably, a change from stud frame walls to masonry walls. In purported satisfaction of the limited retainer, the architect provided the builder with plans that included the footing and slab plan prepared for the original proposal for a stud framed building. The completed building subsequently developed cracks in the exterior cladding and the owners brought proceedings against the builder, the architect, and the engineer.

[337] The court found that the architect knew the foundation plan had not been prepared for a masonry building, but did not revert to the engineer as to its applicability to the new design. The court held that the architect ought to have been aware that the foundation design needed to be modified to suit the new building material and that the architect was negligent to include in the material supplied to the builder, a plan that was not drawn for the particular project without satisfying himself that it was suitable for the purpose, or without warning the builder that he should not use it without first having it checked by the engineer to ascertain its suitability for the new design. The Court rejected the architect's submission that the footings would need to be inspected and approved by the engineer which would break the chain of causation, saying, having armed the builder with an inappropriate plan, it was not open to the architect to absolve himself by relying on the inappropriateness being detected at a later date by somebody else.

[338] The duty (or extension of duty) contended for in the present case, namely that an architect owes a duty to warn an owner if more, or different design work is required to accommodate owner or builder driven changes to the scope or nature of the building work in circumstances where the architect knows, or ought to know, of the changes and the unsuitability for purpose of the extant design work, notwithstanding that the architect may be engaged on a limited retainer, is entirely consistent with the principles derived from *Hedley Byrne* and *Bowen*, namely that in circumstances where a person is called upon to exercise judgment or skill or to make careful enquiry and he or she knows that another person will place reliance upon it, a duty of care will arise, and that contractual duties do not set limits on the duty of care owed to subsequent purchasers.

[339] Accordingly I am satisfied that the duty of care owed by an architect to an owner and to subsequent owners extends to producing amended documentation or warning the owner and/or others involved in the construction process that the plans provided are insufficiently detailed, and/or that more design work is required as a result of owner or builder driven changes to the scope or nature of the building work, in circumstances where the architect knows, or ought to know, of the changes and the unsuitability for purpose of the extant design work, notwithstanding that the architect may be engaged on a limited retainer (*Hedley Byrne, Bowen* and *Brian Geaney & Anor v Close Constructions Pty Ltd*)

The alleged breaches

[340] The Owners allege that the third respondent breached the duty of care to them as subsequent owners of the dwelling by:

- preparing deficient plans;
- failing to produce amended documentation to allow for proper construction following the change in cladding;
- failing to provide sealing and flashing detail once the cladding system was changed;
- failing to alert the Walshaws or other respondents that consequential changes would be needed;
- failing to alert the Walshaws that there was a possibility that the cladding would deteriorate if it were not sealed;

- failing to check with Doug Smith or Mr Vining as to whether or not the Council had been notified of the change in cladding;

- failing to identify the reason for the leaks in the bay windows and inappropriately recommending the use of Clearseal;

- failing to address the other leaks in the dwelling once it became aware of them; and,

- for certifying practical completion when there was no reasonable grounds for believing that the building work had been carried out in accordance with the building code.

Defective plans

[341] Defect 16 is said by the experts to be the result of the driveway tarseal being in contact with the cladding. I accept that the evidence discloses that the plans provided inadequate height separation of 50mm between the floor level of the dwelling and the tarsealed surfaces outside the garage. There was no waterproofing or nib wall detailed at the garage wall/driveway interface and therefore the cladding is in contact with the paved surface and does not comply with the 150mm separation required under the building code. This failure is a breach of the duty owed by the Architect to the Owners in respect of design and the Architect is liable to the Owners' for their losses in relation to that failure/breach.

[342] There is no other direct evidence of building defects having arisen as a result of defective design. It is certainly arguable that the separations between the floor levels and the concrete surfaces for

the terraces that were to be paved with Hinuera stone were inadequate (the step down is detailed as being 50mm variously to the top of the tile or to the underside (refer details 16/A12, 17/A12, 27/A12)) with no separation to the door sill to the games room, but in the end, the cladding system was changed from stucco over a cavity with a waterproofing membrane flashing to the base over a 100x25 batten, to the Equus EIFS cladding directly fixed to the timber framing and without a waterproofing membrane at the base. Put simply, the building work was not undertaken in accordance with the Architect's design details and therefore the allegation of defective design in relation to that work is purely academic as there is no causative link. That much of course goes equally for the allegations of defective design in relation to the sill flashing designed for use with the stucco cladding and the cladding on the north wall of the games room that does not overlap the underlying building element.

[343] I accept Mr Bannatyne's evidence that the Architect's drawings and specifications were quite satisfactory and in the upper range of quality. Mr Bannatyne noted in particular that the documents specified stucco cladding with a cavity which was a conservative and proven cladding system, and that the roof, gutters, and parapet designs, were all conventional and sound, as were the weathering details relating to the installation of windows and doors. It seems clear to me from Mr Bannatyne's evidence that he considered all of these design matters were relevant, important and necessary for the proper construction of the dwelling and that it was the Architect's role to properly specify and detail these design features. There was certainly no suggestion on his part that that important design work in relation to the cladding and the interfaces of the cladding with other building elements was not necessary, in the

sense of being additional detailing to that normally provided by professional architects or that the detail was not required for proper construction, or that the design of that important detail could, or should be, undertaken by an unqualified person.

Failure to produce amended documentation after change of cladding

[344] The majority of the other allegations of negligence on the part of the Architect fall broadly under the head of the change of cladding, and the Architects obligations and duties in relation to that change.

[345] In essence, the Owners submit that the Architect breached its duty of care to them by failing to produce amended documentation after the cladding was changed, or to alert the Walshaws, or other respondents, that consequential changes would be needed.

[346] Against that, the Architect says that the change of cladding was presented as a *fait accompli* observed during the course of an inspection. The Architect submits that in the absence of any request for design changes consequent upon the Walshaws' decision to change the cladding, the third respondent was entitled to assume those responsible for the decision were satisfied as to the buildability of the house with the substituted cladding without further design detail. The Architect further submits that it was under no obligation to volunteer further design detail.

[347] It is clear that the defects and failures that have caused the water ingress and damage have arisen as a result of the change in cladding and the manner in which that work was undertaken.

[348] The evidence of all respondents has been to the effect that the change in cladding was a significant and fundamental change to the design of the Owners' dwelling. In fact it is difficult to think of any change during the building process that would have been more significant in the circumstances, given the architectural design features that are the hallmark of this home viz. the large flat wall planes, the deeply recessed windows and large bay windows, and the minimal separation between interior and exterior surface levels.

[349] First, I do not accept that the cladding change amounted to a *fait accompli*. I accept that the first the Architect knew of the change was when he visited the site for a routine inspection. However, the evidence of Mr Vining, Mr Bidlake and Mr Wilson was that the cladding work had only just begun when Mr Wilson visited the site on 18 March 1996.

[350] In the circumstances, I am driven to conclude that it would have been entirely possible for Mr Wilson, who was on site for the express purpose of observing the building works undertaken pursuant to the design for the purpose of approving and valuing the payment claims of VHL, to have advised the Walshaws against the change of cladding and recorded his opposition to it proceeding if he thought that the change was inappropriate. Alternatively, if he was not opposed to the change in cladding in principle, it was equally possible, and encumbent upon him, to have warned the Walshaws, given the limited retainer that allegedly formed the basis of their contractual arrangements, that there needed to be appropriate construction details provided by VHL for approval as an integral part of his approval of the variation, and/or that amendments and consequential changes needed to be made by the Architect to the approved plans.

[351] Secondly, I do not accept that the third respondent was entitled to assume those responsible for the decision to change the cladding were satisfied as to the buildability of the house with the substituted cladding without further design detail. After all, it was the Architect who was engaged by the Walshaws as the design professional and in whom they reposed reliance and responsibility for observing and approving the construction work, and for which service, the Architect was paid an agreed fee.

[352] Mr Wilson has given no evidence as to the basis for his making that assumption, other than to suggest that he believed the product to be a reliable and reputable product because he had used the product on other projects before, and that he had technical information regarding the product in the office. But if that were the case, he ought to have known that the Equus cladding system was not subject to any independent appraisal (i.e. Branz) and that the architectural detailing that he had specified was unable to be achieved with proprietary product and standard manufacturer's construction details and that more design work was required.

[353] In the circumstances, that should clearly have been enough to put Mr Wilson, or any other competent architect, on notice that further investigation and inquiry was required before his approval for the cladding change could be granted.

[354] I note that no 'Equus' construction detail was provided by any party to these proceedings and it would appear that the parties were content to refer to, and rely upon, the Branz Appraisal Certificate and Construction Details for the product of a competitor, Plaster Systems Ltd's Insulclad Wall Cladding System (See Exhibits 'K' and 'L'). I also note that the cladding details referred to by counsel at

pages 9 and 10 of Plaster Systems Ltd's construction details in respect of cladding in contact with the ground, provide that the bottom plate is to be located 150mm above paved surfaces or 225mm above finished clear ground and that the cladding should overlap the bottom plate by 50mm or may terminate at floor level provided that it is founded on the concrete floor and seated on a Z flashing with two layers of fibreglass mesh laid over the junction.

[355] In the circumstances, I am driven to conclude that the Architect's approach constituted a total abdication of responsibility and a clear breach of the duty of care that the Architect owed the Walshaws and the Owners in respect of its contract administration and observation functions and duties.

[356] Thirdly, given the extent of the project specific detailing provided in respect of the stucco cladding, i.e. the cavity system, the terrace/wall flashing details, the sill construction and flashing details, and the window and door head detailing, I am certain that any reasonably competent Architect ought to have known that all of that detailing would be unsuitable for the proposed EIFS cladding and that further specific detail was required.

[357] The Architect was under an obligation to volunteer further design detail, or at least to warn the Walshaws and others involved in the construction process that more, or different design work was required to accommodate the owner and builder driven changes to the scope and nature of the building work (Hedley *Byrne*, *Bowen* and *Brian Geaney & Anor v Close Constructions Pty Ltd)*.

[358] The Architect failed to volunteer further design detail, or to warn the Walshaws that more or different design work was required to

accommodate the change in the cladding, and that failure was a breach of the duty of care owed by the Architect to the Owners and the Architect will be liable to the Owners and the Walshaws for the losses associated with those failures/breaches.

Failure to notify the Council

[359] All building work is required to comply with the building consent and the building code and that much must have been evident and within the knowledge and expertise of a professional architect.

[360] I accept that the Architect, who was responsible for observing and approving the building work of VHL, for the Walshaws, had a duty to ensure that the Council was advised of, and approved, the change in cladding. The Architect did not. Mr Wilson says he relied upon the builder and DSL to do that, but there is no evidence of any attempt on the Architect's part to enquire of either of those persons, or of the Council, as to whether the change of cladding was notified and if the amendment to the building consent was approved.

[361] In the end however, this is a no loss argument. There is no evidence that the Owners have suffered any loss as a result of the Architect's failure to ensure the Council was notified of the change in cladding and that the building consent was amended accordingly. The cladding change was approved/accepted by the Council and there is certainly not any issue in this case of a refusal on the part of the Council to issue a CCC because of a non-notified change and costs associated with resolving that issue. It is trite law that a party cannot recover (for breach) if it has suffered no loss and any claim under this head fails accordingly.

Failure to address the leaks

[362] There are two issues under this head. First, the Architect's alleged failure to identify the reason for the leaks in the bay windows and the instruction to seal the source of the leak with Clearseal, and secondly, the alleged failure on the part of the Architect to address the other leaks once it became aware of them.

[363] Dealing with the second item first. I accept the evidence of Mr Wilson, supported by Mr Walshaw, that he issued Contract Instructions to VHL relating to the leaks in the games room, the balcony, and the bay windows, once he became aware of those leaks, and when there was no report of continuing problems he believed there was no requirement for further investigation or further instruction. Mr Walshaw confirmed in his evidence that there was no further manifestation of the problem. In the circumstances, I am driven to conclude that there was nothing further the Architect ought to have done in the circumstances and accordingly there was no breach on the part of the Architect in respect of failing to address the leaks.

[364] The position is somewhat different however in respect of the leak to the bay windows and the Architect's instruction to VHL in CI No.14: *"both bay windows leak at head, check seal on outside and window sill of bay window above, seal with Clearseal as necessary".*

[365] I accept the Owners claim that the Architect's instruction to apply Clearseal to the window heads and sills as necessary was negligent in the circumstances when the source of the water penetration had not been identified. It stands to reason, that as Clearseal was not specified to keep water out of the dwelling at those locations, some

other building defect, or defects, were causing the problem, and those defective works ought to have been identified and remedied rather than bandaged over with sealant which could only ever be a temporary fix. As I understand the evidence, there was no apparent consequential damage at the time the instruction (CI NO.14) was issued, there was certainly no instruction to VHL to make good interior surfaces. There has been significant damage subsequently, which was in my view, entirely avoidable if the matter had been dealt with properly with due care and skill at the time, and accordingly it follows that the Architect will be liable to the Owners for their losses in relation to the bay windows.

Practical completion

[366] Practical completion of the building work was achieved by the builder on 12 August 1996.

[367] The Owners allege that the Architect was negligent for certifying practical completion when there were no reasonable grounds for believing the building work had been carried out in accordance with the building code.

[368] I have already concluded that the cladding work around the terraces does not comply with the building code. Mr Cooney and Mr Bayley both gave evidence that in the absence of any specific and alternative solution (as provided in relation to the stucco cladding), the required step down for compliance with E2 paragraph 4.2.5 of the Handbook to the Building Code was 150mm.

[369] I have also determined that the window sills were not constructed strictly in accordance with the detail provided in this adjudication by

Mr Bidlake (See Mr Cooney's Statement of Evidence at para 55) and approved by Mr Wilson following his on site discussions with Mr Vining and Mr Bidlake (Mr Wilson said he was relatively happy with the approach that was proposed to be taken which was broadly outlined by what we have seen on the sketch) or in accordance with the Equus Specification P7017 in that the sealant was placed between the polystyrene and the aluminium joinery and plastered over, obscured from view, and unable to be checked at any later date. Mr Wilson acknowledged the importance of the window sill construction and flashing details during cross examination and agreed that a failure to change the design between the cladding and the joinery interface could lead to weathertightness issues.

[370] I accept the Owners' argument as compelling, given first, the evidence of the building experts as to the degree of non-compliance in relation to the cladding/terrace interface, secondly, the ready accessibility of the subject building works to view and examination, and thirdly, because the Architect had neither provided amended construction details, nor sought and approved construction details from VHL in circumstances where the work was critical and known to be so. The evidence has established that Mr Wilson's assumptions as to the "buildability of the house with the substituted cladding" were misconceived and were not based on any careful exercise of judgment or skill or enquiry when he knew that the Walshaws placed reliance upon it. In the end, it follows that the Architect certified practical completion based on those misconceived assumptions and inadequate inspection.

[371] Accordingly, I am satisfied in the circumstances that the Architect was negligent for certifying practical completion when there were no reasonable grounds for believing the building work had been carried

out in accordance with the building code and the Architect will be liable to the Owners and the Walshaws for the losses in respect of the cladding/terrace/pergola interface, the joinery/cladding interface and the cladding/concrete wall interface.

[372] I am not persuaded that the evidence has established that the Architect ought to have, or even could have, observed all of the defects complained of in the course of his supervisory/observation role, and accordingly I find that the Architect did not breach any duty owed to the Owners and/or the Walshaws in relation to matters involving:

- ponding caused by vegetation in the rainwater head;
- unsealed screw holes through window frames;
- sill tiles;
- cracks in the plaster or parapets;
- delamination of the roof membrane;
- gardens built up too high;
- holes in the membrane caused by excessive length fixings in the garage
- unsealed vents, light fittings, pergola brackets and downpipes.

and is not liable for any losses in relation to those matters, namely items numbered 1a, 1c, 1d, 1e, 4b, 5a, 7c, 8a, 8c, 9b, 10b, 11b, 11c, 13, 14b, 15b, 17, 18, 19, 20, 21b, 22a, 23, 24b, 24c, 25, 26, 27, 28b, 28m, 29b, 30b, 30m, 30n, 31b, 31d, 32b, 33b, 34b, and 35b, in the Schedule of Defects and Loss annexed hereto.

Summary of third respondent's liability in tort

[373] Therefore to summarise the position, I find that the third respondent breached the duty of care that it owed the Owners and the Walshaws, and by reason of the said breaches, it is liable to them for loss and damages in the aggregate amount of $174,408.96 (Refer the Schedule of Defects and Loss annexed hereto)

Third party claim - The liability of the third respondent, Warren & Mahoney, to the first respondents, the Walshaws, in contract

[374] The Walshaws claim against the third respondent in contract on the same grounds set out in the claimants' claim against the third respondent and the respondents' responses and cross claims against the third respondent.

[375] The third respondent could not locate its fee proposal for the project but acknowledged that it owed contractual duties to the Walshaws in respect of design and for limited contract administration and observation. The third respondent contends that its observation obligations extended only to monthly visits to confirm value of work for progress payments and practical completion, and listing maintenance requirements.

[376] The Walshaws submit that there were express or implied terms that the Architect would design and supervise the construction of the dwelling so that it did comply with the building code and the Building Act 1991.

[377] The third respondent quite properly does not dispute that obligation. As all building work is required to comply with the building code pursuant to section 7 BA91, it is axiomatic that the Architect was contractually obliged to design and supervise the construction of the Owners' dwelling so that it did comply with the building code and the Building Act 1991 and the Architect will be liable to the Walshaws in the event of a breach of that obligation.

[378] The evidence has established that the building is a leaky building and the building work does not comply with the building code. Accordingly the Walshaws have established a prima facie case against the Architect for breach of contract and the Architect is liable to the Walshaws for their losses as a result of Owners' dwelling being a leaky building, but limited to those losses that are sufficiently proximate and that arise naturally from the breach of the Architect's contractual obligations in respect of its design and observation/approval functions (See Architects liability in tort supra).

[379] Accordingly the third respondent is liable to the first respondents for breach of contract in the amount $178,142.96, being the cost of repair (See para [234]). The consequential damages and general damages claimed by the claimants in this proceeding have no application in relation to the quantification of damages for breach of contract by the third respondent against the first respondents.

The liability of the fourth respondent, P K Bidlake Painters Ltd, in tort

[380] The Owners' claim against the fourth respondent is also in negligence. The Owners say the fourth respondent owed a duty of care to them as subsequent owners of the dwelling to exercise reasonable care and skill to ensure that the dwelling was clad, plastered and flashed in a proper and workmanlike manner using appropriate materials and in accordance with the Building Act 1991 and the building code.

[381] The fourth respondent denies that it owed any duty of care to the Owners. In short, the fourth respondent submits that the existing categories of relationships that give rise to a duty of care do not include the relationship between a subcontractor and a subsequent purchaser (*Body Corporate No 114424 v Glossop Chan Partnership Architect Ltd & Anor* (Unreported CP612/93 HC Auckland, 22 September 1997, Potter J) and there are no particular facts that warrant imposing a duty of care on the fourth respondent in this case.

[382] Against that, Mr Galloway submits subcontractors are required to comply with the building code in the same way as contractors, and although *Glossop Chan* suggests that subcontractors will not generally be regarded as having assumed a responsibility to the owner and subsequent owners, that general proposition can be displaced and a duty of care can arise as a result of possessing special technical expertise (*Bevan Investments Ltd v Blackhall & Struthers (No 2)* [1973] 2 NZLR 45 (HC); [1978] 2 NZLR 97 (CA)).

[383] Mr Galloway further submitted that there have been a number of adjudications in the WHRS where subcontractors have been found to owe a duty of care to subsequent purchasers including: *Theobald v Coulter & Ors* (Claim No. 0300, 10 June 2005 Anthony Dean), *Miller-Hard v Stewart & Ors* (Claim No. 00765, 26 April 2004, Anthony Dean), *Roburgh v Lay & Ors* (Claim 00062, 11 March 2005, Anthony Dean), *Graham and Glenys Tucker and Stephen Sudbury as trustees of the Ngahere Trust v Tucker & Ors* (Claim No. 00540, 4 April 2005, John Green). Other recent claims where specialist subcontractors have been found liable to subsequent purchasers include *Paul and Isobel Clarken v Philip Carling & Ors* (Claim No. 00804, 11 May 2005, John Green) and *Russell and Joy Tidmarsh v John Glover & Ors* (28 September 2006, John Green). *Andre De Wet and Annette De Wet v North Shore City Council & Ors* (Claim No. 2109, 2 October 2006, David Carden), *P B Atkins and P B F Atkins and J Muller as trustees of The Bruce Family Trust v North Shore City Council & Ors* (Claim No. 1505, David Carden).

[384] Counsel for the fourth respondent, Ms Jurgeleit, submits these cases are of no assistance to the Owners on the basis that it would appear the Adjudicators did not have the benefit of any argument on the issue, no authorities are cited for the proposition that such a duty exists and it must be concluded that these cases were wrongly decided or proceeded on an incorrect assumption on the point.

[385] Ms Jurgeleit further submits that the only case decided in New Zealand, Australia, England or Canada in which a subsequent purchaser has been held to have a cause of action in negligence against a subcontractor is a case from the Canadian Supreme Court in which the Court relied heavily for its decision on the fact

that the subcontractors work had caused “real and substantial danger” (pieces of cladding fell off the ninth floor of a building).

[386] In response, Mr Galloway submits that the decision of Beattie J in case of *Bevan Investments Ltd* made it clear that a subcontractor can be liable to the owner and cannot seek to avoid the consequences of his actions by harbouring under the protection of the head contractor where he is not a mere deputy. Beattie J held at pages 80 & 81:

> I have earlier indicated that the plaintiff has, through no fault of its own, sustained substantial financial loss. Who is responsible for that loss? I have no hesitation in answering that question by saying the loss would not have occurred had it not been for several important defects in design. Responsibility for these defects must, in my firm view, be laid fairly on the shoulders of the second defendant. He is an experienced design engineer and held himself out as such. He knew or ought to have known the particular risks involved in his design proposals, especially as they were to be applied to a lift-slab method of construction which is of relatively limited application in New Zealand. Nor could either the plaintiff or the first defendant be reasonably expected to be possessed of the special technical expertise which such a method demands. On the contrary, they both had good reason to believe that their design engineer was competent and could be expected to exercise the normal care and skill of the reasonable member of that profession. As a professional man engaged to perform that task in a manner appropriate to his qualifications and status. That state of affairs, in my opinion, clearly discloses a duty situation and I can find no reason for declining to apply the neighbour principle of Lord Atkin to the facts of the present case.
>
> I do not think it is open to a design engineer to seek to avoid the consequences of his defective design by harbouring under the protection of the head contractor or supervising architect. He is not,

> in my opinion, simply a "mere deputy" as Mr Clayton suggested. He may be liable in his own right and this possibility is not precluded by the fact of his being contractually bound to the first defendant.

[387] Mr Galloway submits there is nothing in this case to limit its applicability to the professions rather than the trades (although *Glossop Chan* did refer in this regard to the duty having arisen from professional expertise).

[388] Mr Galloway submits that in *Glossop Chan*, Potter J at page 13 distinguished the *Winnipeg Condominium* case on the basis that the work performed created a dangerously defective structure. The decision of Baragwanath J in the *Dicks* case confirms that this is a distinction without a difference. He said at para 114 that "Nothing apart from inadequate foundations could be as insidious as entry into a house of water, which will ultimately have the same effect as inadequate foundations".

[389] Mr Galloway further submits that neither is there any distinction between liability to an original owner and a subsequent purchaser. Again consistent with the observation of Baragwanath J in the *Dicks* case at para. 50, an unsuspecting purchaser of a house is less likely to be reliant upon the original contractual mechanisms established by the original parties, and will be reliant on those involved to have done their jobs with due care and skill.

Did BPL owe a duty of care to the Owners?

The test to be applied

[390] Ultimately it is for the Court to decide whether in light of all the circumstances of the particular case, it is just and reasonable that a duty of care is incumbent on a respondent (*South Pacific Manufacturing Co Limited v New Zealand Security Consultants Limited* [1992] 2 NZLR 282). The framework for an inquiry will focus on, but not be restricted to, the degree of proximity or relationship between the parties and whether there are other wider policy considerations that tend to negative or restrict or strengthen the existence of a duty of care in the particular class of case (*Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA).

[391] The inquiry into proximity is concerned with the nature of the relationship between the parties and focuses on balancing the claimant's moral rights to compensation on one hand and the respondent's moral claim to freedom of action and undue legal burden on the other. That inquiry necessarily focuses on the nexus between the respondent's alleged negligence and the degree of harm and the loss to the claimant, deemed assumption of responsibility by the respondent, and foreseeable and reasonable reliance by the claimant.

[392] The nature of the loss can also be taken into account and as harm to a person or property involves a net loss to social wealth, the Courts have been more willing to impose a duty of care in those cases than in cases of economic loss that may result in mere transfers of wealth so that one person's loss is another's gain (*Perre v Apand* (1999) 198 CLR 180, 213-214, and *Rolls Royce*).

[393] The extent to which those in the claimant's position are vulnerable, i.e. whether a respondent with special skills has power over a

claimant, and whether or not there are, or could realistically have been, other remedies for a claimant may also be taken into account. The statutory and contractual background may also be relevant in defining the relationship between the parties and can point, depending on the circumstances, towards or away from a finding of proximity.

[394] Policy is concerned with the wider legal and other issues associated with deciding for or against a duty of care, and in general, an inquiry will be assisted by focusing on inter alia, the seriousness of the harm, encouraging reasonable care and adequate deterrence for the respondent, the need for commercial certainty, the potential for indeterminate liability (the floodgates factor), the legislative environment, and the vulnerability of the claimant.

[395] In the circumstances of the present case, the inquiry must necessarily entail consideration of the appropriateness of setting quality standards in the setting of an industry that has a long history of self regulation and determination through contractual specifications, warranties, and limitation and exclusion clauses.

[396] In the end however, the important object of the two broad fields of inquiry is to ensure that all relevant factors are properly and consistently identified, pragmatically considered and analysed, and balanced and weighed within a practical and recognised framework.

[397] Such questions are not then considered in isolation from decided cases. In deciding whether or not there is a duty of care in a new situation, the Courts should decide gradually, step by step and by analogy with previous cases (*South Pacific*) because the examination of factors that have influenced earlier decisions

ensures that any development of the law occurs in a cohesive and principled manner (*Connell v Odlum* [1993] 2 NZLR 257,265).

Examination of the case law and the position of those involved in delivering up building work

Builders and developers

[398] The non-delegable duty on the builder/developer is not merely to take reasonable care for the safety of others, it generates a special responsibility or duty to see that care is taken by others, for example by an agent, or independently employed contractors, such as the fourth respondent in this case. Non-delegable duties need not be discharged by the employer personally, but liability rests with the employer if their discharge involves negligently inflicted harm or damage (*Bowen, Mt Albert Borough Council v Johnson, Invercargill City Council v Hamlin*, *Dicks*).

Local Authorities and Building Certifiers

[399] It is well established law in New Zealand that a Council owes a duty of care to house owners and subsequent owners for defects contributed to, or caused by, a building inspector's negligence when carrying out inspections of a dwelling during construction and that position was confirmed by the decision of the Privy Council in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

Building professionals

[400] It is also well established law in New Zealand that an architect or an engineer owes a duty of care to persons whom the architect or engineer should reasonably expect to be affected by their work and

may arise out of either negligent design or negligent supervision of the contract works (*Bowen, Young v Tomlinson*, *Warren & Mahoney v Dynes*, *Rowlands v* Collow). The duty of an architect in tort is founded in the principles derived from the decision in *Hedley Byrne & Co v Heller & Partners Limited* [1964] AC 465, namely that in circumstances where a person is called upon to exercise judgment or skill or to make careful enquiry and he or she knows that another person will place reliance upon it, a duty of care will arise where he or she gives such information or advice or allows that information or advice to be passed on to another person.

Subcontractors

[401] In New Zealand there is no case where a duty of care has been found to exist in analogous circumstances although in *Bevan Investments Ltd v Blackall & Struthers (No.2)* [1973] 2 NZLR 45, 79, a structural engineer was found to owe a duty of care to a building owner in respect of the design of structural components for a recreation centre in Porirua. In that case, the structural engineer was a subcontractor to the architect whom Beattie J described as "possessed of special technical expertise" and was therefore in the position of a building professional and subject to a *Hedley-Byrne* duty of care arising from professional expertise.

[402] In the now almost infamous English case of *Junior Books Ltd v Veitchi Co Ltd* [1982] 3 All ER 201, [1983] 1 AC 520, the specialist subcontractor nominated by the plaintiff owner was held to have owed a duty of care to the owner in respect of a defective floor that was unfit for use. That decision has proven to be controversial and subject to much criticism and has been distinguished by the Courts on many subsequent occasions.

[403] In *Simaan General Contracting Co v Pilkington Glass Ltd* (No.2) [1988] QB 758 (CA), the English Court of Appeal held that Pilkington, who was the supplier and manufacturer of glass to the curtain walling subcontractor, Feal, on a building in Abu Dhabi, owed no duty of care to the main contractor (Simaan General Contracting Co) in relation to discrepancies in the colour of the glass that were unacceptable to the building owner.

[404] Bingham LJ considered that the alleged defects in the glass were not related to durability, serviceability, or present or future performance characteristics, but simply related to the lack of uniformity in the colour of the panels. The issue was whether in the circumstances of the case, Pilkington (a subcontractor to a subcontractor) owed Simaan (the main contractor) a duty to take reasonable care in manufacturing the double glazed units to avoid defects in the units which caused Simaan economic loss occasioned by the withholding of money from Simaan by the owner.

[405] The facts as pleaded disclosed that the glass panels varied in colour noticeably. The architect and the owner objected to the variation in the colour of the panels that caused Simaan to reject the panels and to instruct Feal to replace the units with panels approved by the architect and the owner. At the date the matter was heard, the panels had not been replaced, the building owner had not paid Simaan, and Simaan had not paid Feal the price attributable to the supply of the panels.

[406] The Court determined that there was no reason to extend the law of negligence and allow a direct claim for economic loss alone in circumstances where there was no contract between the parties or any damage to property owned by Pilkington because Pilkington

had not voluntarily assumed any direct responsibility to Simaan for the quality of the glass and Simaan had not relied on Pilkington.

[407] Bingham LJ considered that there was no gap in the law to be filled by the law of torts and to impose a duty of care in that situation would be "inconsistent with the structure of the contract the parties have chosen to make", although he stated that he was quite sure that Pilkington owed Simaan a conventional *Donoghue v Stevenson* duty of care to avoid physical injury or damage to person or property, for example in the event of one of the panels exploding in strong sunlight and injuring an employee of Simaan working in the building.

[408] Dillon LJ considered that the difficulties of awarding damages to any one Claimant would be formidable in view of the differing amounts of retentions by the owner against Simaan, and Simaan against Feal, and other possibilities of set off, and moreover, because none of the parties had actually incurred the major cost of replacing the defective panels with new panels of the correct colour.

[409] Dillon LJ concluded that all three claims (owner-Simaan, Simaan-Feal, and Feal-Pilkington) should be raised in separate proceedings and pursued down the contractual chain ending up with a contractual claim against Pilkington and each claim would then be determined in the light of such exemptions and conditions as applied contractually at that stage.

[410] It can readily be established therefore that *Simaan* is a case where the principal issue/defect was clearly patent and one of mere quality, there was no physical damage to any property that the claimant had a proprietary or possessory interest in, there was no

express or implied assumption of responsibility by Pilkington, and there is no meaningful sense in which it could be said that Simaan relied on Pilkington. The contract(s) were still on foot and the parties' contractual structure provided an agreed and perfectly adequate remedy weighing against the imposition of a duty of care.

[411] In *Winnipeg Condominium Corporation No.36 v Bird Construction Co* [1995] 1 SCR, the Supreme Court of Canada found a contractor and a subcontractor to owe a duty of care to the subsequent owner of a 94 unit apartment building for dangerous defects and La Forest J held that the case was distinguishable on a policy level from cases where workmanship is merely shoddy or substandard (qualitative) but not dangerously defective. La Forest J expressed the underlying rationale as being that a person who participates in the construction of a large and permanent structure which if negligently constructed, has the capacity to cause serious damage to other persons and property in the community, should be held to a reasonable standard of care. New Zealand Courts have not confined themselves to dangerous defects insofar as claims against building contractors in relation to residential dwellinghouses are concerned (*Stieller v Porirua City Council* [1986] 1 NZLR 84).

[412] In *Glossop Chan* (supra), Potter J found that the aluminium joinery supplier/installer, as a subcontractor to the main contractor, did not owe a duty of care to the subsequent owners of the Shangri-la apartments and even if there were found to be a duty, then on the evidence before the Court, the owners had not proved on the balance of probabilities that the duty of care had been breached.

[413] In that case, the defendant, Carter Holt Harvey Aluminium Ltd, subcontracted to the construction company, Wilkins and Davies

Construction Company Ltd, to design, fabricate and install aluminium framed windows and doors in the Shangri-la apartments in Auckland.

[414] The claim against Carter Holt was that it breached a duty of care to the owners to exercise reasonable skill and care in ensuring that the tender documents and shop drawings complied in all respects with the plans, specifications, NZ standards, ACC by-laws and best trade practice and that the fabrication, installation and remedial work in respect of the system of aluminium windows and doors were carried out in accordance with the shop drawings, NZ standards, by-laws and best trade practice so as to produce a weatherproof structure. It would appear that the claim was not founded on failure on the part of the subcontractor to comply with the building code and that Potter J did not have the benefit of argument and submissions on that specific issue.

[415] The evidence disclosed that many of the apartments had been subject to leaking around the windows and doors from the time they were built. Despite the extensive evidence adduced by 32 witnesses, Potter J was unable to determine the cause(s) of water penetration although the Judge considered the most likely causes included inadequate step down at the balconies, cracking of corner columns, and the absence of flashings at the columns which change was made by Wilkins and Davies, inadequate weathertightness at the junction of the window system to the façade of the building, and inconsistent and excessive building tolerances.

[416] It would appear however, that Potter J was strongly drawn to the proposition that the leaking problems may have had their roots in the very nature of the developer-led venture as the Judge observed

that the strength of organisation and experience required in the construct and design project of Shangri-la was lacking and that the contractors and subcontractors employed on the project could not be expected to compensate for the flow on effects of that critical control factor. It should be noted for clarification that both the developer and the main contractor had gone into liquidation before the proceedings were brought by the owners against the architect and the window manufacturer/installer.

[417] The Court found there was no duty in that case because:

(a) There was no allegation or inference that Carter Holt had created a dangerously defective structure or that consequential damage had been caused by the allegedly defective joinery - instead the allegation was only of a failure to provide weatherproofness which allegedly resulted in inconvenience and the cost involved in the remedial work to the joinery.

(b) The contract was between Carter Holt and Wilkins and Davies.

(c) The owners did not place reliance on Carter Holt and Carter Holt did not assume direct responsibility to the owners

(d) The obligation of Carter Holt was to perform the contract and it would be answerable to the head contractor if it failed to do so.

(e) Carter Holt had no knowledge or control of the head contract and lacked information possessed by other parties in the contractual chain such that it would be neither fair nor just to

place the subcontractor in a position of direct obligation to subsequent purchasers.

[418] In *Rolls Royce* (Supra) the Court of Appeal was faced with deciding on an appeal from a strike out application that had been refused first, by Master Kennedy-Grant, and then by Randerson J, whether a novel duty of care was owed by a subcontractor to a third party owner, namely a duty to take reasonable care to perform the contract.

[419] In essence, Carter Holt Harvey entered into a contract with the predecessor to Genesis Power Ltd to procure the building of a Cogeneration plant at Carter Holt Harvey's Kinleith Mill. Genesis in turn entered into a contract with Rolls Royce to design, construct and commission the plant. Carter Holt claimed the plant was defective and sued Genesis primarily in contract and Genesis' subcontractor, Rolls Royce, in negligence on the basis that it breached a duty to perform its contractual obligations to Genesis.

[420] The Court embarked on a thorough examination of the contractual background and a careful analysis of the Carter Holt claim that involved a balancing exercise weighing up proximity, policy factors, whether it was just and reasonable to impose a duty, the vulnerability of the plaintiffs, the statutory and contractual background, foreseeability, and the sophistication of the parties.

[421] The Court considered that it had sufficient information (at the strike out application stage) to understand the relationship between the parties and the roles of each of the parties in the commercial construction context to conclude that the claim must be struck out as it was pleaded as a duty to take reasonable care to perform the

contract, except to the extent that the duty pleaded rested on the *Hedley Byrne* claim and that the claim related to physical damage to the plant allegedly caused by other defects in the plant.

[422] The Court noted that it was not to be taken as expressing approval, as an exception, for the claim for damage to an independent part of the structure caused by defects in another part of the structure so as to bring Lord Bridge's 'complex structure exception' into play (*D & F Estates Ltd v Church Commissioners for England* [1989] 1 AC 177), merely that as it had no argument on the point it would be inappropriate to strike out those parts of the claim at that point.

[423] To the extent that the case turned on the commercial sophistication of the parties and the complex contractual arrangements between them, the Court noted at para.74 that whether or not a duty of care is owed in any particular case, there must be a more complex foundation that a mere distinction between commercial and domestic buildings. (That being a reference to the recent Australian High Court decision in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16 and at para 118, where the Court held that an engineer was not liable to the subsequent purchaser of a commercial building in negligence for the economic consequences of poorly designed foundations).

[424] The Court concluded that the major policy factor militating against a duty of care in this case was the need for commercial certainty, viz. commercial parties are capable of looking after their own interests and assessing their own risks, especially in an industry where insolvency is a major risk, and should be entitled to expect that the risk allocation they have negotiated (and paid for) will not be disturbed by the Courts. However the Court noted at para 118 that it

is not necessarily the case that private individuals are in a position to be able to protect themselves and this can justify a different treatment.

Analysis of, and comparison with, established case law

[425] The cases of *Simaan* and *Rolls Royce* demonstrate that the Courts will generally be unwilling to impose a tortious duty of care in circumstances where the parties are commercially sophisticated and elect to operate under an umbrella of complex contractual arrangements that by agreement of the parties, establish, manage and regulate, the parties' rights, obligations, and risks, and the defect complained of is patent and presents no risk of present or future physical damage to any person or to the fabric or structure of the building, other than in relation to the component itself.

[426] The Court in *Rolls Royce* rejected *Junior Books*, as authority in its wider manifestation, for the imposition of a tort duty on a nominated subcontractor to third parties in New Zealand.

[427] *Bevan, Rolls Royce* and *Junior Books* (to the extent that *Junior Books* has been explained in the United Kingdom as requiring a special relationship between the parties through an assumption of responsibility) demonstrate that the Courts are willing to impose a tortious duty of care of the *Hedley Byrne* type in relation to negligent misstatements by subcontractors to third parties, although it was accepted in *Rolls Royce* that negligent misstatements and services may tend to merge as for example in the negligent audit report produced through the negligent performance of audit services (*Price Waterhouse v Kwan* [2000] 3 NZLR 39, 43).

[428] The Canadian case of *Winnipeg Condominiums* is the only decided case where a subcontractor has been held to owe a duty of care to a subsequent owner (albeit a commercial entity - the subsequent purchaser and owner of a 94 unit apartment block) after a large piece of concrete cladding fell from the building necessitating the removal and replacement of the entire cladding to remedy what was described as a dangerous defect. It was held that where negligence in planning or constructing a building caused the building to be dangerous, the owner could recover the cost of making the building safe.

[429] The principles that may be extracted from the case as underlying the decision to impose a duty of care on the contractor and subcontractor are: first, a person who participates in the construction of a large and permanent structure which if negligently constructed has the capacity to cause serious damage to other persons and property in the community, should be held to a reasonable standard of care; secondly, that a contract cannot absolve a (sub)contractor from a duty in tort to construct to reasonable standards; and thirdly, that whilst an exclusion clause in a contract between a builder and the original owner may be relevant to identifying the task upon which the builder had entered, it does not operate for the benefit of a builder in an action by a subsequent owner because the duty in contract with respect to materials and workmanship flows from the terms of the contract whereas the duty in tort extends only to reasonable standards of safe construction and the bounds of the duty are not defined by reference to the original contract.

[430] New Zealand Courts have not confined themselves to dangerous defects insofar as claims against building contractors and councils

in relation to residential dwellinghouses are concerned (*Stieller v Porirua City Council* [1986] 1 NZLR 84). To take that approach would undoubtedly give rise to further debate over what constitutes a 'dangerous defect' and when a defect becomes dangerous and could lead to a disincentive to repair at an early stage and to mitigate potential losses. Whilst the danger in the *Winnipeg Condominium* case was clear enough, whether a defect poses a threat to health or safety may not always be easy to decide and the desirability and practicability of such a test is thus questionable.

[431] English and New Zealand Courts have also confirmed that builders and architects cannot say that the nature of their contractual duties sets a limit to the duty of care which they owe to third parties (*Voli v Inglewood Shire Council* (1963) 110 CLR 74 and *Bowen* (supra))

[432] In *Glossop Chan,* Potter J found on the evidence presented, that the case fell far short of a situation such as the Supreme Court of Canada found in *Winnipeg Condominium* which compels recognition of a duty of care from subcontractor to subsequent owner to avoid injustice and unfairness. It would appear therefore, that the judge considered physical damage and danger to the structure of the building to be compelling and/or essential ingredients to found a duty of care in relation to the work of a subcontractor, although the Court of Appeal, eleven years earlier in *Stieller,* affirmed that the council's obligations in that case were not confined to defects affecting health and safety, nor to defects threatening to damage other parts of the structure. It was enough that the defects reduced the value of the premises, i.e. that they caused economic loss.

Proximity

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

[434] There is a clear and close nexus between the negligent acts of those persons (developers, architects, engineers, contractors, and those persons exercising powers of inspection and approval of building work) who have caused or contributed in some way to the creation of a building defect that permits or enables water to penetrate a dwellinghouse, and the degree of harm and loss to the owner from the resultant and inevitable damage to the fabric and structure of that dwellinghouse.

[435] One of the strongest factors pointing towards a finding of proximity in this case is foreseeability. It was clearly foreseeable that a lack of reasonable care on the part of BPL in installing the cladding system and designing and installing the flashing system for the windows and doors on the Owners' dwelling, so as to meet the requirements of the New Zealand Building Code, would cause loss to the Owners. Economic loss to a subsequent owner was foreseeable because the dwellinghouse was to be a permanent structure to be used indefinitely (a dwellinghouse is required to remain durable and structurally sound for a minimum of fifty years under the Building Code) which if negligently constructed has the capacity to cause serious damage to other persons and property (*Winnipeg*

Condominiums, Dicks) and would represent a major financial investment for the owner (*Bryan v Maloney*).

[436] Assumption of responsibility for the task cannot be sufficient in itself because if it were then the result in *Simaan* could not be justified as the subcontractor in that case had clearly assumed responsibility for supplying glass that accorded with the contractual specifications. The question in *Simaan* was whether the subcontractor had assumed responsibility to the plaintiffs and the answer was that it had not. Any assumption of responsibility was only to the direct contracting party (*Rolls Royce* at para 100).

[437] *Bryan v Maloney* (1995) 182 CLR 609 was a landmark Australian case that benched the high water mark of the doctrine of reliance and its twin, assumption of liability, in establishing duty of care claims relating to economic loss in relation to negligent construction in Australia. The High Court held that the duty arose out of the relationship of close proximity between the builder and the subsequent owner, the connection being the house itself which constituted a substantial connection. The Court held that the relationship was characterised both by an assumption of responsibility by the builder and by reliance on the part of the owner.

[438] It would seem artificial to suggest that the same connection is exclusive only to building contractors (however they may be defined) and should not, and does not exist, between any person knowingly contributing to the construction of any dwellinghouse in New Zealand and the owner or subsequent owner of that dwellinghouse.

[439] Why should that be so? Because residential building in New Zealand, at least for the past 30 years, has been characterised by a process whereby almost every single aspect of the design, construction, and inspection of any dwelling, is undertaken by specialists (persons possessed of specialist knowledge and skills in respect of discrete aspects of the construction process) who often operate unsupervised and independently of the person(s) managing and coordinating the building works, for sound practical, logistical, and financial reasons.

[440] The contractors may carry out their work onsite, or off site, prefabricating components for later installation by others, with the next contractor in the construction chain coming to their work at such time as it may be complete.

[441] The builder *per se* has in the main become a mere project manager and coordinator of specialist contractors, including in many cases carpentry contractors and sub-specialists in that field. The concept of a builder being a person who constructs a dwelling with his or her own hands, skill, and knowledge from concept to completion, is therefore something that has in this age of specialisation, largely been relegated to the history books.

[442] There can be no doubt that the main contractor is reliant on the skill and expertise of each of the specialist subcontractors, and in respect of whose works, the main contractor cannot be reasonably expected to be possessed of the same special technical expertise which the works demand (*Bevan Investments*).

[443] Assessment and judgment in respect of the patent qualitative/performance aspects of the finished subcontract works

are of course matters that would ordinarily fall within the purview of any competent main contractor as in *Simaan* where the issue related to variations in the colour of the glass panels, but that is not so, and cannot be so, in the case of a hidden and negligently created latent defect.

[444] In the building industry in New Zealand there is little distinction to be drawn therefore between the responsibility assumed by the builder by virtue of possession of specialist skills and knowledge and any of the plethora of present day specialist contractors.

[445] BPL is a specialist contractor that likely carries out the majority of the work it undertakes in relation to any dwellinghouse in accordance with its specific contractual obligations and largely under its own quality control regime.

[446] However, and notwithstanding its contractual obligations, BPL is also obliged by statute (section 7 Building Act 1991) to carry out its work to ensure the Building Code's minimum performance standards are complied with.

[447] It is readily established that BPL, and specialist contractors like it, are not "mere deputies" to the main contractor, they have specialist technical expertise which the main contractor cannot be reasonably expected to be possessed of (*Bevan Investments*).

[448] It follows therefore, that in the present case, there is a direct and close relationship between BPL and the Owners, characterised by an assumption of responsibility on the part of BPL and by reliance on the part of the Owners in respect of compliance with the Building Code and the Owner's house, which itself constitutes a

considerable connection (*Bryan v Maloney*). A concurrent duty in tort that is co-extensive with the statutory duty referred to in para [446] above is not inconsistent with an assumption of responsibility and would not have the effect of short-circuiting the contractual structure put in place by the parties (*Henderson v Merrett Syndicate* at p.195)

[449] There is no evidence of any limitation or exclusion clause in the contract between BPL and VHL, but even if there were such a clause, it would not operate to relieve BPL, in relation to its work, of its statutory obligations to comply with the performance criteria of the Building Code which are directed to ensuring the health and safety of building occupiers and users. In other words the protected interest is more than merely economic which is a factor pointing towards a duty (*Dicks*).

[450] Put another way, it could never be an answer for failure to carry out work in accordance with the building code, for BPL to say it was asked to do the work negligently and in breach of the building code.

[451] Another factor favouring liability is that there was no additional burden on BPL to take precautions against the risk because under section 7 of the Building Act 1991, in force at all material times in relation to the present case, all building work was required to comply with, and to achieve the performance criteria specified in the Building Code. In the case of building elements associated with the exterior building envelope, i.e. windows, doors and cladding, those elements are, with only normal maintenance, required to satisfy the performance criteria of the Building Code for 15 years. Under clause E2 – External Moisture, exterior walls are required to prevent the penetration of water that could cause undue dampness or

damage to building elements. The claim in the present case is that BPL's work has enabled the penetration of water into the Owner's dwellinghouse that has caused dampness and damage to building elements viz. BPL's work has failed to comply with the minimum statutory requirements imposed on all persons (not just builders) that undertake building work, namely compliance with the performance requirements of the Building Code.

[452] I see no reason to distinguish in principle between the subcontractor in the present case and the builder in *Bryan v Maloney* and where, as I have concluded in this case, there has been an assumption of responsibility for a task and it is foreseeable that the Claimant would rely on that undertaking, then, subject to any countervailing policy factors a duty of care will arise (*Rolls Royce* at para 99).

Policy considerations

[453] A broad objection to imposing a duty of care is the concern of the Courts to exposing respondents to "a liability in an indeterminate amount for an indeterminate time to an indeterminate class" (*Ultramares Corporation v Touche, Niven & Co* 174 NE 441.444 (NY, 1931), Cardozo J) – 'the floodgates argument'.

[454] In leaky building claims, the risk in any particular case is limited to a claim by the owner of a dwellinghouse from time to time and the cost of repair or replacement, together with foreseeable consequential loss. A further factor pointing strongly away from an 'indeterminate risk' is the longstop limitation period of 10 years for bringing civil proceedings against any person relating to any building work (section 91(2) Building Act 1991). Under section 7(a)

of the WHRS02 Act, a claim may not be brought more than 10 years after the subject dwellinghouse has been built or altered. It would appear therefore, that any risk is well circumscribed in this jurisdiction.

[455] A policy factor pointing toward a duty of care is the succession of cases in New Zealand over the last 30 years in which it has been decided that community standards and expectations demanded the imposition of a duty of care on those who build and inspect dwellings to ensure compliance with building controls. The nature of the harm that is inflicted by the creation and covering up of defects in property which is intended for permanent use by ordinary people and for whom that property represents the most significant investment in their lifetime, suggests that a remedy is both just and necessary (*Hamlin*).

[456] A further factor pointing toward a duty of care is that there is no morally just reason why a subcontractor whose primary fault caused damage and loss to the owner of a dwellinghouse should be immune from suit and thus liability to that owner (or any other person liable in respect of that same damage) merely because there is no contractual nexus, or because that nexus is broken by the insolvency of others in the contractual chain and about whose financial affairs an owner has no knowledge and is unable to protect himself/herself from the risk (*Rolls-Royce*). If that were to be the case, there would be little in the way of deterrence to encourage the exercise of reasonable care by all persons contributing to the construction of a dwellinghouse, especially in an industry which is renowned for its share of ‘cowboy operators’ and where the insolvency of an intermediate party is commonplace and the

winding up and liquidation of building and development legal entities is often by design on the completion of a building project.

[457] Under the claimed authority of *Glossop Chan* contended for by BPL, namely that a subcontractor does not owe a duty of care to a subsequent owner, and in the circumstances of negligent construction of defective foundations, a specialist foundation contractor whose primary fault created the defect, would be immune from liability in contract and thus tort in the event of the insolvency of the main contractor (that being the only person entitled to bring a claim against the subcontractor in contract and tort). But a local authority (and thus the community) that may have only contributed to the loss by its negligent inspection of the foundations (and was thus not the principal author of the defect causing loss and damage) would be liable for the whole of the loss and damage in tort and would be unable to claim contribution for that same loss from the subcontractor according to the relative blameworthiness of the parties pursuant to section 17 of the Law reform Act 1936. In other words, absent a duty of care on the part of a subcontractor, the burden would fall unjustly on the community that would pay for the shoddy and negligent work of the specialist subcontractor through the liability of the local authority.

[458] The main policy factor militating against a duty of care is the need for commercial certainty, namely that commercial parties are normally entitled to expect that the risk allocation they have negotiated will not be disturbed by the Courts although private individuals may not necessarily be in a position to protect themselves and this can justify a difference in treatment (*Rolls Royce*).

[459] A factor pointing strongly toward a duty of care is the general lack of sophistication and the vulnerability of the owners of residential properties. Those who purchase and own residential properties in New Zealand are generally not sophisticated commercial parties capable of looking after their own interests and can readily be distinguished from the experienced sophisticated commercial parties and the sophisticated and complex tripartite contractual structures disclosed in *Simaan* and *Rolls Royce.*

Is it fair and reasonable to impose a duty of care?

[460] The scope of the tortious duty contended for by the claimants in this case is a duty to exercise reasonable care and skill in carrying out subcontract works so that the subcontract works meet the requirements of the Building Act and the Building Code.

[461] To my mind, that duty is considerably more limited in scope and circumscribed than the duty to exercise reasonable care to perform a contract in accordance with its terms contended for in *Simaan* and *Rolls Royce* and to my mind, does not go any way to disturb the entitlement of parties to residential construction contracts to assess and allocate their risks in all matters other than compliance with their statutory obligations.

[462] As discussed earlier, *Glossop Chan* has often been cited (as it has in the present case) as authority for the principle that a subcontractor in New Zealand does not owe a duty of care to an owner or subsequent purchaser. However, in my respectful opinion, the decision in *Glossop Chan* cannot be authority for that proposition in every case.

[463] I am reinforced in reaching that conclusion for two reasons. First because *Glossop Chan* and the present case are not on all fours factually, as submitted by the fourth respondent. In *Glossop Chan*, a wrap-around flashing designed for weatherproofing purposes was removed in the course of construction by the main contractor and a different cladding system installed (presumably) for aesthetic purposes. Potter J found that this change was made without reference to the subcontractor and was not a matter within its control. In the present case, there is no suggestion that the design and installation of the cladding system by BPL was not a matter within the control of BPL, or that the control was removed from BPL.

[464] I am further reinforced in reaching that conclusion by the view expressed by one of the leading commentators on construction law in New Zealand, Tòmas Kennedy-Grant in; *Construction Law in New Zealand*, Butterworths, 1999, at para 20.18, wherein the learned author suggests that in light of the overseas cases (*Winnipeg Condominiums*), the correctness of the decision in *Glossop Chan*, certainly if it is relied on to support a general proposition regarding the potential liability of subcontractors to employers, must be open to question.

[465] The assumption of responsibility by contractors for their specialist works and the reliance of the owners on those persons to carry out their tasks to the minimum standard set by the legislators to ensure the health and safety of the community has long been a feature of residential construction in New Zealand. Moreover as a matter of public policy, those persons who participate in the construction of a dwellinghouse, which if constructed negligently, has the capacity to cause harm to other persons, should not be immune from liability and should be held to a reasonable standard of care.

[466] There is no principled reason therefore for finding that subcontractors (as opposed to architects or builders) should be entitled to operate in a legal vacuum, immune from liability to all such persons who may be affected by their negligence when the duty is cast upon them by law, not because they made a contract, but because they entered upon the work (*Bowen* as per Richmond P).

[467] The statutory background may also be relevant in defining the relationship between the parties and can point towards or away from a finding of proximity (*Rolls Royce*). Under the Building Act 2004, a number of mandatory warranties are implied into every residential building contract and every agreement for the sale of a household unit by a residential property developer from 30 November 2004. The warranties set out in section 397 of the Building Act 2004 include inter alia; all materials used will be suitable and unless otherwise stated in the contract, will be new; the completed building work will be carried out in accordance with all relevant law including the Building Act and regulations; the building work will be carried out with reasonable care and skill; the household unit will be suitable for occupation at the end of the work; and the building work will be fit for any stated purpose and will be of a nature or quality to achieve any stated result. An action for breach of warranty may be brought by the person who employs the contractor, the owner of the property, or a subsequent owner (subject to limitation).

[468] Because the warranties in section 397 are implied contractual terms, any action for breach of them will be actions based on breach of contract, and time will run from the date of the breach, i.e. when the defective work is performed. The operation of the Act is

not retrospective, therefore building work undertaken prior to 30 November 2004 falls under the Building Act 1991. However, it would seem clear that the new legislation captures in a graphic and appreciable manner, the expectations demanded of the building industry by the community, and now finally reflected by the legislators.

[469] The normal rules of privity of contract prevent the ultimate purchaser of a defective product from suing the manufacturer for breach of warranty of quality, although in certain circumstances that may be circumvented by an action in tort. The Consumer Guarantees Act 1993 (**the CGA**), is significant in that it confers on consumers the direct right of action against manufacturers for damages including consequential loss where their goods fail to measure up to the statutory guarantees. Under section 25 of the CGA, there is the right of redress against the manufacturer of goods that fail to comply with the guarantee of acceptable quality. Goods are of acceptable quality if they are fit for all the purposes for which the goods are commonly supplied; acceptable in appearance and finish; free from minor defects; safe; and, durable. Under section 27(1) of the CGA, the right of action against the manufacturer extends to any person who may acquire the goods from or through the consumer. The Act is significant in that it imposes strict liability where the uncertainty of negligence or fault is not a necessary ingredient of the right of action, and moreover, manufacturers cannot contract out of the CGA. It can readily be established therefore that the tortious duty of care contended for in the present case is not inconsistent with the relationship between the parties defined by statute and could be said to be a factor pointing away from the imposition of a duty.

[470] However, the unfortunate consequence that arises in relation to claims made by a claimant against respondents variously for breach of contract, breach of a duty of care and breach of statutory guarantee under the CGA, is that certain of those respondents may not be liable for contribution *inter se* pursuant to section 17(1)(c) of the Law Reform Act for the same damage that each has caused or contributed to as a wrongdoer. The position could conceivably see a claimant elect to recover only from a deep-pocketed respondent liable in tort with that person then unable to seek contribution from another respondent found liable in respect of the same damage under the CGA.

[471] In my view, there is no principled reason why the law of tort should not fill the gap left by other causes of action where the merits and the interests of justice dictate. That to a large measure has been the case in this jurisdiction for the past 4 years where subcontractors have been joined to adjudication proceedings and found liable to owners, and to one another, where their negligence has caused or contributed to water penetration of the claimant's dwellinghouse causing loss and damage (*Hartley* etc.).

[472] What has occurred in practice, is that the term "builder" or "contractor" as used in *Bowen* and *Stieller* and *Chase* has been given the widest meaning semantically possible to include all persons involved in the building or construction of a dwellinghouse as any attempt to differentiate between the respective roles of those persons in the contractual chain that delivers up dwellinghouses in New Zealand creates an artificial distinction that does not accord with the practice of the building industry, the expectations of the community, or the statutory obligations incumbent on all of those persons.

[473] I am driven to conclude that leaky building cases are *sui generis* and a distinguishing feature of all leaky building claims is damage to the claimant's property caused by latent building defects that allow water to penetrate the dwelling, and that if not remedied, will continue to cause further and more extensive damage to the fabric and structure of the dwellinghouse and in certain cases, may adversely affect the health of the occupants. Where, as in this case, there has been an assumption of responsibility for a task and it is foreseeable that the claimant would rely on that undertaking, then, subject to any countervailing policy factors, a duty of care will arise. I do not apprehend any countervailing policy factors in this case such as would separately, or even in consort, negative a duty of care.

[474] Having considered the facts in the present case against my analysis of the authorities, and the principles derived from those authorities, I am drawn to the inescapable conclusion that there is an appropriate basis on which to find a duty of care owing by BPL to the Owners, and that justice demands a duty of care be imposed (*South Pacific Manufacturing Co*).

[475] What is the extent of the standard of care? I must not be taken to be suggesting that the ordinary principles of *caveat emptor* should not apply in relation to patent defects. The line should clearly be drawn between defects that are patent and/or purely aesthetic or qualitative in nature on the one hand, i.e. the colour of the glass as in *Simaan*, or a poor standard of interior finish, or poor quality of materials, fittings, or chattels, and those on the other hand that are latent and constitute a breach of the Building Code so as to pose actual or potential danger to the fabric and structure of a dwellinghouse, and therefore foreseeable damage and loss to the

owner, i.e. inadequate foundations or defects causing water penetration - “Nothing apart from inadequate foundations could be as insidious as entry into a house of water, which will ultimately have the same effect as inadequate foundations” (Baragwanath J at para. 114 in *Dicks*).

[476] Accordingly, on the basis of the authorities and the principles derived from those authorities, and the consideration and balancing of all the relevant factors, I determine that it is just and reasonable to impose on BPL, a duty of care to the Walshaws, and the Owners as subsequent purchasers of the subject dwellinghouse, to carry out the subcontract works (the cladding and waterproofing works) in accordance with the Building Act 1991 and the Building Code being the First Schedule to The Building Regulations 1992 and BPL will be liable to the Owners in damages for breach of that duty.

Did BPL breach the duty of care that it owed?

[477] The Owners allege that BPL’s cladding and associated works have caused the penetration of water into their dwellinghouse that has caused dampness and damage to building elements.

[478] The evidence has established overwhelmingly that water has penetrated the Owners’ dwelling through defects in the cladding installation and associated flashings, and that that work on the Owner’s dwelling was undertaken by BPL.

[479] Under section 7 of the Building Act 1991, in force at all material times in relation to the present case, all building work was required to comply with, and to achieve, the performance criteria specified in the Building Code. In the case of building elements associated with

the exterior building envelope, i.e. windows, doors and cladding, those elements are, with only normal maintenance, required to satisfy the performance criteria of the Building Code for 15 years. Under clause E2 – External Moisture, exterior walls are required to prevent the penetration of water that could cause undue dampness or damage to building elements.

[480] Therefore it is an inescapable conclusion to be drawn in the circumstances, that BPL's work does not comply with the Building Act 1991 and the building code and that BPL breached the duty of care that it owed the Owners by installing defective cladding work and associated flashings, and by reason of the said breach, the Owners have suffered loss and damage to their property for which BPL is liable.

[481] I accept the evidence of Mr Bidlake that he discussed aspects of BPL's works, particularly the flashings and the lack of separation at the terraces, with Mr Vining, during and/or after the completion of the works. But whilst such arguments may be relevant to the extent of contribution that may be appropriate as between joint or concurrent tortfeasors, in the end there is no evidence that BPL was not in control of its works, or that BPL was instructed to do its works by VHL, or the Architect, in a way which has resulted in a breach of the building code and which instructions BPL ought not reasonably have appreciated as likely to have caused such a breach at the time it undertook the works. Accordingly it follows that BPL will not be relieved of its responsibility for the negligently created defects and the damage that has resulted. For completeness, I should add that it can be no defence to a claim in negligence for a subcontractor to say that it was asked to do its work negligently.

[482] I am not persuaded that the evidence has established that BPL's work has caused or contributed to all of the water ingress and damage to the Owners' property and accordingly I find that BPL did not breach any duty owed to the Owners and the Walshaws in relation to matters involving:

- window fixings;
- roof and head flashing installations;
- tiles to window sills;
- ponding caused by vegetation in the rainwater head;
- tarseal levels;
- gardens built up too high;
- holes in the membrane caused by excessive length fixings in the garage;
- unsealed vents, light fittings and downpipes.

and that BPL is not liable for any losses in relation to those matters, namely items numbered 1a – e, 3, 4c, 5a, 7c, 8a, 10b, 11b, 11c, 13, 14b, 15b, 16, 19, 21b, 24b, 24m, 25, 26, 28b, 28m, 29b, 30b, 30n, 31b, 32b, 33b, 34b, and 35b, in the Schedule of Defects and Loss annexed hereto.

Summary of fourth respondent's liability

[483] Therefore to summarise the position, the fourth respondent, BPL, breached the duty of care that it owed the Owners and the Walshaws, and by reason of the said breaches, it is liable to them for loss and damages in the aggregate amount of $141,706.13 (Refer the Schedule of Defects and Loss annexed hereto)

The liability of the fifth respondent, Peter Bidlake, in tort

[484] The Owners' also claim against the fifth respondent personally in negligence and is founded upon the same grounds as the claim against BPL. The Owners claim that Peter Bidlake owed them a duty of care to exercise reasonable care and skill to ensure the window sill construction on the dwelling complied with the Building Act 1991 and the building code, in particular that it was weathertight.

[485] The owners allege that once the decision had been made to change the cladding, Mr Bidlake acted personally as the designer and installer of the window sills and he is not qualified to design and failed to meet the standard of care required.

[486] Mr Galloway submits that Mr Bidlake personally assumed responsibility for the design and construction of the window sills and that that assumption of responsibility arises from a number of circumstances including inter alia:

- His knowledge of and participation in the decision to change the cladding system;

- His personal and unqualified involvement in designing and constructing the window sill details; and,

- His knowledge of the practical consequences regarding the difficulties with the interface between the cladding and the window junctions.

[487] Mr Galloway submits, that notwithstanding the facts that this was the first house using Equus Thermexx product that Mr Bidlake had worked on, and that Mr Dean Barr from Equus provided advice, this does not mean that Mr Bidlake is not responsible. He submits that it is not sufficient for Mr Bidlake to rely on the advice of Mr Barr, without applying his professional knowledge and skill to it, particularly given what he knew from the Equus specification and what he ought to have been aware of from the level of detail in other specifications around at that time.

[488] Mr Galloway submits that Mr Bidlake breached his duty of care to them and is liable for the losses they have incurred as a result.

[489] Peter Bidlake denies that he owed a duty of care to the Owners on the basis that it was in his capacity as an officer and servant of the fourth respondent that he undertook the construction of the window sills and he assumed no personal responsibility for the construction of the window sills.

Did Mr Bidlake owe a duty of care to the Owners?

[490] It is common ground that BPL was the company contracted by VHL to install the cladding system on the Owners' dwelling.

[491] I have already determined that BPL owed a duty of care to the Walshaws as the owners of the dwelling when the works were

undertaken, and to the Hengs as subsequent purchasers, to carry out its subcontract works in accordance with the Building Act 1991 and the Building Code. The question is whether Mr Bidlake, who is an equal shareholder and co-director with his wife, of BPL, owed a similar duty.

[492] The evidence has established that Mr Bidlake personally designed the sill flashing detail, albeit in consultation with others, and personally constructed the window sills, and/or instructed others employed by BPL in respect of that work. In short, Mr Bidlake actually performed the subcontract works and was in control of the subcontract works of BPL at all material times.

[493] I do not accept that the evidence has established even hesitantly that "Mr Vining was in control of what Mr Bidlake could and couldn't do, what he knew and what he didn't know", as submitted by counsel for Mr Bidlake. Mr Bidlake was not in my opinion, a "mere deputy" (*Bevan Investments Ltd*).

[494] It follows that the position of Mr Bidlake is essentially no different to that of Mr Vining, whom I found to owe a personal duty of care to the Owners and the Walshaws, not because he was a director, but because he was in control of the building works in respect of which VHL owed a duty of care to the Walshaws and the Owners as subsequent purchasers. Indeed, Mr Bidlake's position is also on all fours with Mr Balemi in *Hartley* and Mr McDonald in *Dicks,* each of whom exercised physical control over the building works in respect of which works a duty of care was owed by the employer to the claimants. They were found liable for breach of that duty of care and were therefore personally tortfeasors as well as having their conduct attributed to their employer companies as their torts

because of the control the exercised over the companies' dealings (*Morton v Douglas Homes*).

[495] Accordingly, applying the 'degree of control test' articulated by Hardie Boys J in *Morton* at 595 and followed by Stevens J in *Hartley* (supra) it is no great step to conclude that Mr Bidlake owed the Walshaws, and the Owners as subsequent purchasers, a personal duty of care to exercise reasonable care and skill to carry out the subcontract works (the cladding and waterproofing works) in accordance with the Building Act 1991 and the Building Code being the First Schedule to The Building Regulations 1992 and Peter Bidlake will be liable to the Owners and the Walshaws in damages for breach of that duty.

[496] I am satisfied in this case that it is fair, just, and reasonable, to impute the assumption of responsibility contended for by the Owners as creating Peter Bidlake's personal liability by virtue of the Peter Bidlake's specialist skills in relation to the subcontract works, and the control Peter Bidlake exercised over the particular subcontract works (*Trevor Ivory*).

Did Mr Bidlake breach the duty of care?

[497] For the reasons stated previously in relation to BPL and the defects causing water penetration and damage in relation to the window sill construction, I am constrained to conclude that Peter Bidlake breached the duty of care that he owed the Owners and the Walshaws by constructing window sills that did not comply with the Building Act 1991 and the building code, and in particular that were not weathertight, and that by reason of the said breach, the Owners

have suffered loss and damage to their property for which Peter Bidlake is liable.

[498] I am not persuaded that the evidence has established that Peter Bidlake has caused or contributed to all of the water ingress and damage to the Owners' property, and accordingly I find that Peter Bidlake did not breach any duty owed to the Owners and the Walshaws in relation to matters involving items 1a – e, 3, 4c, 5a, 7c, 8a, 10b, 11b, 11c, 13, 14b, 15b, 16, 19, 21b, 24b, 24m, 25, 26, 28b, 28m, 29b, 30b, 30n, 31b, 32b, 33b, 34b, and 35b, in the Schedule of Defects and Loss annexed hereto, and that Peter Bidlake is not liable for any losses in relation to those matters.

Summary of fifth respondent's liability

[499] Therefore to summarise the position, I find that Peter Bidlake breached the duty of care that he owed the Owners and the Walshaws, and by reason of the said breaches, he is liable to them for loss and damages in the aggregate amount of $141,706.13 (Refer the Schedule of Defects and Loss annexed hereto)

The liability of the sixth respondent, Palmerston North City Council, in tort

[500] The Owners say that the Council owed them a duty to take reasonable care and skill in performing the functions set out in sections 24 and (76(1) of the Building Act 1991, that the Council breached its duty of care and as a result they have suffered loss and damage.

[501] Against that, the Council says: the owners bought a substantial house; they had the ability to protect themselves by making enquiries about the construction before purchase; the building work was undertaken by professionals with the close involvement of a leading architect; all the liable parties are solvent and are before the Adjudicator; and accordingly, this is not a case that falls within the *ratio decidendi* of the Privy Council decision in *Hamlin*.

[502] Mr Robertson, counsel for the Council, submits that as in the High Court decision in *Three Meade Street Limited & Anor v Rotorua District Council & Ors* [2005] 1 NZLR 504, it is neither fair nor reasonable to impose a duty of care on the Council in this case.

[503] Mr Robertson submits that even if the Council was found to owe obligations of the nature alleged, they have not been breached in this case.

[504] Mr Robertson submits that the test of whether the Council breached any duty of care it might be found to owe to the Owners, must necessarily be measured against the levels of knowledge and the practices in force at the time the building work was completed in 1996, and this is reflected in the test adopted *Askin v Knox* (1989) 1 NZLR 248.

The relevant legal principles

[505] Following a long line of authorities, the law is well settled in New Zealand that a council owes a duty of care to homeowners and subsequent homeowners and will be liable to them for economic loss arising out of defects caused by the council's negligence in the

course of the building process and that position was confirmed in *Hamlin v Invercargill City Council* [1994] 3 NZLR 513:

> It was settled law that Councils were liable to house owners and subsequent owners for defects caused or contributed to by building inspector's negligence.

[506] 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 and it will be for a Court to determine on the facts of the particular case before it whether a duty of care is owed or not (Three Meade Street Limited & Anor v Rotorua City Council & Ors HC AK M37/02 [11 June 2004] Venning J).

[507] The duty of care owed by a Council in carrying out inspections of building works during construction is that of a reasonably prudent building inspector and the standard of care will depend on the degree and magnitude of the consequences which are likely to ensue.

> 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 reasonably prudent Council would 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 in which can cause very substantial damage to a building.
>
> *Stieller v Porirua City Council* (1983) NZLR 628

[508] The duty of care imposed upon Council building inspectors does not extend to identifying defects within the building works which are unable to be picked up during a visual inspection. This principle was confirmed by the High Court in *Stieller* where it was alleged the Council inspector was negligent for failing to identify the omission of metal flashings concealed behind the exterior cladding timbers:-

> Before leaving this part of the matter I should refer to some further item of claim made by the plaintiffs but upon which their claim fails. They are as follows:
>
> Failure to provide continuous metal flashings for the internal angles behind the exterior cladding. It seems from the hose test that this is a defect in the corners of the wall at the southern end of the patio deck but I am not satisfied that there is any such defect in other internal angles. It is at all events not a matter upon which the Council or its officers were negligent either in issue of the permit or in the inspection. It is a matter of detail which the Council ought not to be expected to discover or indeed which can be discoverable on any proper inspection by the building inspector.
>
> *Stieller v Porirua City Council* (1983) NZLR 628

[509] The extent of a Council inspector's duty does not extend to including an obligation to identify defects in the building works that cannot be detected without a testing programme being undertaken. In *Otago Cheese Company Ltd v Nick Stoop Builders Ltd*, (Unreported, High Court, Dunedin, CP180/89, 18 May 1992, per Fraser J), the High Court was considering the situation where no inspection of the foundation was carried out prior to the concrete pour. The Court held as follows:-

> I do not consider that any inspection of the sort which a building inspector could reasonably be expected to have undertaken would

> have made any difference. There is no question that the builder faithfully constructed the foundation and the building in accordance with the engineer's plans and specifications. No visual inspection without a testing programme would have disclosed to the inspector that the compacted fill was a layer of peat and organic material. If there was a failure to inspect I do not consider that any such failure was causative of the damage which subsequently occurred.
>
> *Otago Cheese Company Ltd v Nick Stoop Builders Ltd* (Unrep. High Court, Dunedin, CP180/89, 18 May 1992, Fraser J)

[510] Notwithstanding that the common law imposes a duty of care on Councils when performing duties and functions under the Building Act 1991, a Council building inspector is clearly not a clerk of works and the scope of duty imposed upon Council building inspectors is accordingly less than that imposed upon a clerk of works:

> A local Authority is not an insurer, nor is it required to supply to a building Owner the services of an architect, an engineer or a clerk of works.
>
> *Sloper v WH Murray Ltd & Maniapoto CC*, HC Dunedin, A31/85 22 Nov. Hardie Boys J.

[511] The number and timing of inspections is a matter solely at the Council's discretion and the number and duration of the inspections is not limited in any way by cost, policy or legislation. The Court of Appeal dealt with the matter summarily in *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA) at 94:

> A further point made on behalf of the Council by Mr Hancock was that the standard code did not make inspections by the Council mandatory at the stage where the exterior of the house was being clad….
>
> Mr Hancock said the judge had failed to take into account that it might be common practice for the local authority to make no inspections at all at

> certain stages and yet it might be fixed with liability for work done thereafter. The short answer to this submission is that the Council's fee for the building permit is intended to include it's charges for making inspections in the course of construction, and it does not limit these in numbers or by stages (my emphasis added).

[512] The test for liability in negligence was stated by the Court of Appeal in *Askin v Knox* [1989] 1 NZLR 248 as the exercise of reasonable care. The standard of care exercised by a council officer in the execution of the council's duties will be measured in the first instance by reference to the knowledge and practice of other council officers at the time:

> A council officer will be judged against the conduct of other council officers. A council officer's conduct will be judged against the knowledge and practice at the time at which the negligent act/omission was said to take place (Per Cooke P (as he then was)).

but always subject to the determination of the Court that "independently of any actual proof of current practice, common sense dictated the use of particular methods, measures or precautions" (*McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100 CA, at 102 per Turner P and applied by Baragwanath J in *Dicks v Hobson Swan Construction* ("Turner P's test")).

[513] The duty of care owed by a council to a home owner extends to establishing and enforcing an operational system (proper inspections and checks at appropriate intervals and stages during the construction process) to give effect to the building code (*Dicks v Hobson Swan Construction*).

Three Meade Street

[514] The case involved questions regarding the council's duty of care to a subsequent purchaser of a commercial property in Rotorua. The subject property was a motel that was developed by Three Meade Street Ltd whose sole director and shareholder at the time was Mr Coervers. At the time, Mr Coervers was also the sole director and shareholder of another company known as Limberg Construction Ltd. Limberg, through Mr Coervers, built the motel. Building Inspectors employed by the Council inspected the motel during construction at various times, and on completion of the works issued a code compliance certificate.

[515] Shortly after the Motel was completed, Whenua Glen Farms Ltd, the second plaintiff, purchased Mr Coervers' shares in Three Meade Street Ltd. Aspects of the construction work were not satisfactory and Three Meade Street and Whenua Glen Farms Ltd brought proceedings to recover losses they say they suffered as a result of the defects. The defects complained of included signs of corrosion to a steel beam, non-complying handrails, lack of toilet ventilation, and other "cosmetic issues" including poorly fixed weatherboards. The claim proceeded as a case against the council only as Mr Coervers was adjudicated bankrupt and the claim was discontinued against the Architect, Mr Dalton, and an agreement was reached with the engineers, Browne Spurr & Kronast.

[516] The Court held that the council did not owe a duty of care to Three Meade Street. The starting point for the decision was Venning J's finding that a council does not automatically owe duty of care to a commercial property owner through the application of the principles in *Hamlin* and if a duty of care is to be owed in those

circumstances, then the Court needs to be satisfied that the duty should extend to the owner of a commercial property on the facts of the case.

[517] The Judge proceeded to consider the issue in the context of the principles discussed by the Court in *South Pacific Manufacturing*, with the ultimate question being, whether in light of all the circumstances of the particular case, it is just and reasonable that a duty of care should be imposed. The two broad fields of inquiry are the degree of proximity or relationship between the council and the plaintiff, in respect of which he accepted there was sufficient proximity in parallel terms with *Hamlin*, and whether there are policy considerations which tend to negative or restrict, or strengthen, the existence of a duty, in respect of which he concluded on the facts of the case, that the wider policy issues negatived the existence of a duty to the extent that he held the council did not owe a duty of care.

[518] The general policy factors weighing against the imposition of a duty included: economic loss as opposed to physical injury suffered; the *sui generis* nature of the liability in relation to owners of domestic dwellings; the statutory framework and the broad policy goals of the Building Act 1991 directed to promoting public safety and health; the contractual relationships and the ability of the parties to protect themselves from damage by means of those contractual relationships; the minor costs charged by the council for its inspection services in the context of a large commercial development; the lack of expertise on the part of the council's inspectors to meaningfully supervise the detail of the construction work involved in a major project; and the vulnerability of the plaintiffs to the risk of damage.

[519] Apart from those more general considerations, there was a particular and overarching consideration that was directly applicable to the case, namely that the construction process was not a "true arms length transaction". In other words, Three Meade Street Ltd was effectively claiming against the council for recompense for economic loss sustained as a result of the consequences of Mr Coervers' negligent work when Mr Coervers was also its principal shareholder and director at the material time. In *Anns v Merton London Borough Council* [1978] AC 728, Lord Wilberforce observed that the council's duty was owed to owners or occupiers who might suffer injury to health, and not to a negligent building owner who was the source of his own loss. The position was confirmed by Tompkins J in *Bell & Anor v JA Hughes & Anor* (Unreported HC Hamilton A110/80, 10 October 1984). The Judge held that a council owes no duty of care to a builder whose defective workmanship was the cause of the damage and if his workmanship causes damage he cannot look to the local authority to compensate him on basis that it should have prevented him from doing what he did badly.

Discussion

[520] This case involves the construction of a residential dwellinghouse. Inspectors employed by the Council inspected the dwelling during construction at various times, and on completion of the works issued a code compliance certificate. The claimants are the subsequent owners of the property. Accordingly the starting point must be *Hamlin* viz; the Council owes a duty of care to homeowners and subsequent homeowners and will be liable to them for economic loss arising out of defects caused by the council's

negligence in the course of the building process the council owes a duty of care.

[521] The question therefore is whether in light of all the circumstances of the present case it is just and reasonable that a duty of care should not be imposed on the grounds that there are policy factors which negative or restrict the existence of the duty.

[522] In the present case:

- the claim is brought in relation to physical damage and injury to the building caused by water penetration, not the largely aesthetic defects and other economic losses that were at issue in *Three Meade Street*;

- the matters at issue involve physical damage to the structure of the dwellinghouse and the health and safety of the occupants;

- the contractual relationships are no different in the present case to those that present in almost every other residential building project, save for perhaps the observation role of the Architect, but whose inspections were for the purpose of valuing the building works at regular monthly intervals, rather than inspecting critical aspects of the construction work at such time as the work is completed and before that work is covered up.

- There is certainly no suggestion in this case that the Council had any knowledge as to whether there was an architect supervising or observing the construction of the dwelling such

that it could claim to have placed reliance on the architect to any extent in relation to compliance issues in the course of construction. Neither did the Council request or make it a condition of the building consent that the Architect was to provide a producer statement design or construction review in relation to any compliance issues so as to put the Architect and the Owners on notice as to the Architect's obligations and the Council's reliance;

- the dwelling is a large dwelling but it is not unduly complex to the extent that the work involved substantial amounts of specific design outside the scope of NZS3604 and the general parameters of the acceptable solutions of the building code. i.e. the Council's building inspectors ought to have had no difficulty meaningfully supervising the detail of the construction work by exercising the reasonable care and skill expected of a reasonably competent building inspector in 1996;

- the claimants are not in the category of sophisticated commercial parties capable of looking after their own interests. Instead they are vulnerable to the risk of damage from latent defects causing water penetration which defects would be obscured from view once the negligently constructed defect was covered up.

- The defects complained of and said to have caused water penetration and loss and damage are neither patent nor qualitative.

[523] When those issues are weighed in balance on the facts of this particular case, I am driven to conclude that the case clearly falls

within the *ratio* of the Privy Council decision in *Hamlin* and the Council does owe a duty of care to the Owners and to the Walshaws.

The alleged breaches of the duty by the Council

[524] The Owners allege that the Council breached its duty of care to them by:

- Failing to identify, at the time the building consent was processed, the inadequate sill flashing detail, the lack of jamb flashings, and the inadequate clearances at the base of the wall cladding;

- Failing to require amended plans and details when it became aware that the cladding was being changed from that consented to, to the Equus Thermexx Insulated Cladding System;

- Failing to properly inspect:

    - The ground clearance levels;

    - The cladding sitting on top of the masonry wall; The sill flashing not able to shed water to the outside of the cladding;

    - The lack of sealing/flashings to the top of the pergola columns.

- Failing to carry out a sufficient number of building inspections, or to carry out building inspections at appropriate times, stages, or intervals, so that the building inspector could ensure compliance with the building code;

- Failing to issue a Notice to Rectify in respect of the alleged defects;

- Issuing a code compliance certificate when there were no reasonable grounds for believing that the building work complied with the building code. In particular, the building work suffered from the alleged defects and those defects would have been obvious to a reasonably competent council building inspector.

The building consent

[525] I am not persuaded that the evidence has established any negligence on the part of the Council in respect of the issue of the building consent. Any issues regarding the details in relation to the stucco plaster cladding simply evaporate in the context of the change in the cladding system that followed.

Change in cladding system

[526] Mr Galloway submits that the Council was negligent in its handling of the change of the cladding system. He says the cladding system was an alternative solution, i.e. it was not an approved acceptable solution and therefore the Council should not have allowed the cladding work to continue until it was satisfied on reasonable grounds that the completed dwelling/cladding would be code

compliant and this would also have provided the Council with the opportunity to request and carry out inspections before critical work was covered up.

[527] Mr Galloway submits that the Council was negligent for allowing the cladding change without due consideration, in particular:

- No information about the cladding change was provided to the Council by any of the other respondents;

- This particular cladding system had not been the subject of any independent third party review;

- The specification for the cladding contained less robust details than the more recognised similar cladding systems used by the industry at the time.

[528] Against that, it was Mr Sheridan's evidence that the Council was not completing plaster inspections in 1994, and the junctions at the sill and window/door joinery are all workmanship issues completed before or after council inspection took place. He stated that the council was never given an Equus manual but it did receive a producer statement from the cladding installer.

[529] Mr Sheridan said that when he became aware of the cladding change he did not request further details or specifications from the Walshaws or the Architect, builder, or cladding subcontractor. When cross examined on this point, Mr Sheridan said that in deciding the new cladding system was code compliant, he relied on:

- The fact that a reputable architect was involved in the project even though there was no indication what the architects had done specifically in relation to the detailing for the cladding change;

- The contractors involved because he knew them and considered them to be professional and experienced;

- The producer statement from Equus;

- The fact that the product had been applied according to the specifications and he was satisfied that the contractor had done a good job, although he said he did not know whether or not the contractor had followed the specifications;

[530] The starting point for consideration of this issue must be the plans and specifications that were submitted for the building consent. The plans included details, albeit now arguably questionable details, as to how the cladding was to be installed, particularly the detail around the deeply recessed window and door openings, and the junctions with the paved terraces where the separation was to be less than 150mm. The approved plans benchmarked and provided clear guidance for the Council as to the extent of detail that might be required by the Council if it were required to consider any alternative cladding system as an alternative solution to any of the acceptable solutions contained in the approved documents authorised under the Building Act.

[531] With the change in cladding, all of those construction details became redundant and were no longer applicable to the building project. Mr Sheridan confirmed that no information was provided to

the Council by any of the other respondents about the cladding materials and fixing and finishing details that were proposed to be used in substitution of the approved stucco cladding system.

[532] Acceptable solutions given in the Approved Documents authorised under the Building Act 1991 are examples of materials, components and construction methods which, if used, will result in compliance with the New Zealand Building Code. They also serve as guidelines for alternative solutions. There is no obligation to adopt any particular solution. Materials, components and construction methods which differ in whole or in part from those described in Approved Documents may be used, if they comply with the building code.

[533] The evidence of Mr Sheridan has established that the Council did not have any technical information on which to make any valued assessment of the alternative cladding system and its ability to comply with the relevant performance criteria of the building code. If the Council had made any genuine attempt to assess the proposed cladding change for building code compliance, it would readily have apprehended that it was dealing with a cladding system, and/or materials, that had not been the subject of an independent third party review such as a Branz Appraisal, and a cladding system that did not include the same robust standard construction details as other more recognised claddings systems used by the industry at the time.

[534] It is clear that the Council had no knowledge at any time of how the contractors proposed to clad the dwelling and install the Equus product as an alternative solution to any of the acceptable solutions provided in the Approved Documents authorised under the Building

Act 1991 so as to meet the performance criteria of the building code, or in the end, how that work was actually undertaken.

[535] Mr Sheridan deposed that the Council was totally reliant upon good trade practice or adequate design functions.

[536] There were no amended details provided by the Architect in relation to the cladding change and Mr Sheridan advised that the Council had not received any advice or notification from the Architect regarding the cladding change. Accordingly there is simply no evidence that the Council had any grounds whatsoever to place reliance on the Architect's involvement with the project to ensure the cladding system was code compliant.

[537] Mr Sheridan gave evidence that he had no knowledge of BPL and did not know Mr Bidlake although he knew of EIFS cladding. To my mind that nexus does not come hesitantly close to one upon which any reasonable person could place reliance as to the skill and expertise of the person carrying out the specialist cladding work.

[538] I accept that pursuant to section 33(5) BA91 a council may accept a producer statement as establishing compliance with all or any of the provisions of the building code, but subject to section 34(3), namely that the council 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.

[539] A producer statement is defined in s2BA91 as being a statement supplied by or on behalf of an applicant for a building consent, or by, or on behalf of a person who has been granted a building

consent, that certain work will be, or has been, carried out in accordance with certain technical specifications. It follows that a producer statement is essentially a self serving statement by a person regarding compliance of certain building works with the building code and accordingly a council is required to consider whether in the particular circumstances of the case, it is reasonable to accept the statement as establishing compliance with the building code, and that requires some conscious approach to be undertaken. It cannot be enough for a council to merely accept the statement at face value and comply with section 34(3)BA91

[540] Mr Sheridan sought and obtained a Producer Statement from Equus Industries Ltd. The statement was simply to the effect that if the cladding work was carried out in accordance with Equus' specification, the resultant work would meet the performance requirements of the building code. The covering letter from Equus stated that Equus was currently carrying out further testing work in conjunction with BTI which may calvanate [sic] in the issuance of a formal Appraisal. In my view that advice should have been a clear warning to the Council that approval of this cladding system would require the provision of, and the careful consideration of, all relevant technical information and specific construction detail.

[541] Whilst that may have been so, the Council did not have a copy of the specification or any construction details whatsoever in order to satisfy itself that the work could be, or was ultimately carried out in accordance with that specification – the evidence is that it was not in number of respects including notably the window and door installations and wall/ground/deck junctions. More importantly though, the producer statement specifically noted on page three that "...all junctions with associated building elements not forming

part of the cladding system must be correctly detailed and maintained during the life of the structure" to comply with Clause E2 - External Moisture of the building code. This advice in a simple five page document should have been sufficient, in my view, to alert the Council that it needed far more information/construction detail before it could reasonably approve the change in cladding

[542] The Equus Thermexx Insulated Cladding System was described in the producer statement as comprising "..an acrylic modified plaster basecoat system reinforced with coated glass fibre woven mesh with finish coats of either acrylic modified plaster topcoats textured or smooth, and coated with Equus high build acrylic coatings or Equus acrylic polymer texture coatings" which "cladding skin" is applied over various specified surfaces including expanded or extruded polystyrene. The 'system' simply comprised a cladding skin applied over polystyrene "to form a complete insulated cladding system, but a 'system' that relied on correct detailing and maintenance of all junctions with associated building elements.

[543] The Council did not carry out any inspections of the cladding work to attempt to satisfy itself that the junctions with other building elements were correctly detailed, or that work was being undertaken in accordance with the specification, or that the work would meet the performance criteria of the building code, nor did it require in those circumstances, a producer statement construction review from Equus or the builder/applicator confirming that the work had been carried out in accordance with the specification upon which basis the producer statement was made.

[544] Therefore, on weighing all of the relevant matters, it is on balance, an irresistible conclusion to reach in the circumstances, that it was

simply not possible for the Council to satisfy itself on any reasonable grounds at any time during, or after completion of the cladding work, as to whether the cladding work would meet, or met, the requirements of the building code.

Inspections and notices to rectify

[545] I have carefully considered the competing views expressed by the building experts in this case as to the reasonableness and competence of the Council's conduct when carrying out its inspections and approving the work.

[546] I accept Mr Sheridan's evidence as persuasive, that a Council building inspector would not reasonably have observed all of the defects that have caused, or led to water penetration in the Owners' dwelling, although under cross examination he quite properly acknowledged that any inspector should have picked up the non-compliant floor level to exterior surface separations and it follows that a notice to rectify ought to have been issued under section 42 BA91 in respect of these matters and not just in respect of the separation between the floor level of the dwelling and the unpaved surfaces.

Did the Council breach the duty of care?

[547] I have carefully considered this issue and the allegations and contentions of the Owners and the other respondents and in the end, I am simply not persuaded that the Council's acceptance/ approval of the cladding system as an alternative solution was based on any reasonable considered grounds such that the Council could have been reasonably satisfied that the provisions of the

building code would have been met in relation to the changed cladding system and the Council's approval of/acquiescence in respect of, the cladding change and the finished product, was plainly negligent in the circumstances.

[548] I am not satisfied in the circumstances of this case, that the Council conducted its inspections of the dwelling at appropriate times, stages, or intervals so that the building inspector could be reasonably satisfied that the building work was undertaken in compliance with the building consent and the building code, or that the Council's building inspectors exercised reasonable care and skill in carrying out those inspections that they did undertake for the purpose of ensuring the building work was undertaken in accordance with the building consent and the building code.

[549] The Council's approach to its duties clearly fell far short of establishing and enforcing an operational system that would give effect to the building code (*Dicks*). In this case the reliance on VHL, BPL, and the Architect was simply misplaced and misconceived. The Council's practice was a clear abdication of its obligations and duties and renders the purpose of independent inspection nugatory.

[550] Accordingly, I am driven to conclude that the Council breached the duty of care that it owed to the Walshaws as the then owners and the Owners, as subsequent purchasers of the property, and that by reason of the said breach, the Owners and the Walshaws have suffered loss and damage for which the Council is liable.

[551] However, I am not persuaded that the evidence has established that the Council's conduct was such that it could be said to have caused or contributed to all of the water ingress and damage to the

Owners' property by its negligence. I accept Mr Sheridan's assertion that a reasonably prudent building inspector would not have picked up all defects in this construction upon a visual inspection (*Stieller*) and accordingly I find that the Council did not breach any duty owed to the Owners and the Walshaws in relation to matters involving:

- window fixings;
- tiles to window sills;
- ponding caused by vegetation in the rainwater head;
- cracks in cladding and parapets;
- holes in the membrane caused by excessive length fixings in the garage;
- delamination of roofing membrane;
- unsealed; vents, light fittings, pergola brackets and downpipes.

and that the Council is not liable for any losses in relation to those matters, namely items numbered 1b – e, 3, 4c, 5a, 7c, 8a, 8c, 9b, 10b, 11b, 11c, 12, 13, 14b, 15b, 17, 18, 20, 21b, 22a, 23, 24b, 24m, 25, 26, 27, 28b, 28m, 29b, 30b, 30m, 30n, 31b, 31d, 32b, 33b, 34b, and 35b, in the Schedule of Defects and Loss annexed hereto.

Summary of sixth respondent's liability

[552] Therefore, to summarise the position, I find that the Council breached the duty of care that it owed the Owners and the Walshaws, and by reason of the said breaches, it is liable to them for loss and damages in the aggregate amount of $164,899.70 (Refer the Schedule of Defects and Loss annexed hereto)

The liability of the seventh respondent, Doug Smith Limited, in tort

[553] The Owners' claim against the seventh respondent is also in negligence. The Owners say the seventh respondent was a project manager and it owed a duty of care to them as subsequent owners of the dwelling to exercise reasonable care and skill in undertaking the project management for the construction of the dwelling, which duty DSL breached causing loss and damage.

[554] The Owners allege DSL breached the duty of care by:

- Failing to properly supervise the contractors and subcontractors during construction;

- Failing to inspect the dwelling with due care and skill so as to properly identify the defects in the construction;

- Allowing the use of an exterior cladding system different to that shown in the Architect's plans without allowing for proper consequential changes;

- Failing to ensure that the defective work was rectified by the contractor and subcontractors responsible.

[555] DSL denies liability for the loss and damage on the basis that it was engaged as project manager to manage the tendering process for the site works and building work for the project and it was not engaged for the whole of the project and in particular it was not involved in the decision to change the cladding system.

[556] In closing, the Owners accept that DSL was not engaged full time on the project but submit this fact should not lessen any responsibility that it had to properly perform the job. They say that two recent cases have impacted significantly on the potential liability of project managers in overseas jurisdictions.

[557] Mr Galloway submits that project managers engaged on building projects owe a duty of care to owners and subsequent purchasers and must use reasonable care to prevent defects and damage occurring to their work (*Pride Valley Foods Ltd v Hall & Partners* [2000] EWHC Technology 106, *Roborgh v Lay & Ors* WHRS Claim 00062, 11 March 2005, Anthony Dean).

[558] Mr Galloway submits that in England, project managers have been held to be under a duty of care to advise the employer in relation to the suitability of certain materials and the risks involved in their use (*Pride Valley Foods Ltd v Hall & Partners* [2000] EWHC Technology 106). In that case, he says it was accepted that project managers were under an obligation to exercise reasonable care and skill in relation to the duties which they agreed to undertake. He says it was also accepted that this included giving appropriate safety advice. Mr Galloway submits that generally in contracts for

professional services there is an implied term that the professional will exercise reasonable care and skill in exercising their obligations under the contract.

[559] Mr Galloway says that given the scope of the project manager's duties in *Pride Valley Foods Ltd*, the project managers were held to be under a duty to warn the employer of the risks which the employer was undertaking in specifying materials which the project managers knew constituted a serious or unacceptable fire risk. He says that since the project managers were aware of such circumstances, the Court held that it was not sufficient for them to rely on the industry's general acceptance of the use of such materials.

[560] Mr Galloway also referred to the Australian case of *Palermo Nominees Pty Ltd v Broad Construction Services Pty Ltd & Anor, unreported SC of WA; Library No 980202; 17 April 1998* – quoted in *Palermo Nominees Pty Ltd v Broad Construction Services Pty Ltd* [1999] WASC 233, in which case a project manager was found liable when the internal acoustics of a nightclub, which it was engaged to design and construct, were defective. In *Palermo Nominees Pty Ltd v Broad Construction Services Pty Ltd* [1999] WASC 233, it was held that project managers are required to exercise care and skill appropriate to a person with the experience and expertise of a competent project manager and builder.

[561] Mr Galloway also referred me to an earlier WHRS decision in *Roborgh v Lay & Ors* in which case Adjudicator Dean held that project managers engaged on building projects owe a duty of care to owners and subsequent owners and must use reasonable care to prevent defects and damage occurring to their work although the

extent of that duty of care may be limited by the scope of the work that the project manager has been engaged to do.

[562] Mr Galloway submits that in the present case, there is no reason not to conclude that the project manager owed a duty of care to the Owners. Mr Galloway says that it is clear that DSL did nothing to ensure that it satisfied this duty and had it done so, it is unlikely that the building would be suffering from its present defects. He submits that DSL is therefore liable to the Owners for the damage that has resulted.

The extent of the project manager's duty of care

[563] After considering the authorities cited by Mr Galloway, I am satisfied that the position may be summarised as follows: A building project manager owes a duty to the owner and subsequent purchasers of a property to exercise reasonable care and skill in the execution of the duties he or she is contracted to undertake in relation to that property and to ensure that the works he or she is engaged to project manage are undertaken in accordance with the building consent and the building code and in accordance with the terms of the contract under which the building works are undertaken, or in the absence of express contractual terms, that the works he or she is engaged to project manage are undertaken and completed to a reasonable standard, within a reasonable time, and for a reasonable price. The project manager's duty extends to warning the employer of any danger and risks which the project manager knows to exist, or ought reasonably to know exist in relation to, or in connection with, the building works or the project management services.

[564] I can see no principled reason why the extent of a project manager's duty to third parties in tort should not be on all fours with other building professionals viz architects, engineers and builders (*Bowen* supra), however, I am absolutely certain that the duty of care is a limited duty, circumscribed by the task the project manager was contracted to perform.

Did DSL breach the duty of care?

[565] The evidence has established that whilst DSL is a project manager, it was not engaged by the Walshaws to project manage the construction of their home.

[566] Mr Smith said that DSL was engaged by the Walshaws on a strictly limited basis to assist them with preliminary matters including obtaining a building consent and calling tenders for the site works and the building works because the Architect was Wellington based and was not familiar with the Council and the building practices and contracting entities in Palmerston North.

[567] Mr Smith says that when construction work on the dwelling commenced in late 1995, the Walshaws re-engaged DSL to supervise the project until the timber framing was well underway, at which point DSL's services were again suspended.

[568] Mr Smith says that he had no further involvement with the Owners' property until the end of the building project in or about late 1996 when there were some issues in relation to VHL's final account, and then subsequently in or about October 2000, when he was asked by Mr Vining to accompany him to view the Owners' dwelling at such time as the Owners requested assistance from Mr Vining in

relation to water ingress matters. Mr Smith wrote to the Owners on 8 November 2001 setting out DSL's involvement in the construction of their dwelling and including a copy of a letter that he wrote to VHL on the same date advising VHL that he believed it was responsible for certain of the defects causing water penetration and recommended to VHL that it take steps to correct those defects.

[569] Mr Smith's evidence regarding DSL's limited involvement with the Owners' property is consistent with Mr Walshaw's advice to the Architect in a letter dated 1 August 1995, wherein Mr Walshaw recorded:

> I should emphasise that Mr Smith sees his role as assisting both yourselves and us in the tender process, but the overall responsibility for construction of the house would lie with yourselves as architects, the builder and the various other subcontractors.

[570] Mr Smith's evidence was corroborated by Mr Walshaw, Mr Vining and Mr Wilson. Mr Walshaw confirmed that DSL's involvement in the project was limited to the matters Mr Smith referred to in his evidence. Mr Vining confirmed that DSL's involvement with the project ended at such time as the framing was completed and that DSL was not involved in any of the discussions regarding the change of cladding and that DSL was not present during the installation of the selected cladding system. Mr Wilson confirmed that the Contract Instructions issued by the Architect from time to time during the course of the contract works were not copied to DSL and, that if DSL was the project manager for the development, it would have been reasonable for DSL to have been copied in on these critical communications.

[571] In the end I am satisfied that the evidence has established that DSL was not the project manager for the entire building project, that its involvement was limited to calling tenders, obtaining the building consent, and project managing the works through to the completion of the framing stage and resolving issues in relation to VHL's final claim.

[572] There is no evidence, or even any suggestion, that any of those matters have caused or contributed to water penetration and loss and damage, and accordingly, I am driven to conclude that DSL did not breach the duty of care it owed the Owners, or the Walshaws, and is not liable for any of their losses or damage.

The liability of the eighth respondent, Equus Industries Limited, in tort

[573] The Owners' claim against the eighth respondent is also in negligence. The Owners say the eighth respondent owed a duty of care to them as subsequent owners of the dwelling to exercise reasonable care and skill in ensuring that its products are fit for purpose and/or providing specifications that made it clear what the product was to be used for and counsel cited *Milne Construction Limited v Expandite Limited* [1984] 2 NZLR 163 as authority for the imposition of the duty contended for.

[574] The Owners claim Equus breached the duty of care by:

- Providing specifications for the Equus Thermexx Insulated cladding system which did not contain adequate construction details as to how to seal around window and door joinery;

- Providing specifications for the Equus Thermexx Insulated Cladding System which do not contain adequate construction details in relation to ground clearance levels;

- Providing a producer statement for the Equus Thermexx Insulated Cladding System which did not deal with the above matters;

- Failing to publish limitations on the use of the Equus Chevaline Dexx Waterproofing Membrane System warning against constructions which would trap moisture on the upper surface of the membrane and cause a breakdown of the membrane.

[575] Mr Galloway says that the information provided by Equus was limited to the specification (P7017 dated September 1995) and diagrams provided on the buckets that are distributed to contractors. Mr Galloway submits that this information was inadequate compared to other more recognised systems, in particular those details relating to how to seal around windows and doors and to finish at the ground and paving levels.

[576] Mr Galloway further submits that Equus did not publish limitations on the use of the Dexx membrane especially to warn against constructions which could trap moisture on the upper surface of the membrane, causing the membrane to break down.

[577] In response, Equus denies that it acted carelessly or that it breached any duty to the Owners and submits that:

- Equus did manufacture and supply products that were fit for the purpose they were developed and designed for;

- Equus products, when installed in accordance with the specification, are fit for purpose;

- Equus did not carry out any physical work on site and is not responsible for managing construction, or building controls, on site;

- Equus did make information freely available to the Owners and all other parties to these proceedings prior to, during, and after the construction was completed;

- Equus Thermexx specifications dating back to 1988 explain very clearly how to seal around windows and doors, including the need to install Inseal strips or foam behind the joinery;

- Equus' data sheets and specifications do <u>not</u> include instruction to bury Thermexx Insulated Cladding, and NZS3604 clearly shows ground levels and drainage details;

- The producer Statement the Council has on its file is not specific to the Walshaws, the Owners, or the property, and is verification that the Thermexx Cladding System complies with the building code when used as directed and maintained as directed

- Equus publications clearly show the limits of use for the products it manufactures and supplies. Chevaline Dexx and the Thermexx Cladding System are designed for specific

areas of application. The Equus specifications show what these products can be used for, not what they cannot be used for.

[578] *Milne Construction Ltd* v Expandite Limited, was a case involving epoxy adhesive that was purchased by *Milne* from *Expandite* for use in the construction of a concrete floor for the Auckland Electric Power Board. The adhesive was purchased to bond together two layers of concrete. The expected bonding did not occur satisfactorily with the result that the topping slab and the adhesive needed to be removed and repair work undertaken. Moller J held that the *Board* and Expandite were within sufficient "proximity" to each other such that *Expandite* owed a duty of care to the *Board* under the rule in *Donoghue v Stevenson.* The extent of the duty was held to be one to take reasonable care to ensure that any labels or instructions which accompany the article and are necessary for its proper use are so worded as to ensure that the article can be used with safety. The Court found that *Expandite* breached the duty by reason that the instructions and recommendations and warnings as to the use of the epoxy were negligently inadequate insofar as they related to: mixing the two parts; the time required before the new concrete was poured on top of the adhesive; and, the temperature of the surface to which the adhesive was applied. The Judge stated that no distinction can properly be drawn between physical and economic loss and he found against *Expandite* for the agreed cost of repair and general damages.

Did Equus breach the duty of care?

Thermexx

[579] The Owners submit that the technical information provided by Equus was inadequate compared to other systems and did not contain adequate construction details for sealing around windows and doors, and in relation to ground levels.

[580] The difficulty for the Owners with this head of claim is that the cladding work was not carried out in accordance with the specification with regard to sealing around windows and doors or construction of the framing at ground levels.

[581] The specification required the application of a sealant bead between cladding and joinery as a final moisture seal. That simply did not happen. The sealant bead was applied between the polystyrene and the joinery and then plastered over with Thermexx obscuring the sealant joint from view.

[582] Insofar as the ground clearance issues are concerned, the specification required the timber framing to be constructed to comply with NZS:3604 (the current version at that time was NZS3604:1990) which required the bottom plate to be installed a minimum of 150mm above paved surfaces and 225mm above cleared ground for all claddings. Once again this simply did not happen, or where it did, there is no allegation of water penetration and damage having occurred.

[583] I am satisfied that the present case, insofar as it relates to Thermexx, can be distinguished from *Milne Construction v Expandite* on the grounds that in *Milne*, the data sheets provided by *Expandite* provided express application instructions, which when followed by *Milne,* resulted in failure. In this case, the express instructions (albeit limited in content and without accompanying

construction details/diagrams) were not followed, and the argument is that there ought to have been more detail provided.

[584] That argument in my view simply does not withstand scrutiny. There was detail; there is no allegation that the detail was inherently flawed to the extent that compliance would have *ipso facto* resulted in failure; there is no allegation that further details were sought and refused by Equus; there is no allegation that the cladding work was completed in accordance with 'industry standard and generally accepted' construction details for other recognised EIFS systems at the time, and failed, (the evidence is that the cladding work was not undertaken in accordance with the construction detail of the established competitor, Plaster Systems Ltd); and the claim for breach on the basis of inadequate detail in respect of Thermexx fails accordingly.

[585] For completeness, there is simply no evidence that the Thermexx was not fit for purpose if applied in accordance with the manufacturer's recommendations. Thermexx is a 'cladding skin' i.e. a reinforced acrylic modified plaster and becomes an insulating cladding system when it is applied over polystyrene substrate.

Producer statement

[586] The producer statement provided to the Council by Equus did in fact specifically note that: "...all junctions with associated building elements not forming part of the cladding system must be correctly detailed and maintained during the life of the structure", to comply with Clause E2 - External Moisture of the building code. The cladding system was described as comprising "a cladding skin" applied over polystyrene "to form a complete insulated cladding

system", but a 'system' nonetheless that relied on correct detailing and maintenance of all junctions with associated building elements.

[587] Accordingly, it follows (contrary to the Owners' assertions) that the producer statement did deal with the junctions of the cladding with other building elements, albeit not conclusively. In the end however, the Council was not obliged to accept the producer statement unless it was satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application. I have already found that the Council was negligent in that regard and that failure was its tort.

[588] The Owners have not established reliance, and there is in my view, no causal connection between the provision of the producer statement by Equus to the Council, and the defective works causing loss and damage. The Council's request for the producer statement and its assessment of the information provided therein, and Equus' knowledge of, and reliance upon, the intervening event (the Council's assessment of the information) broke any chain of causation, no matter how tenuous, that may ever have been claimed to exist. The claim under this head fails accordingly.

Dexx

[589] The position with regard to the Chevaline Dexx specification is however distinctly more problematic for Equus.

[590] Mr Stills submits that the Equus specifications show what the Equus products can be used for, not what they cannot be used for. I do not accept that is entirely correct.

[591] The Chevaline Dexx Product Data Sheet provided by Equus in these proceedings specifically includes a section headed "Limitations" immediately following the "Key Benefits Summary" in the 'box' at the beginning of the document.

[592] Despite there being warnings in relation to: traffic installations, application temperature limitations, and creasing at joints when applied over plywood substrate, there is no warning that Dexx should not be used in constructions which would trap moisture on the upper surface of the membrane. In fact the following section headed "Purpose & Areas of Use" in the data sheet, specifically records that Dexx can be used on specified substrates as a waterproof membrane under tiles

[593] The evidence of Mr Bannatyne, Mr Cooney, and Mr Stills, is that acrylic waterproofing membranes will break down and become soft and porous when subjected to moisture for long periods.

[594] Mr Still gave evidence that acrylic membranes such as Dexx were roof and deck membranes, ideally suited to roofs, decks, gutters, sumps, and carparks, where water is not trapped or contained on the surface.

[595] There is no qualification or warning in the specification in relation to the use under tiles, that the grout and joints between tiled surfaces must be rendered waterproof so as not to trap water on the upper surface of the membrane as the membrane could become soft and break down causing water penetration into the building elements in contact with the membrane. There is simply no warning that the product could fail if moisture is trapped on the surface and it seems to me, that the inference to be reasonably taken from the tiling

application and the use for lining/waterproofing sumps, is that ponding or prolonged exposure to moisture is not something to be concerned about. The evidence has established that nothing could be further from the truth and that the product will break down and will fail under those conditions, although Mr Still said no testing had been undertaken by Equus to determine the amount of exposure required before degradation and failure occur.

[596] I have found in this case, that water penetration has been caused by degradation of the Dexx waterproofing membrane as a result of moisture trapped on the upper surface of the membrane.

[597] In the end, I accept as compelling, the Owners' submissions that the Equus Dexx specification was negligently inadequate in respect of failing to warn of the limitation of the use of the product in circumstances where moisture could, or may become trapped on the upper surface of the membrane; that the persons involved with the detailing and construction and approval of the sill construction relied on the Equus Dexx specification and the technical advice of Mr Dean Barr to the extent that Dexx was used to waterproof the window sills (For completeness, I find Dean Barr was a duly authorised agent for Equus on the basis inter alia, of Mr Still's evidence that he was paid a commission for selling Equus product and his business card that described him as Dean Barr - National Sales and Marketing for Equus Industries Ltd (Central Region), (App 'D' to Mr Bidlake's Statement dated 25 August 2006); and, the failure to adequately warn of its limitation and potential for failure in relation to long term contact with moisture, has caused direct and immediate loss and damage to the Owners.

[598] Accordingly I am driven to conclude that Equus breached the duty of care that it owed the Owners, the Walshaws, and PBL and that by reason of the said breach, the Owners, the Walshaws and PBL have suffered loss and damage for which the Equus is liable.

[599] I am not persuaded that the evidence has established that Equus' negligence has caused or contributed to all of the water ingress and damage to the Owners' property and accordingly I find that Equus did not breach any duty owed to the Owners in relation to matters involving:

- window fixings;
- roof and head flashing installations;
- tiles to window sills;
- ponding caused by vegetation in the rainwater head;
- tarseal levels;
- terrace and ground levels;
- gardens built up too high;
- holes in the membrane caused by excessive length fixings in the garage;
- cracks in parapets and cladding;
- unsealed vents, light fittings and downpipes.

and that Equus is not liable for any losses in relation to those matters, namely items numbered 1a – e, 2a/c, 3, 4b, 4c, 5a, 5c, 6, 7a-c, 8a-c, 9a-b, 11b, 11c, 13, 14b, 15b, 16, 17, 18, 19, 20, 21b, 22a, 22d, 23, 24b, 24m, 25, 26, 27, 28b, 28c, 29b, 30b, 30m, 30n, 31a-d, 32b, 33b, 34b, 35b, and 36 in the Schedule of Defects and Loss annexed hereto.

Summary of eighth respondent's liability

[600] Therefore to summarise the position, I find that Equus breached the duty of care that it owed the Owners and by reason of the said breach, it is liable to them for loss and damages in the aggregate amount of $69,026.51 (Refer the Schedule of Defects and Loss annexed hereto).

[601] I also find that Equus owed a duty of care to the Walshaws as the previous owners of the dwelling on ordinary *Donoghue v Stevenson* principles, and that Equus owed a duty of care to PBL, under the *Hedley Byrne* principle, in relation to the technical advice of Mr Barr, which I find to have been negligently given. Equus breached the duties of care it owed to the Walshaws and PBL causing loss and damage. I find Equus is liable to the Walshaws and PBL for loss and damages in the aggregate amount of $69,026.51 (Refer the Schedule of Defects and Loss annexed hereto).

The liability of the ninth respondent, Central Tiling Limited, in tort

[602] The Owners make no allegations against the ninth respondent which was joined to these proceedings by application of the fourth and fifth respondents.

[603] In short the fourth and fifth respondents say that the ninth respondent owed them a duty to take care that the application of the tiles to the windowsills did not compromise or undermine the watertightness of the sills constructed by the fourth respondent.

[604] The fourth and fifth respondents say the ninth respondent breached the duty of care by: (with the approval of the second respondent) fixing tiles to the sills using a method and materials which allowed water to enter and compromise the watertightness of the sills.

[605] The fourth and fifth respondents claim from the ninth respondent such amount (if any) as may be awarded in damages against them, or either of them, in respect of any loss caused by the ingress of water through the sills.

[606] The first, second, and third respondents claim for contribution against the ninth respondent.

[607] The ninth respondent denies that it was negligent in supplying or laying the tiles, or that it owes the second, fourth, and/or fifth respondent, any duty of care.

[608] In the event of any liability, the ninth respondent claims complete indemnity from the second, fourth, and fifth respondents.

[609] The allegations in relation to the ninth respondent may be disposed of in short order. That is not to suggest that the ninth respondent's involvement and potential liability was initially so straightforward. The position only really became clear upon hearing all of the evidence.

[610] The nub of the issue was the allegation that the sill tiles were laid by the ninth respondent in such a manner as to trap water and compromise the weathertightness of the sills constructed by the fourth respondent and to allow substantial water ingress.

[611] There is absolutely no evidence that the sill tiles were designed to provide any level of waterproofing to the sill construction or that they were intended to be anything more than merely decorative.

[612] Mr Pirie gave evidence that he was never provided with any specification or written instructions in relation to laying the sill tiles by VHL or any other respondent. Mr Pirie gave evidence that he was instructed to cut the tiles to 100mm in length by Mr Vining and to lay them on the finished plastered sills constructed and formed by others. He says when he discovered that the height of the sills was such that the tile would not fit under the bottom flange of the window frames, he raised the matter with Mr Vining who instructed him to continue with the work and achieve the best result that he could.

[613] Against that Mr Vining gave evidence that he specifically instructed Mr Pirie to lay the tiles with channels at the ends of the sills such that water that may accumulate at the rear of the tiles (because the tiles were too short to reach the sill upstand) would drain away. I do not find Mr Vining's evidence in this regard compelling. If indeed this detail was of such moment and was known to be so by Mr Vining at the time, I am left in absolutely no doubt that Mr Vining would have checked to ensure that his instructions were complied with – he did not. I prefer on balance, indeed to an even higher standard, Mr Pirie's evidence as to what he was instructed to do by Mr Vining with regard to laying the sill tiles.

[614] In the end, the issue in this case is one of sill design as opposed to how the decorative sill tiles were laid. The ninth respondent was not engaged to construct a waterproof surface. It was accordingly entitled to assume that the surface over which it was asked to lay decorative tiles, was waterproof and fit in all respects for the purpose of having porous and decorative tiles laid over it. I am driven to conclude that there was no negligence on the part of the ninth respondent and all claims against the ninth respondent fail accordingly.

CONTRIBUTORY NEGLIGENCE AND FAILURE TO MITIGATE

[615] The second respondent asserts contributory negligence on the part of the Owners for failing to obtain a pre-purchase inspection of the property which it says would have highlighted design and cladding problems because the house has leaked from day one.

[616] Mr Cleary submits that there are some risks associated with real estate purchase in the absence of such inspection, and in the circumstances, the whole burden for loss ought not fall on other parties. He submits a reasonable approach would be to aggregate a percentage for failing to properly inspect, with a contributory negligence percentage for failure to mitigate on the basis of inadequate maintenance and failure on the part of the owners to remedy the damage in a timely manner.

[617] The first, second, fourth and fifth respondents allege contributory negligence on the part of the Owners on the basis that Mr & Mrs Heng failed to mitigate their losses because they did not maintain their house adequately or properly; they did not protect it from

deterioration when leaks became apparent; and, they did not have remedial work done in a timely way.

[618] The fourth and fifth respondents in particular, submit that the Owners in this case have fallen short of doing what a reasonable, prudent person, in their circumstances, would have done, that they are quite apparently not indigent people, who took no care of their own safety at all and have ignored completely BPL's and Mr Bidlake's interests in having the damage contained.

[619] The Walshaws join with the other respondents and claim that the Owners have contributed to their losses by failing to maintain the dwelling and for failing to make any consistent or concerted endeavour to find and fix the problems.

Contributory negligence – failure to obtain a pre-purchase inspection

[620] There is no evidence to support the contention that a pre-purchase inspection would have highlighted design and cladding problems.

[621] The evidence of the Walshaws, which I accept, was that there was no manifestation of continuing water penetration of their house at the time it was sold to the Owners. The property was sold after the bay window leaks had been addressed by VHL by the application of Clearseal (on the basis of the Architect's recommendation) which on the face of it, was likely to provide a temporary fix. The building defects giving rise to the present problems were therefore largely latent.

[622] Moreover, the Owners gave evidence that they were aware from the marketing campaign that the property they planned to purchase was near new and had been designed by a "Top Wellington Architect, Roy Wilson", that it had been built by a well known local builder, and they knew that the Council did inspections and gave signoffs.

[623] The Owners had their lawyer research the title and easements and covenants prior to signing the Agreement. The Owners made it clear to the Walshaws that they would not settle unless a CCC was available from the Council. The CCC was issued by the Council, following inspection of the property by its building inspectors, on 4 November 1999, the day before the Owners settled the purchase of the property, and nearly a month earlier than the settlement date fixed under the agreement.

[624] In the circumstances, there is no evidence that the Owners were, or ought to have been aware of any risks associated with the type of property they were proposing to purchase. I am satisfied that evidence has demonstrated that the Owners acted reasonably and responsibly, and exercised such precautions in the circumstances as someone or ordinary prudence in relation to the purchase of the property from the time they were first attracted to it until they settled the purchase on the basis that the Council issued the CCC. I am absolutely certain that they would not have settled the purchase of property for the full amount had the CCC not been issued by the Council.

[625] The second respondent has not cited any authority for the proposition that purchasers in the position of the Owners would be negligent for not obtaining a pre-purchase inspection, or established

a causative link between the failure to obtain a pre-purchase inspection and the Owner's loss in the context of a claim for repair costs arising from the physical damage to the building, such that would suggest the Owners were at fault when measured by the reasonable foreseeability test (*Hartley*).

[626] In the end, I am simply not persuaded that the Owners were contributorily negligent on the basis of their failure to obtain a pre-purchase property inspection.

Failure to mitigate cost of remedial work

[627] The law does not allow a plaintiff to recover damages which are due to his or her negligence and would not have been suffered if he or she had taken reasonable steps to mitigate the loss (*British Westinghouse Electric and Manufacturing Co v Underground Electric Rail Co of London Ltd* [1912] AC 673):

> The law imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damages which is due to his negligence to take such steps.

[628] The assessment of whether a plaintiff has suffered additional loss by reason of his or her own neglect is a question of fact, not law. What is reasonable on the particular circumstances of each case (*Payzu Ltd v Saunders* [1919] 2 KB 581 (CA) at pp 588-589). It must be noted that the plaintiff is not required to do anything more than is reasonable in the circumstances and the burden of proving that reasonable steps have not been taken rests upon the defendant.

[629] The respondents assert that the Owners have failed to mitigate the damage to the dwelling by:

- Failing to adequately maintain the property;
- Failing to protect the dwelling once the leaks became apparent; and,
- Failing to undertake remedial works in a timely manner.

[630] The perennial problem is the extent to which a plaintiff is required to mitigate loss. The general principles are that a claimant is only required to act reasonably in the claimant's own interests and the interests of the respondents to keep down the damages, so far as it is reasonable and proper (*Hartley* para 113, citing *Hooker v Stewart* [1989] 3 NZLR 543 (CA) at 547) and that a plaintiff cannot reasonably be required to spend money where he or she lacks the means to do so (*Clippens Oil Co Ltd v Edinburgh and District Water Trustees* [1907] AC 291 [HL]) and the plaintiff is not required to go so far as disposing of capital assets, or spending money before liability has been established (The Law of Torts in New Zealand 3rd Edition – Todd page 1170).

Failure to maintain the property

[631] The respondents assert that several of the problem areas relate to lack of maintenance on the part of the Owners, including garden levels, plaster cracks, membrane deterioration, and lichen and fungus growth on the cladding.

[632] Mr Heng gave evidence that he washed the house down with a window wash extension brush and a low pressure water blaster where it was possible to reach on a regular basis but he said [they] had not carried out any maintenance work in the way of painting or repairing of cracks.

[633] Insofar as the failure to paint the cladding and the lichen and fungus growth on the cladding is concerned, the evidence has established that the Owners were told by the Walshaws that one of the benefits of the house construction was that the cladding did not require painting and should not be painted to achieve and maintain the "Tuscan look" the architects had required. In any event, there is simply no evidence of any degradation to the cladding system, or any other aspect of the dwelling, as a result of the lichen and fungus and runoff streaks that have developed over time on the surface of the cladding.

[634] There is no evidence that the Owners knew, or to have known of problems associated with incorrect separation between cladding/framing and ground levels, or that they caused any damage to the dwelling themselves as a result of building up ground levels. In fact, the evidence is quite the opposite, they paid a builder to lower the levels at the rear of the laundry and garage when they were told the levels were too high and could cause problems.

[635] Mr Heng gave evidence that he fitted seals to external doors to prevent leaking and had a builder fit external flashings to divert water away from the lounge bi-folding doors. Mr Heng said they also had a tall solid fence built around the laundry garage area to limit the effect of driving rain from the east.

[636] Mr Heng also gave evidence that he contacted the Master Builders' Association in Auckland (**the MBA**) in early 2000 to inquire about the maintenance of their home as the Walshaws had left no instruction manuals or plans or anything else on the maintenance of the home. Mr Heng says that when he described their home to the person at the MBA he was told that their type of home should have a maintenance review every 10 years as the products were inert materials that should be subject to the normal degradation found in wood or other organic materials. Mr Heng says when he was told this by the MBA, the home was just over 2 years old and he felt no need to consider any maintenance other than just tidying around the place.

[637] Mr Heng's evidence is also that he was not aware of any cracks in the cladding before 2002 when the Joyce Group report was undertaken.

[638] Whilst Mr Bayley's photos disclosed weeds growing in the gutter and rainwaterhead to the roof over the breakfast area, there is simply no evidence that this caused water ingress. The gutter drains to the rainwaterhead and the rainwaterhead is below the gutter outfall and would simply have overflowed, which is the purpose of a rainwaterhead.

[639] In the end I am simply not persuaded that the respondents have established that any lack of maintenance has caused or contributed to the damage, or that the Owners acted unreasonably in respect of maintaining their dwelling in all the circumstances, and I am driven to conclude that any claim for failure to mitigate on this ground must fail accordingly.

Failure to protect the property or undertake remedial work in a timely manner

[640] In essence, the respondents submit that the Owners took no action to stop the leaks getting worse, or to stop them causing increasing damage, and that the Owners failed to undertake the necessary remedial work in a timely manner, preferring instead to sue them first in these proceedings.

[641] The Owners reject those allegations and say they did what they could in the circumstances and sought to secure the assistance and advice of Mr Vining, the Council, and Mr Smith, when they became aware of the water ingress problems, and when they refused or neglected to assist them they sought expert advice first, from Joyce Group Ltd, and more latterly from Mr Cooney.

[642] Mr Galloway submits that the Owners are lay people and the respondents all claim construction expertise. He says at no stage, from the time the Owners first noticed the problems and contacted the respondents in an attempt to have them rectified, did any of the respondents:

- Offer to do anything to remedy any of the defects;
- Advise the Owners that they should do something to prevent further damage; or
- Specify what such steps might entail.

[643] Moreover, as Mr Galloway noted, none of the respondents have specified:

- Exactly what the owners ought to have done;
- When they ought to have done;
- How they ought to have known that;
- What the result would have been;
- What this would have cost, and how the interest costs of the expenditure affect the quantum of the claim against the respondents.

[644] Mr Galloway submits that in the absence of this specification, and evidence to support it, the respondents cannot begin to establish a case of failure to mitigate on the part of the Owners.

[645] Mr Galloway further submits that the Owners consulted a range of experts from 2000 onwards and none of those experts advised them to take any specific steps to prevent further damage.

[646] Ms Jurgeleit submits that no building expertise is required to appreciate that if leaks are not stopped, whether permanently or temporarily until the time is right for permanent repairs, they are going to go on and get worse and cause more damage.

[647] Ms Jurgeleit further submits that despite Mr Heng's evidence to the contrary, the respondents are not indigent people and the failure to contain the damage is surely not the result of a lack of funds.

[648] Mr Heng declined to state his income during the hearing, but gave evidence that he is the sole income earner for the family, the family

still has an existing mortgage, and any new borrowing would be subject to his ability to repay within the next 16 months when he reaches the age of 65. He says therefore, before any substantive work can be carried out on the home, the costs will need to be recovered from the respondents first.

[649] Put simply, a claimant is not required to fix first, then sue, in order to mitigate the respondents losses, particularly as in the circumstances of the present case, where monies would need to be borrowed and repaid with interest, and respondents refuse, or neglect, to render assistance in respect of identifying and remedying building defects causing water penetration and ultimately dispute the alleged causes of water penetration and the extent of the remedial work required to be undertaken.

[650] Mrs Heng gave evidence of the steps the Owners took to try and resolve the problems associated with water penetration and to get help from Mr Vining, Mr Smith, and the Council. In particular Mrs Heng said:

- Their efforts started in October 2000 when she contacted the Council.

- Council officers visited the property in October 2000 and told her to contact the builder.

- She contacted Mr Vining who then visited the property with Mr Smith.

- She made repeated phone calls to Mr Vining and Mr Smith and finally in November 2001, Mr Smith wrote to her

apologising for the delay and including a letter to VHL in which he made it clear to VHL that he considered VHL was responsible for defective work causing water penetration.

- Mr Vining's response was that he would not do anything until the problem was pinpointed by the Hengs' insurers.

- In March 2002, she contacted Branz and was put in touch with Charles Tribe of the Joyce Group Ltd who inspected the house.

- In April 2002 Mr Tribe provided a report, but did not suggest that they could do anything to prevent water ingress or to prevent damage occurring.

- Following receipt of the report, they got in touch with Mr Walshaw who said he would cooperate in bringing a claim against the other parties as long as they did not claim against him.

- In October 2002 they were advised of the Government's plans for the WHRS.

- In December 2002 Mr O'Connor from the Joyce Group Ltd inspected the property and prepared a further report. Mr O'Connor did not suggest anything they could do to prevent water ingress or to prevent damage occurring.

- On 10 December 2002, Mr O'Connor provided a cost estimate for extensive repairs in the amount of $160,000.00.

- In February 2003 they lodged their claim with the WHRS.

- In December 2003 the WHRS Assessor visited the house on three occasions. There was cracking visible in the plaster but the Assessor did not suggest that there was anything they could do to prevent water ingress or damage.

- On 14 June 2004 the Assessor's report was received and he recommended that the house needed to be reclad and estimated the remedial work would cost $178,130.00. He did not recommend interim work be undertaken.

- There followed attempts at mediation through until September 2005 but the matter did not settle. Mr Cooney was engaged prior to the mediation.

- Mr Cooney carried out invasive investigations and the claim was referred to adjudication in December 2005.

[651] I have carefully considered the matter, but in the end, the Owners' evidence of the lengths that they went to, to obtain advice and assistance with the leaking problem (the true nature and extent of which I am satisfied they had no knowledge of whatsoever until Terry O'Connor's report and cost estimate was produced in December 2002) discloses a tragic tale of delay, frustration, and ultimately despair, in circumstances where the Owners, having no building expertise, were put to the trouble, inconvenience and cost of first identifying building defects in a near new dwelling designed, built, and approved by building professionals, and then determining the proper remedial work necessary to stop the leaking and repair the damage.

[652] In the circumstances, it is in my view, rich indeed, for the respondents to claim that the damages ought to be reduced or set off completely by reason of failure on the part of the Owners to repair the dwelling or to take steps to prevent further degradation occurring due to the leaks.

[653] The Owners are lay people, the respondents all profess to have building expertise. It has taken a formal hearing and the evidence of no less than nine contractors and experts to determine the cause of the water penetration, the extent of the damage and the necessary and proper remedial work, and all of which has been strenuously contested.

[654] I am satisfied that the evidence establishes overwhelmingly that the Owners took such positive action as it was reasonable for them to take in the circumstances to mitigate their losses.

[655] It is clear that the facts of the present case are readily distinguished from those in the *Hartley* case (supra) where the recorded evidence suggests that apart from lodging a claim with the WHRS, the owners took no other steps to mitigate the damage that was occurring to the house. In that case, the Adjudicator found that the owners' failure to take any steps whatsoever to try and stop the leaks to mitigate the obvious damage to the house was unreasonable in the circumstances [para 12.25]. That finding was plainly open to the Adjudicator on the evidence, as was the finding that the damage increased in severity over the intervening period (*Hartley*).

[656] In the present case however, I do not consider that the respondents have established, even hesitantly, that the Owners failed to act

reasonably in the circumstances and that they failed to mitigate their losses as a result of their dwellinghouse being a leaky building. Even if were wrong on that point, there is simply no evidence before me as to what the Owners ought to have done to mitigate their losses apart from filling certain cracks, when they ought to have done such work, how they ought to have known what work to do and when to do it, and what the likely result would have been had they done the work at any particular time, such as to establish an evidentiary base for a case of failure to mitigate.

[657] Accordingly, the claims by the respondents that the amount of the Owners' losses should be reduced due to the Owners' alleged failure to protect their property from deterioration once the leaks became apparent, or to undertake remedial work in a timely manner so as to mitigate their losses, fail on all bases submitted.

SUMMARY OF THE OWNERS' LOSSES

[658] To summarise the position therefore, I determine that the Owners have suffered loss and damage as a result of their dwelling being a leaky building in the amount of **$228,042.96** calculated as follows:

Scheduled summary of element costs		$117,195.00
Less:		
Allowance for carpet (see para 218)	$ 4,650.00	
Allowance for ext. painting (see para 232)	$ 1,380.00	
Allowance for betterment in respect of interior painting (see para 233)	$ 730.80	
	$ 6,760.80	($6,760.80)

Subtotal	$110,434.20
Add P&G @ 5%	$ 5,521.71
Subtotal	$115,955.91
Add Contractor's margin @ 15%	$ 17,393.39
Subtotal	$133,349.30
Add contingency sum	$ 25,000.00
Subtotal	$158,349.30
Add GST	$ 19,793.66
Subtotal	**$178,142.96**
Add:	
Consequential losses (See para 237)	$ 19,900.00
General damages (See para 249)	$ 30,000.00
Deduct:	
Contributory negligence/failure to mitigate	$ NIL
Total damages	**$ 228,042.96**

[659] That amount is based on Mr Sheridan's evidence, and the advice of counsel for the Council, that the Council's position is that it is prepared to process an application by the Owners for a building consent for the remedial work, and impliedly, issue a CCC on the proper completion of the building work, on the basis of targeted repairs i.e. the Council will not require a complete reclad and cavity construction as claimed by the Owners, supported by Mr Cooney.

[660] I do not consider that the Owners should have to bear the risk, as a result of this determination, that the extent of the remedial work and the cost of the remedial work will not increase in the event that the Council's position regarding the building consent should change before the work is completed and a CCC is issued.

[661] Accordingly the amounts to be paid by each of the liable respondents are dependant on whether the Council issues a building consent and a CCC for the repair work on the basis of targeted repairs, or whether it requires a complete re-clad.

Damages based on a full re-clad over a cavity system

[662] Having heard and considered all the evidence in this matter, it is only just, fair, and reasonable that I should now fix the amounts to be paid by the respondents in the event of the Council requiring a re-clad over a cavity system as a condition of the issue of a building consent and/or a CCC in respect of the remedial works.

[663] I have carefully considered the arguments submitted by Mr Bayley in respect of the quantum submitted by the Owners for repairs involving a full re-clad over a cavity system. I think Mr Bayley's criticisms regarding rates and other matters are on the whole justified, but overstated in respect of several of the items. In the end I am satisfied that the proper value of that work is **$273,904.09** calculated as follows:

Scheduled summary of element costs		$230,089.00
Less:		
Cost of plans	$ 3,000.00	

Cost of scaffold	$ 16,408.00	
Cost of tarpaulins	$ 6,513.00	
Cost of reveals	$ 3,945.00	
Cost of exterior paint	$ 6,060.00	
Interior painting betterment reduction of 45%	$ 1,370.00	
Disruption to services	$ 4,000.00	
Carpet	$ 4,650.00	
	$45,946.00	($ 45,946.00)
Subtotal		$ 184,143.00
P&G @ 5%		$ 9,207.15
Subtotal		$ 193,350.15
Contractor's margin @ 15%		$ 29,002.52
Subtotal		$ 222,352.67
Contingency allowance @ 5%		$ 11,117.63
Subtotal		$ 233,470.30
Professional fees sum		$ 10,000.00
Subtotal		$ 243,470.30
Add GST at 12.5%		$ 30,433.79
Total inclusive of GST		**$ 273,904.09**

[664] To that amount of $273,904.09 must be added the consequential damages and general damages in the aggregate amount of $49,900.00. Accordingly the total amount of damages to which the

Owners would be entitled in the event of the Council requiring a complete reclad as a condition of the building consent for the remedial work, and/or, the issue of a CCC on completion of the remedial works, is $323,804.09 together with such further amount that might be appropriate in the circumstances to take account of any increased costs in labour, plant, and materials, that the Owners may incur from the date of this determination.

[665] That total amount of damages to which the claimants would be entitled in these circumstances shall be apportioned according to my findings in respect of the targeted repairs, namely:

Party	R1	R2	R3	R4	R5	R6	R8
Percentage Liability of total amount of damages	100	83.31	76.48	62.14	62.14	72.31	30.27
Percentage contribution to total damages (s17 of the Law Reform Act 1936)	5.31	33.44	11.07	16.39	16.39	11.35	6.05

[666] There would also need to be an appropriate adjustment as between the first respondent on the one hand, and the third respondent on the other hand, in relation to difference between the third respondent's contractual and tortious liabilities to the first respondent.

[667] In fairness to the respondents, the time for completion of the works needs to be fixed, and I set that time at 12 months from the date of

this determination which should allow that claimants adequate time to prepare plans, apply for a consent, call for tenders, and execute the remedial works and to obtain a CCC from the Council for the consented works.

[668] In the event of any practical/timing difficulties arising in relation to the implementation of this determination, the parties are granted leave to bring the matter back before an Adjudicator for further directions or determination.

CONTRIBUTION

[669] I have found that the first respondents, the Walshaws, breached the terms of the Agreement and are liable to the Owners by reason of that breach for the full extent of their loss, namely $228,042.96.

[670] I have found that the second, third, fourth, fifth sixth and eighth respondents breached the duty of care that each owed to the first respondents. Each of the second, third, fourth, fifth, sixth, and eighth respondents, is a tortfeasor or wrongdoer, and is liable to first respondents in tort for their losses to the extent disclosed in the attached schedule of defects and loss.

[671] I have also found that the second, third, fourth, fifth sixth and eighth respondents breached the duty of care that each owed to the claimants. Each of the second, third, fourth, fifth, sixth, and eighth respondents, is a tortfeasor or wrongdoer, and is liable to the claimants in tort for their losses to the extent disclosed in the attached schedule of defects and loss.

[672] The second, third, fourth, fifth, sixth, and eighth respondents, are concurrent tortfeasors because they are responsible for different acts/torts (i.e. negligent construction/supervision on the part of the second respondent, Mr Vining, and negligent inspection on the part of the Council) that have combined to produce the same damage giving rise to concurrent liability. Concurrent liability arises where there is a coincidence of separate acts which by their conjoined effect cause damage (*Allison v KPMG Peat Marwick* [2000] 1 NZLR 560 at 584 (CA)).

[673] Under section 17 of the Law Reform Act 1936 any tortfeasor is entitled to claim a contribution from any other tortfeasor in respect of the amount to which it would otherwise be liable.

[674] The basis of recovery of contribution provided for in s17(1)(c) is as follows:

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

[675] The approach to be taken in assessing a claim for contribution is provided in section 17(2) of the Law Reform Act 1936. In essence, it provides 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.

[676] 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. In *Mount*

Albert Borough Council v Johnson [1979] 2 NZLR 234 (CA), the Court apportioned responsibility for the damages at 80% to the builder and 20% to the Council on the basis that primary responsibility lay with the builder as the person responsible for construction in accordance with the bylaws and that the inspector's function was supervisory. That position was upheld and adopted recently in *Body Corporate 160361 & Anor v Auckland City Council* HC AK CIV 2003-404-006306 25 June 2007, Harrison J, and by Baragwanath J in *Dicks*. However, in another recent leaky home case, Judge Hubble fixed the Council's liability at 60% (*Standen v Waitakere City Council & Ors*), Waitakere District Court, CIV 2657/04, June 2007).

[677] As in *Mount Albert v Johnson* I am satisfied that primacy for the damage to the Owners' dwelling rests with the second, fourth and fifth respondents.

[678] It was Mr Vining's responsibility to carry out, or to ensure that the building works were carried out in accordance with the building code and the building consent. It is a condition of every building consent that the building work is to be undertaken in accordance with the plans and specifications so as to comply with the building code, and that was Mr Vining's role and the observance of that requirement was Mr Vining's primary responsibility.

[679] It was BPL's and Mr Bidlake's responsibility to carry out the specialist cladding work in accordance with the building consent and the building code, and that was BPL's and Mr Bidlake's role and the observance of that requirement was BPL's and Mr Bidlake's primary responsibility.

[680] It was Equus' responsibility to provide proper and adequate technical information and advice regarding the use and limitations of Chevaline Dexx waterproofing membrane so that the waterproofing work, when undertaken by BPL and Mr Bidlake, would meet the performance criteria set out in the building code, and that was Equus' role and the observance of that requirement was Equus' primary responsibility.

[681] The Council's role and the Architect's role on the other hand, are essentially supervisory and to that extent I consider that their responsibilities should be less than that of the principal author(s) of the damage, although in the circumstances of the present case, their failures in respect of dealing with the change of cladding, as opposed to merely inspecting or observing, and approving the works, serves to extend their roles and increase their culpability for the failures in my view.

[682] Whilst the first respondents are liable for the entire amount of the Owners' loss and damages caused by water ingress and associated damage in the amount of $228,042.96; the second respondent, Mr Vining, is liable for the Owner's loss and damages in the amount of $189,982.60; the third respondent, the Architect is liable for the Owner's loss and damages in the amount of $174,408.96; the fourth respondent, BPL, is liable for the Owner's loss and damages in the amount of $141,706.13; the fifth respondent, Peter Bidlake, is liable for the Owner's loss and damages in the amount of $141,706.13; the sixth respondent, the Council, is liable for the Owner's loss and damages in the amount of $164,899.70; and, the eighth respondent, Equus, is liable for the Owner's loss and damages in the amount of $69,026.51; the first respondents are entitled to be indemnified against the Owners' loss

and damages for which I have found them liable, by each and any of the other respondents to the extent disclosed above, and each of the other respondents, as concurrent tortfeasors, is entitled to a contribution toward those amounts from each and every of the other respondents (save for the first), according to the relevant responsibilities of the parties for the same damage, that I have determined (See: Schedule of Defects and Loss).

[683] Accordingly, if each respondent meets its obligations under this determination, this will result in the following payments being made by the respondents to the Claimants for loss and damages:

First respondent:	$ 12,101.95
Second respondent:	$ 76,255.26
Third respondent:	$ 25,237.72
Fourth respondent:	$ 37,381.46
Fifth respondent:	$ 37,381.46
Sixth respondent:	$ 25,881.80
Eighth respondent	$ 13,803.31
Total	$228,042.96

COSTS

[684] The Owners submit that some of the arguments raised by the respondents are without substantial merit and therefore justify an award of costs under section 43 of the Act. These arguments include:

- Allegations that the Owners failed to mitigate or were guilty of contributory negligence;

- The arguments by the Council that the Owners are not within the category of individuals that the New Zealand Courts have historically said are owed common law obligations by councils in relation to consents and inspections;

- Evidence by Mr Vining as to his lack of personal involvement;

- Spurious arguments raised as to the cause of leaks;

- Resistance to the admission of Russell Cooney's supplementary brief of evidence.

[685] Mr Galloway submits that it is difficult to attribute a particular amount to these costs but submits that an award of $20,000.00 would be appropriate.

[686] Mr Galloway submits that the WHRS system is supposed to deliver a quick and cost effective method of dealing with claims and that objective is undermined if respondents and their experts behave in the way that they have in this proceeding. He further submits that a message should be sent that arguments without substantive merit will be met with an award of costs as provided by the Act.

[687] The Walshaws claim costs against all other parties found liable in contract or tort, to be paid and then apportioned on the same basis as the damages.

[688] The power to award costs is addressed at clause 43 of the Act, which provides:

> **43 Costs of adjudication proceedings**
>
> (1) An adjudicator may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if the adjudicator considers that the party has caused those costs and expenses to be incurred unnecessarily by-
>
> (a) bad faith on the part of that party; or
>
> (b) allegations or objections by that party that are without substantial merit
>
> (2) If the adjudicator does not make a determination under subsection (1) the parties must meet their own costs and expenses.

[689] I think it is fair to summarise the legal position by saying that an Adjudicator has a limited discretion to award costs which should be exercised judicially, not capriciously.

[690] I have carefully considered the parties' claims for costs, however I am not persuaded that any party has acted in bad faith, or that its allegations or objections were without substantial merit such that an award of costs would be appropriate in this case. I accept that there was considerable dispute in respect of the facts and conflicting opinions and argument in respect of the legal principles to be applied to those facts, some of those matters being relatively novel and requiring more extensive research, consideration, and analysis,

than would ordinarily be the case in a simple dispute involving a builder and a local authority for example.

[691] I am only too conscious that this has been a most unpleasant and expensive saga for all of the parties. This has been a complicated and difficult case involving nine parties and more than 70 alleged defects/causes of water ingress and the end result will no doubt come as a great disappointment to some, but each took the risk that its views would be vindicated in the adjudication, and in the end result, the Owners have been largely successful overall.

[692] In the result, I am grateful for the capable conduct of each party's case in this adjudication.

CONCLUSION AND ORDERS

[693] For the reasons set out in this determination, and rejecting all arguments to the contrary, I determine:

[a] The first respondents are in breach of contract and are liable to the Claimants in damages for the loss caused by that breach in the sum of $228,042.96.

[b] The second respondent is in breach of the duty of care owed to the claimants and is liable to the claimants in damages for the loss caused by that breach in the sum of $189,982.60.

[c] The second respondent is in breach of the duty of care owed to the first respondents and is liable to the first respondents in damages for the loss caused by that breach in the sum of $189,982.60.

[d] The third respondent is in breach of the duty of care owed to the claimants and is liable to the claimants in damages for the loss caused by that breach in the sum of $174,408.96.

[e] The third respondent is in breach of the duty of care owed to the first respondents and is liable to the first respondents in damages for the loss caused by that breach in the sum of $174,408.96.

[f] The third respondent is in breach of contract, and is liable to the first respondents in damages for the loss caused by that breach in the sum of $178,142.96.

[g] The fourth respondent is in breach of the duty of care owed to the claimants and is liable to the claimants in damages for the loss caused by that breach in the sum of $141,706.13.

[h] The fourth respondent is in breach of the duty of care owed to the first respondents and is liable to the first respondents in damages for the loss caused by that breach in the sum of $141,706.13.

[i] The fifth respondent is in breach of the duty of care owed to the claimants and is liable to the claimants in damages for the loss caused by that breach in the sum of $141,706.13.

[j] The fifth respondent is in breach of the duty of care owed to the first respondents and is liable to the first respondents in damages for the loss caused by that breach in the sum of $141,706.13.

[k] The sixth respondent is in breach of the duty of care owed to the claimants and is liable to the claimants in damages for the loss caused by that breach in the sum of $164,899.70.

[l] The sixth respondent is in breach of the duty of care owed to the first respondents and is liable to the first respondents in

damages for the loss caused by that breach in the sum of $164,899.70.

[m] The eighth respondent is in breach of the duty of care owed to the claimants and is liable to the claimants in damages for the loss caused by that breach in the sum of $69,026.51.

[n] The eighth respondent is in breach of the duty of care owed to the first respondents and is liable to the first respondents in damages for the loss caused by that breach in the sum of $69,026.51.

[o] The eighth respondent is in breach of the duty of care owed to the fourth respondent and is liable to the fourth respondent in damages for the loss caused by that breach in the sum of $69,026.51.

[p] The claim against the seventh respondent, Doug Smith Limited, fails and I make no order against it.

[q] The claim against the ninth respondent, Central Tile Distributors Limited, fails and I make no order against it.

[r] As a result of the breaches referred to in [b] – [e] and [g] - [o] above, the second respondent on the one hand and the third, fourth, fifth, sixth, and eighth respondents on the other hand are concurrent tortfeasors, and each is entitled to a contribution toward the amount that I have found each liable for in loss and damages to the claimants and the first respondents from each and every of the other respondents (save for the first), according to the relevant responsibilities of the parties for the same damage that I have determined (See: Schedule of Defects and Loss annexed hereto).

[s] As a result of the breaches referred to in [a], [b], [d], [g], [h], [i], [k] and [m] above, the gross entitlement of the claimants is $228,042.96.

[t] As a result of the breaches referred to in [c], [e], [f], [h], [j], [l], and [n] above, the gross entitlement of the first respondents is $178,142.96.

[u] I make no orders as to costs. The parties shall bear their own costs in this matter.

[v] The payments that I have directed to be made by the parties to this adjudication in [a] - [o] above, are conditional upon the claimants obtaining a building consent and CCC from the Council for the remedial works described herein without any obligation to completely reclad the dwelling. Of course they are free to do so if they so choose.

[w] In the event that the Council requires a complete re-clad as a condition of the building consent for the remedial work, and/or, declines to issue of a CCC on the proper completion of the remedial works described herein without a full re-clad of the dwelling, the amount of damages that the claimants will be entitled to receive from the respondents is $323,804.09 together with such further amount that may be appropriate in the circumstances, to take account of any increased costs in labour, plant, and materials, that the Owners may incur from the date of this determination, and that total amount will be payable by the respondents in the proportions determined herein.

[x] The claimants are granted leave to file an application with the WHRS for further directions or determination in respect of such further amounts that may be payable to the claimants pursuant to [w] above.

[y] In the interests of fairness and justice, the time for completion of the claimants' remedial works is fixed at 12 months from the date of this determination which should allow the claimants adequate time to prepare plans, apply for a consent, call for tenders, and execute the remedial works and to obtain a CCC from the Council for the consented works.

[z] In the event of any practical/timing difficulties arising in relation to the implementation of this determination, the parties are granted leave to bring the matter back before an Adjudicator for further directions or determination.

[aa] In the event that the claimants fail or neglect to file an application for further directions or determination pursuant to [x] above, the amounts determined herein as being payable forthwith by the respondents, shall be the full extent of the respondents' liabilities in respect of the matters which are the subject of this adjudication.

Therefore, I make the following orders:

(1) The first respondents, Christopher and Margaret Walshaw, are jointly and severally liable to pay the claimants the sum of $228,042.96 forthwith.

(s42(1))

(2) The second respondent, Peter Vining, is liable to pay the claimants the sum of $189,982.60 forthwith.

(s42(1))

(3) The second respondent, Peter Vining, is liable to pay the first respondents the sum of $189,982.60 forthwith.

(s42(1))

(4) The third respondent, Warren & Mahoney, is liable to pay the claimants the sum of $174,408.96 forthwith.

(s42(1))

(5) The third respondent, Warren & Mahoney, is liable to pay the first respondents the sum of $178,142.96 (for breach of contract) forthwith.

(s42(1))

(6) The fourth respondent, P K Bidlake Painters Limited, is liable to pay the claimants the sum of $141,706.13 forthwith.

(s42(1))

(7) The fourth respondent, P K Bidlake Painters Limited, is liable to pay the first respondents the sum of $141,706.13 forthwith.

(s42(1))

(8) The fifth respondent, Peter Bidlake, is liable to pay the claimants the sum of $141,706.13 forthwith.

(s42(1))

(9) The fifth respondent, Peter Bidlake, is liable to pay the first respondents the sum of $141,706.13 forthwith.

(s42(1))

(10) The sixth respondent, Palmerston North City Council, is liable to pay the claimants the sum of $164,899.70 forthwith.

(s42(1))

(11) The sixth respondent, Palmerston North City Council, is liable to pay the first respondents the sum of $164,899.70 forthwith.

(s42(1))

(12) The eighth respondent, Equus Industries Limited, is liable to pay the claimants the sum of $69,026.51 forthwith.

(s42(1))

(13) The eighth respondent, Equus Industries Limited, is liable to pay the first respondents the sum of $69,026.51 forthwith.

(s42(1))

(14) The eighth respondent, Equus Industries Limited, is liable to pay the fourth respondent the sum of $69,026.51 forthwith.

(s42(1))

(15) In the event that the second respondent pays the claimants or the first respondents the sum of $189,982.60, he is entitled to a contribution from the third, fourth, fifth, sixth, and eighth respondents in respect of the amounts which the second respondent on the one hand, and the third, fourth, fifth, sixth, and eighth respondents on the other hand, have been found jointly liable for breach of the duty of care.

(s29(2)(a))

(16) In the event that the third respondent pays the claimants or the first respondents the sum of $174,408.96, it is entitled to a contribution from the second, fourth, fifth, sixth, and eighth respondents in respect of the amounts which the third respondent on the one hand, and the second, fourth, fifth, sixth, and eighth respondents on the other hand, have been found jointly liable for breach of the duty of care.

(s29(2)(a))

(17) In the event that the fourth respondent pays the claimants or the first respondents the sum of $141,706.13, it is entitled to a contribution from the second, third, fifth, sixth, and eighth respondents in respect of the amounts which the fourth respondent on the one hand, and the second, third, fifth, sixth, and eighth respondents on the other hand, have been found jointly liable for breach of the duty of care.

(s29(2)(a))

(18) In the event that the fifth respondent pays the claimants or the first respondents the sum of $141,706.13, he is entitled to a contribution from the second, third, fourth, sixth, and eighth respondents in respect of the amounts which the fifth respondent on the one hand, and the second, third, fourth, sixth, and eighth respondents on the other hand, have been found jointly liable for breach of the duty of care.

(s29(2)(a))

(19) In the event that the sixth respondent pays the claimants or the first respondents the sum of $164,899.70, it is entitled to a contribution from the second, third, fourth, fifth, and eighth respondents in respect of the amounts which the sixth respondent on the one hand, and the second, third, fourth, fifth, and eighth respondents on the other hand, have been found jointly liable for breach of the duty of care.

(s29(2)(a))

(20) In the event that the eighth respondent pays the claimants or the first respondents the sum of $69,026.51, it is entitled to a contribution from the second, third, fourth, fifth, and sixth respondents in respect of the amounts which the eighth respondent on the one hand, and the second, third, fourth, fifth and sixth respondents on the other hand, have been found jointly liable for breach of the duty of care.

(s29(2)(a))

(21) To summarise the position therefore, if all respondents meet their obligations under this interim determination, this will result in the following payments being made forthwith:

To the Claimants by:

First respondent:	$ 12,101.95
Second respondent:	$ 76,255.26
Third respondent:	$ 25,237.72
Fourth respondent:	$ 37,381.46
Fifth respondent:	$ 37,381.46

Sixth respondent:		$ 25,881.80
Eighth respondent		$ 13,803.31
Total	amount of this interim determination	$228,042.96

and

To the first respondents by the third respondent, being the difference between the third respondent's contractual liability to the first respondents and its tortious liability; the amount of $3,734.00

(s29(2)(a))

(22) The parties shall meet their own costs and expenses in this matter.

(s43(2))

(23) The payments that I have directed to be made by the parties to this adjudication in (1) – (21) above are conditional upon the sixth respondent issuing the claimants a building consent for the remedial work without the requirement for a complete re-clad, and issuing a CCC on the proper completion of the remedial works pursuant to the building consent.

(s43(3)&(4))

(24) In the event of the sixth respondent requiring a complete re-clad of the claimants' dwelling as a condition of: the issue of a building consent for the remedial works consequent upon the water penetration and damage of the dwelling; or the issue of a CCC on the proper completion of those works; the claimants are granted leave to file an application for further directions or determination in respect of such further amounts that may be payable by the respondents to the claimants in respect of the matters that are the subject of this adjudication, within one calendar year of the date of this interim determination.

(s36(i))

(25) In the event that the claimants shall fail or neglect to file an application for further directions or determination pursuant to (24) above, the amounts determined herein as being payable by the respondents to the claimants, shall be the full extent of the respondents' liabilities to the claimants in respect of the matters which are the subject of this adjudication.

(s36(i))

Dated this 30th day of January 2008

_____

JOHN GREEN

ADJUDICATOR

STATEMENT OF CONSEQUENCES

IMPORTANT

Statement of consequences for a respondent if the respondent takes no steps in relation to an application to enforce the adjudicator's determination.

If the Adjudicator's determination states that a party to the adjudication is to make a payment, and that party takes no step to pay the amount determined by the Adjudicator, the determination may be enforced as an order of the District Court including, the recovery from the party ordered to make the payment of the unpaid portion of the amount, and any applicable interest and costs entitlement arising from enforcement.

SCHEDULE OF DEFECTS AND LOSS											
DEF REF	% CONT	AMOUNT	DED BETT	NET AMT	ITEM AMT	%AMOUNT	%MISC	%P&G.MAR	SUBTOTAL	GST	TOTAL
1.0		13,962.00	543.60	13,418.40		-	-				
1a	55				7,380.12	0.12617	6,553.90	6,045.68	19,979.70	2,497.46	22,477.17
1b	5				670.92	0.01147	595.81	549.61	1,816.34	227.04	2,043.38
1c	3				402.55	0.00688	357.49	329.76	1,089.80	136.23	1,226.03
1d	2				268.37	0.00459	238.32	219.84	726.53	90.82	817.35
1e	5				670.92	0.01147	595.81	549.61	1,816.34	227.04	2,043.38
1h	30				4,025.52	0.06882	3,574.86	3,297.64	10,898.02	1,362.25	12,260.27
2		6,053.00	219.00	5,834.00		-	-	-	-	-	-
2a	15				875.10	0.01496	777.13	716.87	2,369.10	296.14	2,665.24
2b	80				4,667.20	0.07979	4,144.70	3,823.30	12,635.20	1,579.40	14,214.60
2c	5				291.70	0.00499	259.04	238.96	789.70	98.71	888.41
3		0.00		0.00		-	-	-	-	-	-
						-	-	-	-	-	-
4		239.00	21.60	217.40		-	-	-	-	-	-
4b	50				108.70	0.00186	96.53	89.05	294.28	36.78	331.06
4c	50				108.70	0.00186	96.53	89.05	294.28	36.78	331.06
5		1,165.00	40.80	1,124.20		-	-	-	-	-	-
5a	0				-	-	-	-	-	-	-
5b	80				899.36	0.01538	798.67	736.74	2,434.78	304.35	2,739.12
5c	20				224.84	0.00384	199.67	184.19	608.69	76.09	684.78
6	100	750.00		750.00	750.00	0.01282	666.04	614.39	2,030.42	253.80	2,284.23
						-	-	-	-	-	-
7		864.00	25.80	838.20		-	-	-	-	-	-
7a	80				670.56	0.01146	595.49	549.31	1,815.36	226.92	2,042.28
7b	15				125.73	0.00215	111.65	103.00	340.38	42.55	382.93
7c	5				41.91	0.00072	37.22	34.33	113.46	14.18	127.64
8		1,400.00		1,400.00		-	-	-	-	-	-
8a	50				700.00	0.01197	621.63	573.43	1,895.06	236.88	2,131.95

8b	48				672.00	0.01149	596.77	550.49	1,819.26	227.41	2,046.67
8c	2				28.00	0.00048	24.87	22.94	75.80	9.48	85.28
9		1,916.00	120.00	1,796.00		-	-	-	-	-	-
9a	70				1,257.20	0.02149	1,116.45	1,029.88	3,403.53	425.44	3,828.97
9b	30				538.80	0.00921	478.48	441.38	1,458.66	182.33	1,640.99
10		980.00	20.40	959.60		-	-	-	-	-	-
10A	85				815.66	0.01395	724.35	668.18	2,208.18	276.02	2,484.20
10B	15				143.94	0.00246	127.83	117.91	389.68	48.71	438.39
11		1,020.00	20.40	999.60		-	-	-	-	-	-
11A	80.75				807.18	0.01380	716.81	661.23	2,185.22	273.15	2,458.37
11B	14.25				142.44	0.00244	126.50	116.69	385.63	48.20	433.83
11c	5				49.98	0.00085	44.38	40.94	135.31	16.91	152.22
12		0.00		0.00		-	-	-	-	-	-
						-	-	-	-	-	-
13	100	150.00		150.00	150.00	0.00256	133.21	122.88	406.08	50.76	456.85
						-	-	-	-	-	-
14		1,605.00	94.80	1,510.20		-	-	-	-	-	-
14A	85				1,283.67	0.02195	1,139.96	1,051.56	3,475.19	434.40	3,909.59
14B	15				226.53	0.00387	201.17	185.57	613.27	76.66	689.93
15		1,328.00	69.00	1,259.00		-	-	-	-	-	-
15A	85				1,070.15	0.01830	950.34	876.65	2,897.15	362.14	3,259.29
15B	15				188.85	0.00323	167.71	154.70	511.26	63.91	575.17
16	100	2,400.00		2,400.00	2,400.00	0.04103	2,131.32	1,966.04	6,497.36	812.17	7,309.53
						-	-	-	-	-	-
17	100	566.00		566.00	566.00	0.00968	502.64	463.66	1,532.29	191.54	1,723.83
						-	-	-	-	-	-
18	100	546.00		546.00	546.00	0.00933	484.87	447.27	1,478.15	184.77	1,662.92
						-	-	-	-	-	-
19	100	828.00		828.00	828.00	0.01416	735.30	678.28	2,241.59	280.20	2,521.79
						-	-	-	-	-	-
20	100	150.00		150.00	150.00	0.00256	133.21	122.88	406.08	50.76	456.85

						-	-	-	-	-	-
21		1,905.00	67.80	1,837.20		-	-	-	-	-	-
21A	85				1,561.62	0.02670	1,386.79	1,279.26	4,227.67	528.46	4,756.13
21B	15				275.58	0.00471	244.73	225.75	746.06	93.26	839.32
22		840.00	30.00	810.00		-	-	-	-	-	-
22a	95				769.50	0.01316	683.35	630.36	2,083.22	260.40	2,343.62
22d	5				40.50	0.00069	35.97	33.18	109.64	13.71	123.35
23	100	840.00	30.00	810.00	810.00	0.01385	719.32	663.54	2,192.86	274.11	2,466.97
						-	-	-	-	-	-
24		2,979.00	142.80	2,836.20		-	-	-	-	-	-
24A	25.5				723.23	0.01236	642.26	592.46	1,957.95	244.74	2,202.70
24B	4.5				127.63	0.00218	113.34	104.55	345.52	43.19	388.71
24m	70				1,985.34	0.03394	1,763.08	1,626.36	5,374.78	671.85	6,046.62
25		0.00				-	-	-	-	-	-
						-	-	-	-	-	-
26	100	550.00	15.00	535.00	535.00	0.00915	475.11	438.26	1,448.37	181.05	1,629.42
						-	-	-	-	-	-
27	100	646.00		646.00	646.00	0.01104	573.68	529.19	1,748.87	218.61	1,967.48
						-	-	-	-	-	-
28		2,307.00	30.00	2,277.00		-	-	-	-	-	-
28A	80.75				1,838.68	0.03144	1,632.83	1,506.22	4,977.73	622.22	5,599.94
28B	14.25				324.47	0.00555	288.15	265.80	878.42	109.80	988.23
28m	5				113.85	0.00195	101.10	93.26	308.22	38.53	346.75
29		1,521.00	62.40	1,458.60		-	-	-	-	-	-
29A	85				1,239.81	0.02120	1,101.01	1,015.63	3,356.45	419.56	3,776.01
29B	15				218.79	0.00374	194.30	179.23	592.32	74.04	666.35
30		1,435.00	46.20	1,388.80		-	-	-	-	-	-
30A	68				944.38	0.01615	838.66	773.62	2,556.67	319.58	2,876.25
30B	12				166.66	0.00285	148.00	136.52	451.18	56.40	507.57
30m	10				138.88	0.00237	123.33	113.77	375.98	47.00	422.98
30n	10				138.88	0.00237	123.33	113.77	375.98	47.00	422.98

31		1,090.00	40.80	1,049.20		-	-	-	-	-	-
31a	5				52.46	0.00090	46.59	42.97	142.02	17.75	159.77
31b	5				52.46	0.00090	46.59	42.97	142.02	17.75	159.77
31c	50				524.60	0.00897	465.87	429.74	1,420.21	177.53	1,597.74
31d	40				419.68	0.00718	372.70	343.80	1,136.17	142.02	1,278.19
32		1,839.00	42.00	1,797.00		-	-	-	-	-	-
32A	85				1,527.45	0.02611	1,356.45	1,251.26	4,135.16	516.90	4,652.06
32B	15				269.55	0.00461	239.37	220.81	729.73	91.22	820.95
33		1,517.00	73.20	1,443.80		-	-	-	-	-	-
33A	85				1,227.23	0.02098	1,089.84	1,005.33	3,322.40	415.30	3,737.70
33B	15				216.57	0.00370	192.32	177.41	586.31	73.29	659.59
34		1,717.00	73.20	1,643.80		-	-	-	-	-	-
34A	85				1,397.23	0.02389	1,240.81	1,144.59	3,782.63	472.83	4,255.46
34B	15				246.57	0.00422	218.97	201.99	667.52	83.44	750.96
35		2,889.00	102.00	2,787.00		-	-	-	-	-	-
35A	85				2,368.95	0.04050	2,103.74	1,940.61	6,413.30	801.66	7,214.96
35B	15				418.05	0.00715	371.25	342.46	1,131.76	141.47	1,273.23
36	100	2,605.00	180.00	2,425.00	2,425.00	0.04146	2,153.52	1,986.52	6,565.04	820.63	7,385.67
TOTAL		60,602.00	2110.80	58,491.20							
add Misc		25,650.00	4650.00	21,000.00							
add P&G		30,943.00		30,943.00							
Total		117,195.00	6760.80	110,434.20	58,491.20	1.00			158,349.30	19,793.66	178,142.96
				47915.1							
SUBTOTAL				158,349.30							
GST				19793.663							
TOTAL				178,142.96							

							LIABILITY FOR DAMAGES							**APPORTIONM**		
R1	**R2**	**R3**	**R4**	**R5**	**R6**	**R8**	**R1**	**R2**	**R3**	**R4**	**R5**	**R6**	**R8**	**R1**	**R2**	**R3**
							22,477.17	22,477.17	22,477.17			22,477.17		0	70	15
							2,043.38	2,043.38						0	100	
							1,226.03	1,226.03						0	100	
							817.35	817.35						0	100	
							2,043.38	2,043.38						0	100	
							12,260.27	12,260.27	12,260.27	12,260.27	12,260.27	12,260.27		0	8	6
							2,665.24	2,665.24	2,665.24	2,665.24	2,665.24	2,665.24		0	70	10
							14,214.60	14,214.60	14,214.60	4,264.38	4,264.38	4,264.38		0	40	10
							888.41	888.41	888.41	888.41	888.41	888.41		0	70	10
								-	-	-	-	-				
								-	-	-	-	-				
								-	-	-	-	-				
								-	-	-	-	-				
							331.06	331.06	331.06	331.06	331.06	331.06		0	40	10
							331.06							100		
								-	-	-	-	-				
								-	-	-	-	-				
							-									
							2,739.12	2,739.12	2,739.12	2,739.12	2,739.12	2,739.12	2,739.12	0	10	15
							684.78	684.78	684.78	684.78	684.78	684.78		0	40	10
								-	-	-	-	-				
							2,284.23	2,284.23	2,284.23	2,284.23	2,284.23	2,284.23		0	70	10
								-	-	-	-	-				
								-	-	-	-	-				
							2,042.28	2,042.28	2,042.28	2,042.28	2,042.28	2,042.28		0	40	10
							382.93	382.93	382.93	382.93	382.93	382.93		0	70	10
							127.64							100		
								-	-	-	-	-				
								-	-	-	-	-				
							2,131.95	2,131.95						0	100	

							2,046.67	2,046.67	2,046.67	2,046.67	2,046.67	2,046.67		0	70	10
							85.28			85.28	85.28			0		
								-	-	-	-	-				
								-	-	-	-	-				
							3,828.97	3,828.97	3,828.97	3,828.97	3,828.97	3,828.97		0	70	10
							1,640.99	1,640.99	1,640.99	1,640.99	1,640.99	1,640.99		0		
								-	-	-	-	-				
								-	-	-	-	-				
							2,484.20	2,484.20	2,484.20	2,484.20	2,484.20	2,484.20	2,484.20	0	10	15
							438.39	438.39						0	100	
								-	-	-	-	-				
								-	-	-	-	-				
							2,458.37	2,458.37	2,458.37	2,458.37	2,458.37	2,458.37	2,458.37	0	10	15
							433.83	433.83						0	100	
							152.22			152.22	152.22			0		
								-	-	-	-	-				
								-	-	-	-	-				
								-	-	-	-	-				
							456.85	456.85						0	100	
								-	-	-	-	-				
								-	-	-	-	-				
							3,909.59	3,909.59	3,909.59	3,909.59	3,909.59	3,909.59	3,909.59	0	10	15
							689.93	689.93						0	100	
								-	-	-	-	-				
								-	-	-	-	-				
							3,259.29	3,259.29	3,259.29	3,259.29	3,259.29	3,259.29	3,259.29	0	10	15
							575.17	575.17						0	100	
								-	-	-	-	-				
							7,309.53		7,309.53			7,309.53		0		50
								-	-	-	-	-				
							1,723.83	1,723.83		1,723.83	1,723.83			0	20	
								-	-	-	-	-				
							1,662.92			1,662.92	1,662.92			0		
								-	-	-	-	-				
							2,521.79					2,521.79		80		
								-	-	-	-	-				
							456.85			456.85	456.85			0		

								-	-	-	-	-					
								-	-	-	-	-					
							4,756.13	4,756.13	4,756.13	4,756.13	4,756.13	4,756.13	4,756.13	0	10	15
							839.32	839.32						0	100	
								-	-	-	-	-					
								-	-	-	-	-					
							2,343.62			2,343.62	2,343.62			0		
							123.35	123.35	123.35	123.35	123.35	123.35		0	10	10
								-	-	-	-	-					
							2,466.97			2,466.97	2,466.97			0		
								-	-	-	-	-					
								-	-	-	-	-					
							2,202.70	2,202.70	2,202.70	2,202.70	2,202.70	2,202.70	2,202.70	0	10	15
							388.71	388.71						0	100	
							6,046.62							100		
								-	-	-	-	-					
								-	-	-	-	-					
								-	-	-	-	-					
							1,629.42			1,629.42	1,629.42			0		
								-	-	-	-	-					
							1,967.48			1,967.48	1,967.48			0		
								-	-	-	-	-					
								-	-	-	-	-					
							5,599.94	5,599.94	5,599.94	5,599.94	5,599.94	5,599.94	5,599.94	0	10	15
							988.23	988.23						0	100	
							346.75							100		
								-	-	-	-	-					
								-	-	-	-	-					
							3,776.01	3,776.01	3,776.01	3,776.01	3,776.01	3,776.01	3,776.01	0	10	15
							666.35	666.35						0	100	
								-	-	-	-	-					
								-	-	-	-	-					
							2,876.25	2,876.25	2,876.25	2,876.25	2,876.25	2,876.25	2,876.25	0	10	15
							507.57	507.57						0	100	
							422.98			422.98	422.98			0		
							422.98							100		
								-	-	-	-	-					

								-	-	-	-	-					
							159.77	159.77	159.77	159.77	159.77	159.77		0	40	10	
							159.77							100			
							1,597.74	1,597.74	1,597.74	1,597.74	1,597.74	1,597.74		0	60	10	
							1,278.19			1,278.19	1,278.19			0			
								-	-	-	-	-					
								-	-	-	-	-					
							4,652.06	4,652.06	4,652.06	4,652.06	4,652.06	4,652.06	4,652.06	0	10	15	
							820.95	820.95						0	100		
								-	-	-	-	-					
								-	-	-	-	-					
							3,737.70	3,737.70	3,737.70	3,737.70	3,737.70	3,737.70	3,737.70	0	10	15	
							659.59	659.59						0	100		
								-	-	-	-	-					
								-	-	-	-	-					
							4,255.46	4,255.46	4,255.46	4,255.46	4,255.46	4,255.46	4,255.46	0	10	15	
							750.96	750.96						0	100		
								-	-	-	-	-					
								-	-	-	-	-					
							7,214.96	7,214.96	7,214.96	7,214.96	7,214.96	7,214.96	7,214.96	0	10	15	
							1,273.23	1,273.23						0	100		
								-	-	-	-	-					
							7,385.67	7,385.67	7,385.67	7,385.67	7,385.67	7,385.67		0	40	10	
							178,142.96	148,410.91	136,245.44	110,698.27	110,698.27	128,817.01	53,921.78				
						%	100	83.31	76.48	62.14	62.14	72.31	30.27				
		cons damages & gds					49,900.00	41,571.69	38,163.52	31,007.86	31,007.86	36,082.69	15,104.73	consequential d			
		TOTAL					**228,042.96**	**189,982.60**	**174,408.96**	**141,706.13**	**141,706.13**	**164,899.70**	**69,026.51**	**TOTALS**			

ENT AS A PERCENTA				**APPORTIONMENT OF DAMAGES**							
R4	**R5**	**R6**	**R8**	**R1**	**R2**	**R3**	**R4**	**R5**	**R6**	**R8**	**CHECK**
		15		0	15,734.02	3,371.57			3,371.57		22,477.17
				0	2,043.38						2,043.38
				0	1,226.03						1,226.03
				0	817.35						817.35
				0	2,043.38						2,043.38
40	40	6		0	980.82	735.62	4,904.11	4,904.11	735.62		12,260.27
											-
											-
5	5	10		0	1,865.67	266.52	133.26	133.26	266.52		2,665.24
20	20	10		0	5,685.84	1,421.46	2,842.92	2,842.92	1,421.46		14,214.60
5	5	10		0	621.89	88.84	44.42	44.42	88.84		888.41
											-
											-
											-
											-
20	20	10		0	132.42	33.11	66.21	66.21	33.11		331.06
				331.06							331.06
											-
											-
											-
20	20	15	20	0	273.91	410.87	547.82	547.82	410.87	547.82	2,739.12
20	20	10		0	273.91	68.48	136.96	136.96	68.48		684.78
				0							-
5	5	10		0	1,598.96	228.42	114.21	114.21	228.42		2,284.23
											-
											-
20	20	10		0	816.91	204.23	408.46	408.46	204.23		2,042.28
5	5	10		0	268.05	38.29	19.15	19.15	38.29		382.93
				127.64							127.64
											-
											-
				0	2,131.95						2,131.95

5	5	10		0	1,432.67	204.67	102.33	102.33	204.67		2,046.67
50	50			0			42.64	42.64			85.28
											-
											-
5	5	10		0	2,680.28	382.90	191.45	191.45	382.90		3,828.97
50	50			0			820.49	820.49			1,640.99
											-
											-
20	20	15	20	0	248.42	372.63	496.84	496.84	372.63	496.84	2,484.20
				0	438.39						438.39
											-
											-
20	20	15	20	0	245.84	368.76	491.67	491.67	368.76	491.67	2,458.37
				0	433.83						433.83
50	50			0			76.11	76.11			152.22
											-
											-
											-
				0	456.85						456.85
											-
											-
20	20	15	20	0	390.96	586.44	781.92	781.92	586.44	781.92	3,909.59
				0	689.93						689.93
											-
											-
20	20	15	20	0	325.93	488.89	651.86	651.86	488.89	651.86	3,259.29
				0	575.17						575.17
											-
		50		0		3,654.76			3,654.76		7,309.53
											-
40	40			0	344.77		689.53	689.53			1,723.83
											-
50	50			0			831.46	831.46			1,662.92
											-
		20		2,017.43					504.36		2,521.79
											-
50	50			0			228.42	228.42			456.85

											-
											-
20	20	15	20	0	475.61	713.42	951.23	951.23	713.42	951.23	4,756.13
				0	839.32						839.32
											-
											-
50	50			0			1,171.81	1,171.81			2,343.62
35	35	10		0	12.33	12.33	43.17	43.17	12.33		123.35
											-
50	50			0			1,233.48	1,233.48			2,466.97
											-
											-
20	20	15	20	0	220.27	330.40	440.54	440.54	330.40	440.54	2,202.70
				0	388.71						388.71
				6,046.62							6,046.62
											-
											-
											-
50	50			0			814.71	814.71			1,629.42
											-
50	50			0			983.74	983.74			1,967.48
											-
											-
20	20	15	20	0	559.99	839.99	1,119.99	1,119.99	839.99	1,119.99	5,599.94
				0	988.23						988.23
				346.75							346.75
											-
											-
20	20	15	20	0	377.60	566.40	755.20	755.20	566.40	755.20	3,776.01
				0	666.35						666.35
											-
											-
20	20	15	20	0	287.63	431.44	575.25	575.25	431.44	575.25	2,876.25
				0	507.57						507.57
50	50			0			211.49	211.49			422.98
				422.98							422.98
											-

											-
20	20	10		0	63.91	15.98	31.95	31.95	15.98		159.77
				159.77							159.77
10	10	10		0	958.64	159.77	159.77	159.77	159.77		1,597.74
50	50			0			639.10	639.10			1,278.19
											-
											-
20	20	15	20	0	465.21	697.81	930.41	930.41	697.81	930.41	4,652.06
				0	820.95						820.95
											-
											-
20	20	15	20	0	373.77	560.65	747.54	747.54	560.65	747.54	3,737.70
				0	659.59						659.59
											-
											-
20	20	15	20	0	425.55	638.32	851.09	851.09	638.32	851.09	4,255.46
					750.96						750.96
											-
											-
20	20	15	20	0	721.50	1,082.24	1,442.99	1,442.99	1,082.24	1,442.99	7,214.96
				0	1,273.23						1,273.23
											-
20	20	10		0	2,954.27	738.57	1,477.13	1,477.13	738.57		7,385.67
				9,452.26	59,568.70	19,713.79	29,202.85	29,202.85	20,218.15	10,784.36	178,142.96
		total		178,142.96							
		%		5.31	33.44	11.07	16.39	16.39	11.35	6.05	100.00
amges and gd's				2,649.69	16,686.56	5,523.93	8,178.61	8,178.61	5,663.65	3,018.95	49,900.00
				12,101.95	**76,255.26**	**25,237.72**	**37,381.46**	**37,381.46**	**25,881.80**	**13,803.31**	**228,042.96**
				228,042.96							