CLAIM NO: 376

UNDER the Weathertight Homes Resolution Services Act 2002

IN THE MATTER	of an adjudication
BETWEEN	**JANICE LORRAINE** and **NOEL EWART HILL** Claimants
AND	**DIANNE** and **ROSS WHIMP** First Respondents
AND	**AKITA CONSTRUCTION LTD** Second Respondent
AND	**EUROBRIK PRODUCTS LTD** Third Respondent
AND	No Fourth Respondent, Jeff Young Contractors Ltd having been struck out
AND	No Fifth Respondent, David John Follas having been struck out
AND	No Sixth Respondent, Anthony Barry Watkins having been struck out
AND	No Seventh Respondent, Pat C Follas having been struck out
AND	No Eighth Respondent, Gary Grant Boswell having been struck out
AND	**NORTH SHORE CITY COUNCIL** Ninth Respondent
AND	No Tenth Respondent, Don England having been struck out

Hearing: 28-30 November 2005

Appearances: Counsel Mr Tee for the Claimants
Counsel Mr Wilson for the First Respondents
Mr Walden for the Third Respondent
No appearances for the Second and Ninth Respondents

DETERMINATION OF LIABILITY
28 April 2006

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BACKGROUND

[1] The Claimants lodged a claim under the Weathertight Homes Resolution Services Act 2002 ("the Act") in relation to the dwelling at 2/22 Norwood Road, Bayswater, Auckland. The claim was deemed to be eligible under the Act. The Claimants filed a Notice of Adjudication under s 26 of the Act with the Weathertight Homes Resolution Service ("WHRS") in December 2004.

[2] A preliminary conference was held at the WHRS offices in Auckland on 22 December 2004. Initially there were eight Respondents but over the next 11 months the Fourth, Fifth, Sixth, Seventh and Eighth Respondents were removed; the North Shore City Council was joined on the application of the First Respondents (as Ninth Respondent) and another party was joined and subsequently removed as Tenth Respondent.

[3] Within a month or so of the preliminary conference the remediation work on the Claimants' dwelling commenced and proceeded over the next few months. During the lead-up to the hearing I have issued ten Procedural Orders and five Memoranda to assist in the preparation for the hearing and to monitor the progress of the proceedings. An eleventh Procedural Order was issued on 8 December 2005 to record a settlement entered into between the Claimants and the Third Respondent during the hearing.

HEARING

[4] I conducted a site inspection of the property on Friday, 25 November 2005 in the presence of counsel Messrs Tee and Wilson. The hearing commenced on Monday, 28 November 2005 and concluded on Wednesday, 30 November 2005, taking place in the hearing room at the WHRS offices in Auckland City.

[5] The Claimants and First Respondents were represented by counsel at the hearing; the Third Respondent was represented by its director Mr Walden. The Second Respondent Akita Construction Ltd filed its Response dated 22 April 2005 and took no further part in the proceedings. The Ninth Respondent North Shore City Council, which was joined on the application of

the First Respondents, effectively took no part in the proceedings and did not file any substantive documents.

[6] The witnesses who gave evidence under oath or affirmation at the hearing were the following:

- Peter Jordan (Exhibit 1), called by the Claimants;
- Neil Alvey (Exhibit 2), called by the Claimants;
- Janice Hill (Exhibit 4), a Claimant;
- Andrew McIntyre (Exhibit 8), the WHRS Assessor;
- Noel Hill (Exhibit 9A), the other Claimant;
- Gregory O'Sullivan (Exhibit A), called by the First Respondents;
- Dianne Whimp (Exhibit B), a First Respondent;
- Ross Whimp (Exhibit C), the other First Respondent.

[7] Evidence was also given by Allan Taylor, an architect instructed by the Claimants to oversee the remediation work and in particular to keep track of the cost of the work. On the morning of the third hearing day it was agreed by counsel that the question of quantum would be put aside at that stage and that I was to give my determination only on the question of liability, with the parties then deciding what steps might follow that decision. Accordingly Mr Taylor's evidence has not formed part of this determination.

[8] It should also be recorded that at the hearing I obtained the consent of the parties to a reasonable extension to the timing of the completion of this determination, pursuant to s 40(1)(b) of the Act.

[9] Mr Tee, counsel for the Claimants, helpfully provided a folder containing 43 documents; a number of other exhibits including witness statements by his witnesses were produced at the hearing, as were witness statements by and for the First Respondents, as recorded in [6] above alongside the witnesses'

names. At the conclusion of the hearing the remaining parties, being the Claimants and the First Respondents, were provided with an opportunity to prepare and file written submissions, which both did, plus replies.

CHRONOLOGY AND PARTIES

[10] I set out below a brief history of the events that have led up to this application.

[11] In 1992 Mrs Whimp, then known as Dianne Butt, purchased the rear section at 22 Norwood Road, Bayswater, known as 2/22 Norwood Road. She obtained a building consent for the dwelling to be built on the section on 11 November 1992 and construction was undertaken from November / December 1992 until about June 1993. The North Shore City Council records the date of its final inspection as being 19 April 1993 but the "Advice of Completion of Building Work" form filled in and sent to the City Council by Mrs Whimp is dated 18 June 1993. Some cracks appearing in the cladding of the dwelling resulted in BRANZ being requested to visit and produce a report. The report is document 10 in the Claimants' folder. The Code Compliance Certificate was issued on 14 March 1995.

[12] The Claimants purchased the dwelling in April 1995. Settlement took place in May 1995. They became aware of leaks in the dwelling for the first time in January 1997 and found other leaking problems later that year. Despite remedial work the problems continued so in April 1998 the Claimants commissioned a report from Prendos Ltd. Its report is document 11 in the Claimants' documents. Following receipt of the Prendos report the Claimants contacted both the builder Akita Construction Ltd and the Whimps. The latter provided some guarantees and other documents from their records, while the former carried out some remedial work. Water ingress problems persisted and so the Claimants lodged an application with WHRS in January 2003, this document being received by the Service on 17 January 2003. The assessor completed his report on 30 September 2003 and as a result of a WHRS mediation the Claimants settled their claims against North Shore City Council and the plasterer Robert Gore Ltd.

[13] In their Notice of Adjudication dated 1 December 2004 the Claimants cited as parties Akita Construction Ltd, Eurobrik Products Ltd, Jeff Young Contractors Ltd, three directors of the company which had carried out the roofing work, plus one of its managers. Subsequently North Shore City Council was joined to the adjudication proceedings on the application of the First Respondents, and the plumber was joined and later removed as a party.

[14] Remediation was commenced in the latter part of 2004, and the adjudication took place in late November 2005, followed later by closing submissions.

[15] The Claimants purchased the dwelling from Mrs Whimp, who with her husband Ross Whimp are the First Respondents. The Second Respondent Akita Construction Ltd is the company which carried out the actual building work. Its principal, the late Brian Purdy, was an acquaintance of Mr and Mrs Whimp. The Third Respondent Eurobrik Products Ltd was involved in the supply and installation of the glass bricks used in the dwelling, while the Ninth Respondent North Shore City Council issued the building consent for the dwelling, carried out the inspections and issued the Code Compliance Certificate.

THE CLAIMS

[16] The jurisdictional basis of the claim is that the dwellinghouse at 2/22 Norwood Road, Bayswater is a "leaky building", which is defined in the Act as "a dwellinghouse into which water has penetrated as a result of any aspect of the design, construction, or alteration of the dwellinghouse, or materials used in its construction or alteration" (s5). The Claimants rely on the report of the WHRS assessor and the evidence of their witnesses Peter Jordan and Neil Alvey.

[17] The Claimants allege breach of contract by the First Respondents, relying on the warranties provided by Mrs Whimp in the Agreement for Sale and Purchase signed by her in April 1995.

[18] In addition they seek to recover in tort from the First Respondents, alleging they breached their non-delegable duty of care owed to the Claimants as the builder/developer of the property.

[19] The claim against the Second Respondent is in tort, alleging that as the actual builder, it failed to carry out the construction work in a proper and workmanlike manner and/or in accordance with the plans and building consent, and also that it failed to properly supervise the sub-trades. The Claimants also seek general damages and stigma damages from the First and Second Respondents.

[20] The claim against the Third Respondent Eurobrik Products Ltd was settled by agreement between it and the Claimants on the third day of the hearing – see Procedural Order No. 11.

[21] The First Respondents deny any liability to the Claimants but if found liable formally seek indemnification in respect of any amounts required to be paid by them to the Claimants from the Ninth Respondent, North Shore City Council. This indemnification is based on an alleged breach of duty of care by the Council, and a breach of its statutory duties under the Building Act 1991.

THE DAMAGE TO THE CLAIMANTS' DWELLING AND ITS CAUSES

[22] In this part of the determination I will consider the probable cause of any leaks, the resulting damage caused by the leaks and the remedial work required.

[23] Not only have I had the benefit of a report prepared by the WHRS assessor, but in addition I have had evidence from Peter Jordan and Neil Alvey, both called as witnesses by the Claimants. I am satisfied that all three of these "technical" witnesses qualify as experts. It should be clarified that Mr McIntyre, the WHRS assessor, is not a witness for any particular party; he has prepared his report as part of the WHRS process, and in this case the Claimants have chosen not to rely solely on Mr McIntyre's report but also to provide their own technical witnesses.

[24] In his witness statement (Exhibit 1) Mr Jordan states that his role is “to give expert evidence on the defects (he) observed and … identified from two site visits (he) made to the property 15 February 2005 and 2 March 2005”. Mr Alvey’s role was “to supervise the repair and replacement of decayed framing to the dwelling” and also “to provide expert opinion on the nature and extent of damage to the external timber frame and the likely cause of the damage” (Exhibit 2). It should be noted that the WHRS assessor Mr McIntyre concluded his report on 30 September 2003, some two years before the hearing of the claim.

[25] I will not be considering liability in this part of the determination. Also I will not be referring to the detailed requirements of the New Zealand Building Code, although I confirm that Clauses B2 “Durability” and E2 “External Moisture” and the meeting of their objectives is central to this claim.

[26] At para 6 (p 12) of his report Mr McIntyre sets out his view as to the causes of water entry into the dwelling. Messrs Jordan and Alvey concur with his conclusions, adding two other problem areas not identified by Mr McIntyre. Mr Jordan in particular expresses a slightly different perspective on a couple of the identified causes but these are minor so it is fair to say that the three experts did not disagree on the causes of water entry.

[27] The problem areas are as follows:

1. Roof and flashings.

2. Windows, cladding and walls.

3. Pergola and deck.

4. Entrapment of cladding.

5. Rainwater heads.

6. Kitchen extract vent.

1. Roof and Flashings

[28] Mr McIntyre considered that the roof parapet metal cap flashing downturns were too short and likely to be allowing moisture to enter the dwelling. Mr Jordan was more concerned with the cap flashings over unsealed plaster. Mr Alvey's conclusion was akin to that of Mr Jordan, and the combined opinion of the three experts leaves me in no doubt that the parapet cap flashings are the cause of significant leaking and resulting damage, especially in the north and east elevations, as set out in Exhibit 3 (which is at tab 42, p 388a, Claimants' document folder), which is a copy of the house plan which Mr Alvey has marked upon the various repairs and remediation work required.

[29] Mr McIntyre testifies that the rubber butynol membrane over the kitchen bay window in the northern elevation was poorly installed, allowing water to enter the building. Mr Jordan concurs, and Mr Alvey also accepts water entry through the window but he considers the cause to be the lack of upstand to the head and sill flashings. The opinion on the causes may differ but the conclusion is the same; water entered through defects in the bay window.

[30] The final leak identified by Mr McIntyre under this heading relates to the roof barge flashing over the northern wall of the garage, which he asserts is allowing water to enter the building by capillary action. Mr Jordan concurs that leaking is taking place in the area identified by Mr McIntyre (see his photos 6 and 17) but he sees the cause as lack of waterproofing of the short section of fascia which is butted into the stucco plaster on the northern wall of the garage. He identifies other causes for the damage in this area and these will be discussed below. The causes identified by Mr Alvey for the damage in this northern garage wall area do not coincide with Mr McIntyre's conclusion immediately above but will be seen below to concur with other causes put forward by Messrs McIntyre and Jordan.

2. Windows, Cladding and Walls

[31] Mr McIntyre states the cause as "the side and sill flashings are not joined correctly. The sill flashings are not deep enough to catch and direct water

externally from any water that leaks through the small mitered (sic) joint". Mr Jordan agrees that the sill flashings have insufficient depth and also cites the lack of appropriate stop endings. As referred to above Mr Alvey attributes the entry in the area of the kitchen window to inadequate flashings, and also the leaking damage under the bedroom windows on the west elevation. I am persuaded by the opinion of the three experts and their various photographs that there has been (in the words of Mr Jordan's statement) "substantial damage caused by water penetrating into the wall cavity from window to cladding junctions in several areas" due to inadequacies in the window flashings.

3. Pergola and Deck

[32] Mr McIntyre identifies both the pergola and the upper deck (to which most of the pergola is fixed) as causes of leaks. He states that "the pergola is embedded into the plaster, in (his) opinion a poor detail, allowing capillary and gravity leaks to occur". Regarding the deck he asserts that there is an absence of saddle flashings and cap flashings which allows moisture to enter the top of the barrier wall. Mr Jordan agrees with Mr McIntyre but makes the point that saddle flashings were not identified as a problem in 1993. His detailed explanation of the problem with the pergola is set out in para 16 of his witness statement (Exhibit 1). Mr Alvey was unable to comment because the pergola and deck had been removed by the time he first inspected the site. The two experts' oral evidence and their photographs leave me in no doubt that water penetration occurred in the pergola/upper deck (northern elevation) of the dwelling and that significant damage resulted.

4. Entrapment of Cladding

[33] In the words of Mr McIntyre "the cladding has been taken hard down and entrapped onto the concrete paving on the front entrance, on the southern elevation, around the front and the side of the garage on the south end, the eastern elevations and along the back of the garage northern elevation. This is allowing water to wick up into the structural timber framing". Mr Jordan concurs, adding that, not only is another result of this defect to prevent

proper draining of moisture clear of the timber framing, but also it is in breach of the details shown on the building consent plans prepared by the architect. Mr Alvey also agrees with the identification of the entrapment of cladding as a cause of leaking.

5. Rainwater Heads

[34] Both Mr Jordan and Mr Alvey have identified problems with the rainwater head above the garage on the northern wall, and the rainwater head at the master bedroom above the balcony. Both witnesses have provided photographs of these rainwater heads and agree that, in the words of Mr Alvey's witness statement (Exhibit 2), "the rainwater head (above garage) has been fitted over unsealed plaster" and "the rainwater head and gutter junction has been inappropriately formed". He identifies the same two failings as constituting the problem with the rainwater head by the master bedroom above the balcony. Mr Jordan agrees, expanding his comments into criticism of the gutter that drains into the rainwater head over the garage, and he confirms the "extensive decay below the rainwater head". His concurring comments about the rainwater head at the master bedroom go into more detail in identifying the defective work; see Exhibit 1 paras 21 and 26. I accept these experts' opinion on the failings with the rainwater heads.

6. Kitchen Extract Vent

[35] In Mr Jordan's words "the flexible duct that extended through the stucco wall cladding (by the kitchen) had not been adequately sealed to the cladding. There was some timber decay below this feature". Mr Alvey concurred. I am satisfied that this defective work has resulted in water penetration.

Summary of Causes of Water Penetration

[36] After careful consideration of the WHRS assessor's report, the witness statements of Messrs Jordan and Alvey, their responses in cross-examination, and their photographs (and Mr Alvey's helpful marking of Exhibit 3, the plan at tab 42, Claimants' document folder) I have come to the conclusion that water was entering the dwelling as the result of inadequate

parapet metal cap flashings over unsealed plaster, inadequate formation of and sealing of the butyl rubber over the kitchen window (contributed to by there being no upstand to the head and sill flashings), failure to properly weatherproof the roof barge flashing/fascia to wall junction at the rear of the garage, inadequate windowsill flashings and lack of appropriate stop ends (which have allowed water penetration into the wall cavity from window to cladding junctions in several areas), the northern elevation upper storey deck allowing moisture to enter the top of the barrier wall, and the pergola attached to it without flashings being fitted to where it penetrated the structure so that water ingress ensued, and the cladding being taken hard down and entrapped into the concrete paving where the two elements met, a defective gutter and outlet at the rainwater head over the garage, and an inappropriately fitted rainwater head above the balcony of the upstairs master bedroom, and an inadequately sealed kitchen extract duct penetration.

[37] I am persuaded that as a result of the water penetration outlined above the dwelling has suffered serious damage, well illustrated by the photographs of the three expert witnesses and shown on Mr Alvey's marked drawing (Exhibit 3). Clearly the dwelling did not comply with the Building Code, in particular Clauses B2 Durability and E2 ExternaI Moisture, meaning that the building work did not comply with the mandatory requirements of the Building Act 1991. I am also satisfied that (in brief summary) the remediation work required included new bottom plates on the east and northern elevation of the garage, significant replacement of framing (and the treatment of timber that was able to be saved), and a complete recladding of the dwelling. I accept the evidence of all three technical witnesses that the cladding had to be totally replaced and that (in the words of two of the experts) the dwelling represented a "systemic failure".

[38] It should be noted that there was no contrary evidence provided by the Respondents on the water penetration, its causes and remediation. The First Respondents did not challenge the damage (reserving the right to bring evidence to rebut the quantum evidence if required); they deny liability on legal grounds. The Second Respondent has not taken part in the hearing but

in its formal Response (dated 22 April 2005) it relies on the Limitation Act 1950 and Building Act 1991 limitation defences. As stated above the Ninth Respondent effectively took no part in the proceedings.

THE POSITION OF THE FIRST RESPONDENTS

[39] The position of the First Respondents, outlined by Mr Wilson in his opening and expanded in his submissions dated 2 December 2005 is that they have no liability to the Claimants because firstly they were not "property developers", and if they were the Claimants have not identified anything which they did carelessly. Secondly that a claim in contract based on the warranty contained in the Agreement for Sale and Purchase is barred by the Limitation Act, and thirdly in the event of their being found liable to the Claimants then they claim indemnity for such amount as they may be ordered to pay from the Ninth Respondent, North Shore City Council.

THE POSITION OF THE SECOND RESPONDENT

[40] After taking part in the earlier interlocutory activity in this claim and filing a Response on 22 April 2005, the Second Respondent in a letter dated 18 November 2005 (from the "Insolvency Specialists" now handling its affairs) advised that it was "insolvent and not able to meet the costs of any representation. Consequently (it) will not be participating in the matter". It took no further part in the proceedings.

[41] The aforementioned Response of the Second Respondent is in the following terms:

> *"1. Akita Construction Ltd relies on the relevant provisions of the Limitation Act 1950 in respect of the claims brought against it, on the basis that the Claimants' claim is outside the six year time limit provided therein.*
>
> *2. Further/alternatively, Akita Construction Ltd further relies on the relevant provisions of the Building Act and says that its obligations were limited to 10 years from*

the date of the act or omission on which the claims are based."

THE POSITION OF THE NINTH RESPONDENT

[42] The Ninth Respondent (North Shore City Council) originally was not a party to the adjudication because it settled with the Claimants during a WHRS mediation some time before the Claimants' Notice of Adjudication was filed. Subsequently, as referred to above, it was joined as the Ninth Respondent on the application of the First Respondents who will look to it for indemnity/contribution if the claim against them is successful.

[43] Effectively the Ninth Respondent has taken no steps (including not filing a Response) but it is a respondent; s 29(2) of the Act empowers me to determine what if any liability it has to any other respondent and the resulting remedies it may be found to have, so I am required to consider its liability in this claim.

LIABILITY OF THE FIRST RESPONDENTS (DIANNE & ROSS WHIMP)

[44] The Claimants bring their claim against the First Respondents under the heads of tort and contract. It is alleged that the First Respondents built the subject dwelling as "builders/developers", and therefore owed a duty of care to the Claimants as subsequent purchasers. They say that not only should the First Respondents be held to be "developers" because of their level of involvement in the building process at the dwelling, but also because of their history of owning and subdividing other land.

[45] The law is well settled that those who build owe a duty of care to future owners of those buildings. The leading case is Mt Albert Borough Council v Johnson [1979] 2 NZLR 234 (Court of Appeal). The decision in that case arose from a development company engaging contractors to do the building work on a block of flats. The legal principle has been subsequently applied to the not uncommon situation in New Zealand where an owner of land effectively supervises and manages the construction of the dwelling to be built on his/her land including engaging the subcontractors, arranging the

supply of materials etc. This direct involvement in matters of construction is in contrast to "turnkey"-type contracts where a landowner enters into a contract with a builder or construction company to build a dwelling on the basis that the "head" contractor will arrange all aspects of the construction work, with the owner making the agreed payments and taking occupation of the dwelling at its completion.

[46] Putting to one side at this stage the question of the First Respondents' history of owning and subdividing land, it must be acknowledged that there is a lack of documentary evidence about the nature of the contract between the First Respondents and Akita Construction Ltd, the Second Respondents, but this is not surprising given that the dwelling was built 12 years before the hearing.

[47] The Claimants argue that the evidence which supports their view that the First Respondents built or developed the dwelling themselves includes that Mrs Whimp applied for the permit and corresponded directly with the local body regarding consent issues, that the First Respondents gained experience from building the house at Birkley Road, that the limited time they owned the subject property supported the view that it was built primarily for sale rather than for occupation, that the First Respondents failed "to obtain a written building contract", their involvement in obtaining plans and engaging directly the architect, and choosing a limited fee retainer arrangement with the architect, the failure to allegedly appoint anyone else to supervise or oversee the builders, the naming of Mr Whimp as the contact person on documents involved with the project including the building consent application, his "involvement … on site", the First Respondents paying the driveway concrete contractor direct and in cash for the completion of works after the final inspection, and the quality of the work.

[48] In reply the First Respondents say they did not "build/develop" the dwelling but rather entered into a contract with Akita Construction Ltd; the principal of that company was the late Mr Brian Purdy, an "acquaintance" of the First Respondents. Mrs Whimp's evidence at para 10 of her witness statement (Exhibit B) is as follows:

> *"We entered into a contract with Akita by which it agreed to build the house … The contract was a comprehensive one which required Akita to be responsible for management of the project and to arrange all subcontractors. Our agreement with Akita was that they (sic) would provide to us a home which was fully completed and ready for us to move into with our furniture".*

[49] Further on in para 14 Mrs Whimp states that:

> *"We were clear that Mr Purdy was the supervisor of the project. He organised and controlled all workmen who were on site throughout construction of the home. At no time did we ever give any direction or requirement to these people and we only ever dealt with Mr Purdy".*

[50] The more substantial of the arguments cited above in support of the proposition that the First Respondents were "developers" were responded to by the following. The architect was instructed to draw plans sufficient for the building consent and for the purpose of contracting with a construction company. That was the First Respondents' choice and it was "perfectly legitimate". There was no need to instruct the architect to supervise the building contract because they had entered into a contract with an experienced and substantial building contractor and arranged project management with that company's principal. Mrs Whimp was the legal "owner" and fulfilled her legal obligations under the Building Act including applying for the consent and advising when the work was completed etc. They reject that the undertaking given by Mrs Whimp to the Council in the letter dated 19 April 1993 (document 4 in the Claimants' document folder) implied that she had building or subdivision expertise, and argue that the letter was probably prepared for her to sign, the point being made that her Christian name is misspelt. Mr Whimp was the "contact person" because as a school principal he was more accessible than Mrs Whimp who was a classroom teacher. The point is made in Mr Wilson's submissions that no evidence was given of the First Respondents having onsite involvement and

direct dealings with subcontractors and suppliers (although Mrs Whimp recalled that at Brian Purdy's request they made a cash payment direct to the now deceased concrete contractor). The First respondents also submit in rebuttal that, even if they were the builders/developers, there is no evidence of their breaching any resulting duty and so there is no evidence of any specific negligent acts by the First Respondents. This latter point only requires addressing by me if I find that they were the builders/developers.

[51] The second part of the Claimants' argument that the First Respondents were developers is based on their "history of owning and subdividing land". The Claimants produced the "Certificates of Title" for, and provided a "PowerPoint" presentation of, the various properties owned by the First Respondents on the North Shore and Langs Beach. In his "Synopsis of Submissions" Mr Tee for the Claimants referred to the First Respondents building five houses in the space of 10 years, stating that there were "seven sales and five purchases of land in that period in total". He went on to argue that these figures created a strong presumption of property being bought, sold and developed for profit.

[52] In response Mr Wilson in his "Submissions of Counsel" sets out the detail of the property transactions entered into by the First Respondents since 1983 when Mrs Whimp purchased 3 Birkley Road. He opens by making the point that their property transactions took place over a 20 year period (1981 – 2001). His summary, set out immediately below, is based on the evidence given by Mrs Whimp at the hearing.

[53] Mrs Whimp purchased 3 Birkley Road two years after separating from her husband in 1981. In 1987 she cross-leased this property to create a rear section but because of the repercussions of the sharemarket crash she was unable to sell it so two years later she sold off the existing house at the front and built on the rear section. (In 1988 Mr and Mrs Whimp began their relationship.)

[54] In 1992 she sold 3A Birkley Road and purchased the rear section at 22 Norwood Road. The subdivision had been undertaken by the owners of

that property from whom she had purchased it. She gave evidence that the decision was made to sell 3A Birkley Road because it was a large house, her children had left home and they had a big mortgage on it. The subject property at Norwood Road was built in 1993 and was Mr and Mrs Whimp's home until 1995. They married during this period.

[55] Mrs Whimp says she and her husband had always intended to stay at Norwood Road but several years before he had sold a townhouse he owned in Glenfield and purchased a property at Langs Beach (with which she had family connections) and so, if I understood the situation correctly, they spent many, if not most, weekends at the beach. Mr Whimp was teaching at Northcote and she was teaching at Glenfield (until the end of 1994). The traffic problems and the travel involved in driving between Bayswater and Northcote/Glenfield, coupled with the additional traffic burden of Mr Whimp having to return to Bayswater and then head out north to the beach on a Friday led them to decide to re-locate closer to the Northcote/Birkenhead area; while Mrs Whimp had spent the first two terms of 1995 close to the Norwood Road property (at Bayswater Primary), in term two, which presumably was soon after the property was sold, she accepted a management position at Birkenhead. The First Respondents moved from Bayswater to a house at La Roche Place, Northcote. They bought it in joint names.

[56] Mrs Whimp testified under cross-examination that they had intended staying in this house but that Mr Whimp had some "health issues" and wished to retire to Langs Beach. So Mrs Whimp obtained a teaching position at Mangawhai School (where she remains to the present day) and the decision to move north was actioned, and La Roche Place sold.

[57] From the above facts I conclude, regarding Auckland real estate, that Mrs Whimp was only involved in one subdivision as such (3 Birkley Road) and, with Mr Whimp, although he was not on the title (she wishing to retain sole ownership at that stage of their relationship), together they had built the new family home on the rear section at 3A Birkley Road, and later at 2/22

Norwood Road. By the time the First Respondents purchased La Roche Place they were married and purchased in joint names.

[58] Turning attention to Langs Beach, Mr Whimp had a property in Archers Road, Glenfield which he sold in 1989/1990 to purchase a section at Langs Beach. A small bach was built on that original section (8 Anderson Place, Langs Beach) but when the retirement move to Langs Beach was made at the end of 1996 the bach was not "sufficient for (their) needs" and therefore the property was sold. The First Respondents purchased the section at 10 Gazelle Way and engaged a building firm to build a larger permanent home on the site. That property was intended to be their "retirement home" and they lived there for about five years. In 2001 Mr Whimp's health deteriorated and in his words "it was not easy for (him) to manage the large section … A land agent approached (them) and persuaded (them) to sell". This property was replaced by 3 Gazelle Way upon which Jennian Homes built their present home in which they still live.

[59] In posing the question of whether the First Defendants are developers counsel for the Claimants lists a number of factors, most of which have been discussed earlier in this section. I accept that the "history of owning and subdividing land" as a factor is worthy of more detailed consideration because a finding that a party was in the business of building/developing property might be significant when deciding whether or not it was likely that the party had developed a particular property (in this case Norwood Rd.).

[60] My conclusion after carefully considering the evidence is that the First Respondents' "history of owning and subdividing land" as set out above does not indicate that they were "builders/developers". I accept the evidence of Mrs Whimp that their land ownership and subdivision "history", both on the North Shore and at Langs Beach, arose because of perfectly reasonable changing circumstances including children leaving home, travel difficulties, Mr Whimp's health problems and his retirement. Many New Zealanders move house regularly as their circumstances change, and that factor alone is not seen as indicating that a person or couple are "builder/developers".

[61] In terms of the fundamental argument put forward by the Claimants that the First Respondents were the builders/developers of the subject dwelling I conclude that I can deal with that issue without needing to consider the recent decision of Associate Judge Doogue in Body Corporate No. 178820 v Auckland City Council – CIV 2004-404-6508 (High Court Auckland); I am satisfied that the First Respondents entered into a "turnkey"-type building contract with the Second Respondents Akita Construction Ltd for the construction of their dwelling at 2/22 Norwood Road, Bayswater, which included that the project would be managed by the company's principal the late Brian Purdy. As well as being responsible for the management of the project he would (and did) arrange and supervise the subcontractors.

[62] I accept the First Respondents' evidence that neither of them and in particular Mr Whimp had any direct involvement or control in the building process at Norwood Rd, that they were busy full-time school teachers who did not have nor profess to have the experience or even interest in managing, supervising or carrying out the construction work. In effect they entered into a "turnkey"-type contract with Akita, making progress payments when due as is customary with those contractual arrangements. I also accept the First Respondents' evidence that every house they have had built has been constructed by professional builders and not been "built/developed" by them personally. There is no sustainable evidence to the contrary.

[63] For the sake of completeness I record that I reject the various factors set out in Counsel's opening and "Synopsis of Submissions" in support of the Claimants' contention that the First Respondents were the builders/developers of this property. I accept unreservedly that in New Zealand those who build/develop properties owe a non-delegable duty of care to subsequent purchasers, but after carefully considering the available evidence I am left in no doubt that the First Respondents did not build/develop the subject dwelling; rather it was built pursuant to a "turnkey"-type contract by the Second Respondents Akita Construction Ltd, and it is the possible liability of that party to which I will turn my attention later in this

determination. The claim in tort against the First Respondents must be dismissed.

[64] The Claimants have also brought a claim against the First Respondents in contract, in particular alleging breach of warranties contained in the Agreement for Sale and Purchase entered into between the Claimants and the First Respondents in April/May 1995 (Document 2, Claimants folder).

[65] The specific warranties relate to clause 6.1(9) and (8) of the "General Conditions of Sale" which are part of the aforementioned agreement.

[66] In his "Synopsis of Submissions" counsel for the Claimants sets out the wording of the two sub-clauses, the legislative link-up which establishes the obligations imposed on a vendor, and directs me to the expert evidence which details the non-compliance of the dwelling.

[67] I adopt the statement of Adjudicator Green in WHRS Claim No. 277 Smith v Waitakere CC & Ors, 20 July 2004, at para [203], and accordingly "I accept that the decision of the Court of Appeal (in Riddell v Porteous [1999] 1 NZLR 1) is authority for the proposition that a vendor will be liable to a purchaser for a breach of warranty that building work undertaken by the vendor complies with the Building Act 1991". *Prima facie* the First Respondents are liable.

[68] However their counsel argues that a claim in contract is statute-barred under s 4(1) of the Limitation Act 1950. That section provides that a claim in contract must be brought within six years of when the cause of action arose. The Court of Appeal in the defective building case Invercargill City Council v Hamlin [1994] 3 NZLR 513 at 536 clarified that "in contract the cause of action accrues as soon as there has been a breach of contract". Counsel submits that the wording of the warranties, especially sub-clause (9), relates to the situation at the date of the agreement (April/May 1995), and that this "is not a case of an on-going obligation by the vendor". The action constituting the bringing of a claim (as referred to in the Limitation Act) in this jurisdiction is the "making of an application under s9(1)" (see s55(1), WHRS Act). In this case that application was made in January 2003, which is more

than 6 years after the date of the Agreement for Sale and Purchase (April/May 1995).

[69] Counsel for the Claimants in his "Synopsis of Submissions" relies on "concurrent liability" as between the contract and tort claims against the First Respondents. That submission is clarified in his "Submission in Reply" dated 12 December 2005 where he puts his argument as follows: Mrs Whimp had been negligent in the performance of her contractual warranty in that there was failure to comply with the Building Act 1991 and failure to build in accordance with the plans and building consent. If I understand the submission correctly it is that Mrs Whimp's breach of warranty makes her liable not only in contract but also in tort in that she was "negligent in the performance of her contractual warranty". If upheld this argument would overcome the Claimants' limitation problem because the limitation period (in tort) would run from the date of "reasonable discoverability" of the defects by the Claimants.

[70] Counsel for the First Respondents anticipated the point summarised immediately above when in his "Submissions" he argued that the obligations imposed on Mrs Whimp as vendor were required to be fully complied with at the settlement date (clause 6.1(9)), and that it was not an ongoing obligation. He accepted that there can be "concurrent liability", giving the example of a contract for a solicitor to perform services for a client. The client can complain that the contract has been performed negligently. It appears that in such cases the courts may be disposed to treat the existence of damage and awareness of the negligence as relevant factors, meaning that the limitation period only arises when these factors are present.

[71] Counsel returned to the point in his "Submissions … in Reply" dated 7 December 2005 where he set out what he saw as the "correct position on the limitation issues", summarised below.

[72] The Claimants have a claim in negligence alleging that the First Respondents were property developers who breached the duty of care which property developers have. The Claimants have a second claim in contract alleging

that under the Sale and Purchase Agreement Mrs Whimp gave warranties relating to work being done in accordance with the permit and obligations under the Building Act. It was claimed that she breached those warranties. After repeating the established law on limitation for contract and tort claims (and confirming that the First Respondents were only raising the limitation defence for the contract claim) he asserts that "concurrent liability exists when the same claim could be pleaded either as a tort claim or a contract claim". He quotes the text "Law of Contract in New Zealand" (Burrows, Finn & Todd, 8th Edition at p 828) and then submits that:

> *"This is not a case of the same claim being formulated both in contract and in tort; it is not a matter of negligent performance of a contract. If there was negligence by the Whimps acting as property developers in 1992 and 1993 (which is denied) that has no relationship to the contractual warranty given by Dianne Whimp in 1995. The contractual warranty cannot possibly be a matter of Dianne Whimp performing the contract negligently. Either the facts which she warranted were true or they were not true. It has nothing to do with negligence".*

[73] He goes on to submit that "the substance of the matter is that the two claims which (the Claimants) have brought in contract and tort are quite different claims".

[74] After careful consideration of the submissions and relevant case law I have come to the view that counsel for the First Respondents' argument must prevail. I adopt his submissions as set out above and am satisfied that there is no issue of concurrent liability in these proceedings; the contract here is a straightforward one for the sale and purchase of property. In accordance with the express terms of its clause 6 the warranties were either satisfied or breached as at the date of settlement. As a result of my finding the limitation defence raised by the First Respondents against the breach of warranty claim must succeed. The warranties were (inadvertently) breached and the First Respondents would nonetheless have been liable except for the fact

that the six-year limitation period for contractual claims expired in April/May 2001, whereas the WHRS application was made by the Claimants in January 2003. The claim against the First Respondents in contract for breach of warranty is accordingly dismissed.

LIABILITY OF THE SECOND RESPONDENT (AKITA CONSTRUCTION LTD)

[75] The Claimants bring a claim in tort against the Second Respondent which was the builder that actually carried out the construction of the dwelling. There is no dispute that the Second Respondent was the builder nor that the law in New Zealand is that a builder owes a duty of care to future purchasers. See Bowen v Paramount Builders (Hamilton) Ltd [1971] 1 NZLR 394 (CA), Mt Albert Borough Council v Johnson [1979] 2 NZLR 234 (CA), Stieller v Porirua City Council [1986] 1 NZLR 84 (CA), and Chase v De Groot [1994] 1 NZLR 613.

[76] Builders have a duty in tort to take care to build a reasonably sound structure, using good materials and workmanlike practices, in accordance with the Building Code. They also have a duty to supervise the work of sub-trades. As set out above it is clear from the evidence that the dwelling did not comply with the requirements of the "Building Code", in particular clauses B2 Durability and E2 External Moisture. It was a "leaky building" as defined in the Act. There was no significant disagreement between the three expert witnesses that the water penetration and damage resulted from the failure to carry out the construction work in a proper and workmanlike manner by the builder itself and those who worked for it (whether as employees or subcontractors – the exact nature of the relationship of the Second Respondent with those who carried out the work is unknown).

[77] During the course of his oral evidence the WHRS assessor Mr McIntyre was asked to identify the particular trades likely to have carried out the work on the structure which resulted in the water penetration and damage. His answers were given under the headings at p 12 of his report "Results of Investigation: Causes". Regarding 6.1 (roof and flashings) he stated that the roof parapet metal cap flashings would have been fitted by the plumber or

roofer, that it was the rubber membrane applicator who was responsible for the kitchen bay window penetration and that the roof barge flashing work would have been carried out by the plumber or roofer. It should be added that in his evidence Mr Jordan said that the guttering would have been formed by the builder.

[78] Regarding the "windows, cladding and walls" Mr McIntyre testified that the tradesperson responsible for the inadequate window flashings would have been whoever fitted the windows. Sometimes this is the window manufacturer but it is more common for the work to be done by the carpenters onsite.

[79] It was the carpenters who would have constructed the pergola and deck, while responsibility for the cladding entrapment would have been the (now deceased) concrete contractor.

[80] Mr Jordan in his oral evidence observed that in his opinion the job had been "poorly supervised". I accept the evidence of the First Respondents that they entered into a contract with the Second Respondent to build them a house, and that part of the contract included that the Second Respondent (in particular its principal Mr Purdy) would be responsible for arranging materials, supervising the sub-trades etc. In other words the Whimps entered into a "turnkey"-type contract whereby they paid for a completed dwelling. Whether or not the tradespersons who worked on the site as carpenters, plumbers or roofers were employees of the Second Respondent, or were subcontractors to it (which the roofer, plumber/drain layer and plasterer seem to have been) it is clear law that the Second Respondent as the builder/head contractor owes a non-delegable duty of care to the Claimants as subsequent purchasers.

[81] As mentioned above the Second Respondent initially took part in these proceedings (including filing a Response dated 22 April 2005) but later withdrew from participation. Therefore, while I have not had the benefit of evidence from any witnesses for the Second Respondent, at least we have its Response which is repeated below:

> *"1. Akita Construction Ltd relies on the relevant provisions of the Limitation Act 1950 in respect of the claims brought against it, on the basis that the Claimants' claim is outside the six-year time limit provided therein.*
>
> *2. Further/alternatively, Akita Construction Ltd further relies on the relevant provisions of the Building Act and says that its obligations were limited to 10 years from the date of the act or omission on which the claims are based."*

[82] No submissions were directed to me on this point but the issue is straightforward; do the limitation defences raised by the Second Respondent save it from liability?

[83] The claim against the Second Respondent is in tort so the relevant legal principles (from s 4(1) of the Limitation Act and case law) are firstly, that the six year time limit commences either when the damage occurred or when it was "reasonably discoverable". Secondly s 55(1) of the WHRS Act clarifies that "the making of an application under s 9(1) is deemed to be the filing of proceedings in a court". In this case the s 9(1) application was made on or about 17 January 2003. Therefore if the damage had occurred or was "reasonably discoverable" before 17 January 1997 the Second Respondent would have a valid limitation defence.

[84] Mr Hill's witness statement (Exhibit 9A) at para 19 says that:

> *"Leaks and water ingress first became apparent and were first noticed by us in January 1997. The ceiling to the dining room had to be replaced as a consequence of the shower above it leaking. The wall beneath the glass bricks on the staircase had to be replaced also in 1997."*

[85] Elaborating upon the aforementioned paragraph when giving oral evidence Mr Hill said that in 1997 they decided to replace the light over the dining room table. The electrician who did the job told Mr & Mrs Hill that they had a

"problem", and their investigations indicated that there was leaking from the main bathroom above. In my view this date is not significant because for me to have jurisdiction the dwelling must comply with the definition of a "leaky building", and a leaky building in the "Interpretation" section of the Act (s5) "means a dwellinghouse into which water has penetrated as a result of any aspect of the design, construction or alteration of the dwellinghouse, or materials used in its construction or alteration". Especially because of the phrase "a dwellinghouse into which water has penetrated" I agree with the view taken by my colleagues in earlier determinations that we only have jurisdiction where there is water ingress from the outside of a structure. For an example see paras 5.4.1-11 of WHRS Claim No. 27 Gray v Lay & Ors ("Ponsonby Gardens"), 11 March 2005.

[86] Perhaps more significantly from a factual point of view I accept that while this was the first instance of leaking that the Claimants encountered, it related to a bathroom above, a not uncommon situation, and not one that would lead a reasonable person to conclude that the whole dwelling was subject to serious water ingress problems.

[87] There is also reference in the aforementioned para 19 of Mr Hill's witness statement to there being a problem "underneath the glass bricks on the staircase". Under cross-examination by Mr Walden of Eurobrik Products Ltd, the Third Respondent, Mr Hill agreed that it was in June 1997 that the two men met onsite to discuss the problem and that on 3 September 1997 Mr Walden sent a fax to Mr Hill showing where drain holes needed to be made. It could be argued that the problem with the glass bricks (which continued on despite attempts to rectify it) constituted reasonable notice to the Claimants that there was a problem with water penetration into their home but even if I were to take that view it would seem from the evidence that the discovery of a problem with the glass bricks occurred after January 1997 and therefore within six years of the date of filing the WHRS application.

[88] It appears from both Mr Hill's oral evidence at the hearing and also comment in the Prendos Ltd report dated 19 June 1998 that during 1997 there were

also other signs emerging of leaking problems including in the master bedroom, outside the son's bedroom and the garage. However the evidence before me is that these issues arose during 1997, rather than in the first month of the year and therefore they do not support the Second Respondent's position that the claim was outside the six-year time limit. Accordingly that particular defence must fail.

[89] The further or alternative limitation defence is based on the 1991 Building Act 10 year "long stop". Again I have not had the benefit of specific evidence/submissions in support of this contention but my examination of the totality of the evidence indicates the following. Quotes from the butynol applicator and the glass brick supplier are dated 24/25 November 1992, while the "Planning Consent" on the building plans is date-stamped November 1992. These dates tie in with the dates in the North Shore City Council "Inspector's Field Inspection Sheet" recording inspections of the property. The first, approving the footings, is dated 1 December 1992, then the floor slab inspection date is 19 January 1993. The "preliminary" inspection was on 26 February 1993 and the moisture inspection on 3 March 1993. "Final ok" is dated 19 April 1993. Given that the timber framing is unlikely to have commenced before the floor slab was inspected, and in light of the dates for the preliminary and moisture inspections I conclude that construction probably began late November/early December 1992 and continued well into 1993. In para 12 of Mrs Whimp's witness statement (Exhibit B) she states that "when the house was nearing construction Mr Purdy drew to our attention some cracking in the exterior cladding. When it was raised we asked for advice from BRANZ and from Greg O'Sullivan". That BRANZ report is dated 28 July 1993 and refers in its para 3.0 "Description" to the house being "in the final stage of construction; the last job of significance was the coating of the plaster cladding". This evidence suggests to me that the Second Respondent would have probably been working onsite, and certainly as builder had the ongoing duty to supervise the sub-trades including the plasterer until June/July 1993. It should be noted that the plasterer was not named among "the persons who should be parties to the claim" (s 10 of the Act) nor was he cited in the Notice of Adjudication, although subsequently it

has come to light that he made a relatively small contribution as part of the settlement entered into in mediation in 2004. In other words there is no suggestion that the problem identified by BRANZ in July 1993 contributed in any way to the subsequent weathertightness problems; the significance of my referring to the report is to assist in establishing the time period of the construction work.

[90] The Second Respondent had a duty, contractual and tortious, to construct the dwelling in a proper and workmanlike manner and in accordance with the plans and building consent etc, and also a duty to properly supervise the sub-trades.Given that it is its proven failure to fulfil those duties which has led to the claims "the date of the act or omission on which (those) claims are based" (Akita Response No.2) would have been during the period November 1992 to June/July 1993. This means that the 10 year "long stop" contained in s 91 of the Building Act 1991 would not have come into effect until the Second Respondent's responsibilities were fulfilled (ie the dwelling built, and the sub-trades finished), and that was seemingly June/July 1993. 10 years from then is June/July 2003, and as the claim was made to WHRS on or about 17 January 2003 it was at least five months within the 10-year period. Accordingly the limitation defence based on the 10-year Building Act "long stop" must also fail.

[91] As set out above I am satisfied that the Second Defendant as builder of the dwelling not only breached its duty as builder to the First Respondents, but more significantly for this claim, it also owed a non-delegable duty of care to the Claimants as subsequent purchasers. Its limitation defences have failed and therefore it is liable to the Claimants for the reasonable costs of remediation and any other awards I make in the Claimants' favour.

LIABILITY OF THE NINTH RESPONDENT (NORTH SHORE CITY COUNCIL)

[92] The position of the Ninth Respondent is set out above in paras [42] and [43]. In brief summary the Ninth Respondent was not a party originally because it settled with the Claimants during mediation (that settlement agreement including the Claimants indemnifying the Council "against any claim by any

other party" – see document 19, Claimants' document folder) but the Ninth Respondent was later joined at the application of the First Respondents who sought indemnity/contribution if the claim against them was successful.

[93] The Ninth Respondent has taken no steps and presented neither evidence nor submissions. However my finding above that the Second Respondent is liable to the Claimants requires me to examine the potential liability of the Ninth Respondent so that the issue of "contribution" may be considered if the Ninth Respondent is found to have some liability.

[94] The North Shore District Council was and is the territorial authority responsible for the administration and enforcement of the Building Act 1991 in the area where the Claimants' dwelling is located. Its functions, duties and obligations under that Act include, among other things, the processing of building consent applications, the inspection of building work, the enforcement of the "Building Code" and the issuing of Code Compliance Certificates. It is these functions, duties and oblogations which form the basis of the current claim as it affects the Council.

[95] A Code Compliance Certificate may only be issued if the territorial authority is satisfied on reasonable grounds that the building work to which the certificate relates complies with the Building Code and the building consent (s 43(3), Building Act 1991). A territorial authority will typically undertake inspections of building work so as to satisfy itself that the building work has been undertaken in accordance with the building consent and the Building Code.

[96] There is no contractual relationship between the Council and the Claimants as subsequent purchasers so any liability that the Ninth Respondent may have to them will be in tort for breach of the duty of care that a Council owes a subsequent homeowner when discharging its functions and duties under the Building Act 1991.

[97] The New Zealand Court of Appeal in Invercargill City Council v Hamlin [1994] 3 NZLR 513 held that "it was settled law that councils were liable to house owners and subsequent owners for defects caused or contributed to by building inspectors' negligence". That duty of care in carrying out inspections

of building work during construction is that of a "reasonably prudent building inspector" (Stieller v Porirua City Council [1983] NZLR 628), but it has also been clarified by the courts that a council building inspector is not a "clerk of works", and the aforementioned Stieller decision confirmed that the duty of care imposed upon council building inspectors does not extend to identifying defects within the building works which are unable to be ascertained by a visual inspection.

[98] Regarding the issuing of the Code Compliance Certificate, deciding if the Council has discharged its duty of care so doing will require an objective assessment of the reasonableness of its approach, and conduct in deciding whether the building work complied with the Building Code and the building consent.

[99] The evidence indicates that the building consent was issued on 11 November 1992. The Council's "Inspector's Field Inspection Sheet" which records inspections shows that the footings were inspected on 1 December 1992, the floor slab 19 January 1993, "preliminary" on 26 February 1993, "moisture percentage" 3 March 1993 and the "final" inspection was 19 April 1993. The Code Compliance Certificate was issued on 14 March 1995.

[100] As referred to in the section above discussing the damage to the Claimants' dwelling and its causes the three expert witnesses gave consistent evidence as to the causes of the leaks and those contractors likely responsible.

[101] The WHRS assessor Mr McIntyre specifically stated that the pergola and deck problem was a "slack construction detail" which the building inspector should not have passed. He also considered that the inspector should have picked up on the absence of flashings on the barrier wall above the pergola. The same for the cladding entrapped by the concrete. Mr Jordan, an expert witness for the Claimants with wide technical and Territorial Authority experience, was questioned about the Council's liability. He agreed that the Council inspector should have identified the cladding touching the concrete as an issue, and also the problem with the pergola junctions. He would not have expected a Council inspector in 1993 to pick up on the other identified

faults with the dwelling, making the point that what was acceptable in 1993 was not now acceptable; he said that all councils were "getting it wrong" around that time, but now most defects in this dwelling would be identified. He made the point that in 1993 councils did not routinely inspect before plastering was undertaken and therefore would not identify lack of flashings.

[102] Mr Jordan was also questioned about the Council issuing the Code Compliance Certificate in 1995. After confirming a council's statutory functions under the Building Act he stated that it was "wrong" for the Council to issue a Code Compliance Certificate because the building did not comply with the Building Code. He went on to say that there should not have been a Code Compliance Certificate issued because the Council did not have reasonable grounds to issue one. His evidence was that in 1995 the Council should have concluded that the dwelling was not inspected to a sufficient level to issue a Code Compliance Certificate. He was adamant that, by 1995, the time the Council issued the Code Compliance Certificate (and so should have been checking that the dwelling complied with B2 Durability and E2 External Moisture requirements in the Building Code) it should have had systems in place so that it could identify the various defects that it missed two years previously. Mr Jordan concluded his evidence by explaining that in the period 1992 to 1993 he was involved in helping councils throughout the country come to terms with the then new Building Act 1991 and its implications for them, this "continuing education" being arranged by the Local Government Association. Part of that programme included talking to councils about the necessity of having "reasonable grounds" before issuing a Code Compliance Certificate. Mr Jordan did not say that he specifically spoke to North Shore City Council staff but the implication is that the local government sector should or would have been aware that the new legislation brought big changes to its responsibilities etc, and so taken steps to prepare its staff to fulfil those increased responsibilities.

[103] Based on the evidence before me I am satisfied that, while not all the defects in this dwelling could reasonably have been identified by the Council building inspector in 1993, two at least (pergola and cladding entrapment) should

have been. Accordingly the duty to properly inspect the dwelling has been breached in some respects. The breaches of the Building Code that the Council officer could reasonably have been expected to detect were overlooked and missed, and I accept Mr Jordan's evidence that the Council should not have issued the Code Compliance Certificate two years later in 1995 because an inspection at that time should have disclosed the non-compliant work which has caused or contributed to the water penetration of the Claimants' dwelling. Therefore there were not "reasonable grounds" at that time to issue the Code Compliance Certificate. After considering the evidence of the experts and the relevant cases (conveniently set out in detail by Adjudicator Green in WHRS Claim No. 277 Smith at paras [136] – [140]) I have come to the conclusion that the Council did breach its duty of care to the Claimants as subsequent purchasers by negligently inspecting and approving the building work and by issuing a Code Compliance Certificate when there was not "reasonable grounds" to do so. Therefore it is liable to the Claimants for the reasonable costs of remediation and any other awards I make in the Claimants' favour. See the section below: "Contribution Between Respondents".

GENERAL DAMAGES

[104] The Claimants seek general damages from the First and Second Respondents. That general damages (which are available for pain and suffering, humiliation, distress and loss of enjoyment) can be awarded in WHRS claims has been confirmed by His Honour Judge McElrea when he dismissed an appeal against the decision in WHRS Claim No. 277 (Smith). In para [78] of his reserved decision (Waitakere City Council v Smith CIV 2004-090-1757, 28 January 2005) His Honour stated that "standing back and looking at the matter overall, I am clear that the purpose and intent of the Act is not inconsistent with a power to award general damages but is in fact enhanced by it … The Act should be interpreted in a way that allows it to afford the fullest possible relief to deserving claimants".

[105] Is an award of general damages justified in this claim? Mr Hill in paras 33-36 of his witness statement (Exhibit 9A) sets out the impact of the water ingress

problems upon him and his wife. He refers to his wife developing severe bouts of bronchitis, a condition she had never suffered previously, and the fact that both he and his wife in the last 18 months have been prescribed medication to deal with health issues arising from their situation. They were required to move out of the house into a rental property for six months while the repairs were carried out; this had a significant impact especially as their son was in his final year at secondary school. The situation "severely compromised (their) family time and stopped (them) from taking holidays" and it also placed "extraordinary stress" on their "professional lives". He concludes by stating that the financial costs have put them "under the most pressure". They began with a very low mortgage and as a result of the nature and extent of the repairs they had been forced to increase their mortgage six-fold to over $240,000.00.

[106] Most of Mrs Hill's eight paragraph witness statement (Exhibit 4) is taken up with "distress, anxiety and stigma issues". She goes into greater detail than did her husband in his aforementioned evidence, making the point that they both led very busy professional lives and deliberately bought a house that required very little maintenance. Within three years their lives became "increasingly dominated by its maintenance and repair". "We felt let down. We felt duped. We were angry". It is clear from her evidence that, including taking part in the mediation and adjudication process, "it has been the most stressful experience of (her) life". She has keenly felt the impact of the problem upon the last two years of having their son living at home and says that the stress had "compromised our relationships and for me represents the greatest cost to our family". She also refers to the resulting health problems and the financial burden of the repairs and what a stress that continues to be. She concludes her evidence on this issue by suggesting that a reasonable award would be $56,000.00, made up of $3,500.00 each for the last eight years, being the time period from when the major problems manifested themselves until the date of her statement.

[107] The legal position with general damages is that they cannot be awarded for stress or anxiety caused by litigation (or in the case of this claim the WHRS

process including assessment, mediation and adjudication); the stress, anxiety, inconvenience etc must be a direct consequence of a breach of a duty of care, in this case by the Second and Ninth Respondents (as I have dismissed the claims against the First Respondents).

[108] I have no doubt that the Claimants have suffered stress, anxiety, disturbance and general inconvenience as a direct result of the leaks in their dwelling. That stress, anxiety etc is a reasonably foreseeable consequence of the Second and Ninth Respondents' breach of their duty of care owed to the Claimants, and both should pay general damages.

[109] I am conscious that in this determination I am dealing with "liability" and not "quantum" (amounts). But in the hope that it may be helpful to the parties I will make some comment on the realistic likely range of any award, based on the approach of the courts and previous WHRS determinations.

[110] Adjudicator Green in the Smith determination (WHRS Claim No. 277) in para [129] referred to a number of New Zealand cases: 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 NZLR 106 at 113, and Stevenson Precast Systems Ltd v Kelland (HC Auckland, CP 303-SD/01), and stated that his detailed examination of those authorities disclosed "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".

[111] Because I am not making an award I will not compare closely the facts of the various WHRS determinations where an award of general damages has been made but I can observe from a cursory glance at the awards that they range from $2,000.00 (Claim No. 277 Smith) to $18,000.00 in WHRS Claim No. 27 Gray ("Ponsonby Gardens"). The Putmans in WHRS Claim No. 26 were awarded $5,000.00 for the husband, and $15,000.00 for the wife who spent much more time at home, while a retired person who lived in a leaky house for four years was awarded $16,000.00 (WHRS Claim

No. 136 – "Ponsonby Gardens"). Out of eleven claims where general damages were awarded eight were in the $2,000.00 to $6,000.00 range (for each party), and all awards, including the aforementioned $18,000.00 awarded to Mr Gray (WHRS Claim No. 27) were very much lower than the amounts sought. It may help if I comment in relation to Mrs Hill basing their claim on eight years problems; the opposing view is likely to be that perhaps they should have considered taking legal steps after the 1998 Akita repairs had obviously not worked, rather than making a claim five years later. To conclude this section I formally record that I find the Second Respondent Akita Construction Ltd and the Ninth Respondent North Shore City Council liable to pay some "general damages" to the Claimants.

STIGMA DAMAGES

[112] Reference was made by counsel for the Claimants in his opening, and there was also a paragraph in his "Synopsis of Submissions", seeking damages for "stigma". In para 37 of his witness statement (Exhibit 9A) Mr Hill states: "Currently our house is red-flagged on Council records. Any potential buyer will be made aware that the house has been a 'leaky home'. We would need to disclose this information to any potential buyer. We will be considerably disadvantaged in any sale process because of the history of the house …", and suggests that "stigma damages amount to $50,000.00". Mrs Hill repeats that figure in her witness statement (para 7).

[113] Counsel points out that there was "recognition of a claim for stigma damages" in the aforementioned Gray determination (WHRS Claim No. 27 – "Ponsonby Gardens"). In paragraph 15.1 on "Damages for Stigma" in the Gray determination Adjudicator Dean expands upon the meaning of the term "stigma" as follows:

> *"The owners are claiming that their dwelling has suffered a diminution in value due to the stigma that has attached to it being a 'leaky home'. They say that this loss in value is a direct result of the fact that the dwelling was badly built, and is now known to have been badly built".*

[114] He further states that the claimants in that case submitted "that 'stigma' is an uncertainty or perceived risk of trouble which may result from the purchase of a property that has been damaged. They say that it is unlikely that the average prospective purchaser would make a distinction between repair or remediation, so that it is probable that the public would see a repaired house as being something less than a properly built house". After pointing out that the Respondent City Council had submitted that there was no proof of stigma value loss, and noting three cases where stigma damages have been awarded by the New Zealand Courts (Morton v Douglas Homes Ltd [1984] 2 NZLR 548; Scott v Parsons, Auckland HC, CP 776.90, 19.09.1994; Evans v Gardner [1997] 3 NZ Conv C 95.316) Adjudicator Dean went on to quote from his earlier decision in WHRS Claim No.765 Millar-Hard v Stewart & Ors, 26 April 2004) parts of which he set out. In Millar-Hard he had referred to him a research paper by a Massey University Masters student which concluded "that there was clear evidence of a 'stigma' directed at monolithic-clad houses, and that an average loss in value of about 13% was being experienced". He went on in that decision to quote the adjudicators in WHRS Claim No.26 Putman v Jenmark Homes Ltd & Ors, 10 February 2004, where they concluded: "we have considered all the evidence carefully and are of the view that there is no sufficient evidence of 'stigma' value loss. As Mr Farrelly indicates, the repair work which we have considered appropriate does include a cavity, treated timber, and full compliance with the Building Code and Harditex technical information. That will be known and that information can be available to any purchaser. If there is any 'stigma' then we suspect this will rather be because of the significant adverse publicity that dwellings of this nature have attracted and nothing that the claimants can do by way of repair will alter that. Indeed we consider it a significant prospect that if remedial work is done thoroughly and comprehensively as proposed that may well reassure purchasers even to the extent of possibly enhancing the value as compared with the property, had it been properly constructed in the first place, and the worries and misgivings that prospective purchasers may have had not knowing whether the building was suspect or not". Adjudicator Dean in Millar-Hard was provided with a valuation from a registered valuer two years after "extensive remedial work to the outside of the house" was

completed. Despite there having been widespread publicity by January 2003, including the passing of the WHRS Act, there was no reference by the valuer in his report to the value of the house needing to be discounted or diminished because it had been a "leaky home". Adjudicator Dean's conclusion from the aforementioned research paper was that the conclusions and analysis appeared "to show that the marketplace stigma is more pertinent to monolithic-clad dwellings in general, rather than individual and identified leaky homes".

[115] He moves on in the Gray determination to discuss the sale by auction of a unit in the "Ponsonby Gardens" complex (where Mr Gray's unit was situated). The unit was sold for a figure very close to a registered valuer's valuation which took into account the remediation work. The valuer's opinion was that "this sale price showed no element of stigma" and confirmed his view that none of the dwellings (in the Ponsonby Gardens complex) has suffered any loss in value due to the stigma. Ultimately Adjudicator Dean came to the view that he was not convinced that the claimants in that case had been able to show that the neighbouring unit sold at auction "suffered a loss in value as a result of stigma, or that any other units in Ponsonby Gardens have suffered, or will suffer, losses as a result of stigma", and dismissed the claim. (What I have set out above is very much a summary and does not purport to be comprehensive. The 14 paragraphs making up the section on "stigma damages" in the Gray determination are available for perusal, together with the whole determination, on the WHRS/Department of Building and Housing website.)

[116] Helpfully Adjudicator Dean in the Millar-Hard determination (quoted in para 15.5 of Gray) sets out the burden of proof on claimants seeking stigma damages:

> *"For this claim to succeed the owners have not only got to show that there is a public resistance to purchasing houses that might be known or perceived to be "leaking homes", but also that the problems with their house would probably lead to a loss in value. Furthermore if a stigma is of the type that*

will diminish with time, the stigma will only translate into a loss if the owners sell within the period that the stigma still attaches to the property".

[117] I have evidence, summarised above, of the Claimants' concerns that negative "stigma" will impact on the price they get when they ultimately sell their dwelling but, with respect, that does not come close to establishing a claim for stigma damage. An argument for such damages would require covering the matters raised in the quote immediately above from Adjudicator Dean in Millar-Hard. Expert evidence would usually be required to sustain such a claim. In the absence of such evidence I can only dismiss the claim for stigma damages.

CONTRIBUTION BETWEEN RESPONDENTS

[118] I have found that both the Second Respondent Akita Construction Ltd and the Ninth Respondent North Shore City Council breached the duty of care they owed to the Claimant, and accordingly both at law are a "tortfeasor" or "wrongdoer". Our law allows one tortfeasor to recover a contribution to any damages award from another tortfeasor, the basis for this principle being set out in s 17(1)(c) of the Law Reform Act 1936 as follows:

"Where damage is suffered by any person as a result of a tort …(c)Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is … liable in respect of the same damage, whether as joint tortfeasor or otherwise …".

[119] Section 17(2) of the Law Reform Act states that the amount of contribution recoverable will 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.

[120] Technically the two Respondents are "concurrent tortfeasors" because they are responsible for different torts (ie negligent construction on the part of the builder, and negligent inspection and issuing of the Code Compliance

Certificate on the part of the Council). These breaches have combined to produce the same damage. The cases and the leading text (Todd, "The Law of Torts in New Zealand", 3rd Edition, 2001) make clear that joint or concurrent tortfeasors are each liable in full for the entire loss, but pursuant to the Law Reform Act set out above I must consider the respective contribution that the two liable parties should pay, based on their relevant responsibilities for the damage, in a "just and equitable" manner.

[121] The leading case for builder/territorial authority contribution is Mt Albert Borough Council v Johnson [1979] 2 NZLR 234 (CA). It held that the main responsibility in a case like this lies with the owners/builders/developers of the property who had responsibility to carry out the building works in accordance with the Building Code and the building consent. On the other hand the Council's role is essentially supervisory and so it bears significantly lower responsibility than the builder. In the Mt Albert Borough Council decision responsibility was split 80% for the builder and 20% for the Council. On the evidence in the claim before me I consider that there is no good reason to depart from that division and accordingly I declare that the Second Respondent Akita Construction Ltd is 80% responsible for the various damages for which I have found it liable, and the Ninth Responsible North Shore City Council 20% responsible. Put another way, Akita Construction Ltd is entitled to a contribution from North Shore City Council for 20% of the same loss for which each has been found liable, and North Shore City Council is entitled to a contribution from Akita Construction Ltd for 80% of the same loss for which each has been found liable.

CONCLUSION AND ORDERS

For the reasons set out above in this determination I record below my findings of liability in this claim:

(1) The First Respondents Dianne and Ross Whimp bear no liability to the Claimants under contract or tort in this matter and the total claim against them is dismissed. (s 42(1), WHRS Act)

(2) The Second Respondent Akita Construction Ltd is in breach of its duty of care owed to the Claimants as subsequent purchasers and is liable to them for the costs of remediation and general damages (but not for stigma damages). (s 42(1), WHRS Act)

(3) The Ninth Respondent North Shore City Council is in breach of its duty of care owed to the Claimants as subsequent purchasers and is liable to them for the costs of remediation and general damages (but not for stigma damages). (s 42(1), WHRS Act)

(4) The Second Respondent Akita Construction Ltd is entitled to a 20% contribution towards the remediation costs and general damages payable by it on the basis that the Ninth Respondent is a concurrent tortfeasor who should make a 20% "just and equitable" contribution to the total damages to be paid by the Second Respondent. (s 42(1), WHRS Act)

(5) The Ninth Respondent North Shore City Council is entitled to an 80% contribution towards the remediation costs and general damages payable by it on the basis that the Second Respondent is a concurrent tortfeasor who should make an 80% "just and equitable" contribution to the total damages to be paid by the Ninth Respondent. (s 42(1), WHRS Act)

(6) The parties are given leave to continue the claim relating to quantum. (s 42(1), WHRS Act)

DATED the day of April 2006

P D SKINNER
Chief Adjudicator