Claim No: 01993

Under	the Weathertight Homes Resolution Services Act 2002
In the matter	of an adjudication claim
Between	**Steven David Hutchison** and **Dawn Elissa Hutchison**
	Claimants
And	**Arvind Solomon**
	First respondent
And	**Pauline Solomon**
	Second respondent
And	**Rodney Graham Pratt**
	Third respondent

Determination
20 June 2006

1. Index

2. Summary

2.1 The claim is for $80,926.38 for remedial work, interest, loss of income and general damages in respect of repairs claimed to be necessary to the dwellinghouse at 75 Matipo Road, Mairangi Bay.

2.2 The repair costs are in respect of damage occurring and remedial work required first, as the result of uneven flooring in the garage and basement area allowing entry of water and secondly, a failure to apply adequate waterproofing to the concealed exterior block work.

2.3 The claim against the first and second respondents relates first to their time as owners and work that they did during that time and claims breaches of their obligations under the Building Act 1991 and obligation to obtain a building consent for conversion from a non-habitable to a habitable space. It is also a claim for breach of contractual obligations under the agreement for sale to the claimants.

2.4 The claim against the third respondent is in respect of a pre-purchase inspection report completed by him as a building inspector/consultant on behalf of a company, Auckland Property Services Limited.

2.5 There is no adequate evidence that work by the first and second respondents did convert the basement from a non-habitable to a habitable area or that work carried out by them required a building consent. There is no evidence that the work that they did do was defective or contributed to the areas of concern or causation of leaks and damage. There is no breach of any duty of care in the work that they did do to ensure compliance with the Building Act 1991 or the Building Code in relation to latent defects. There is no breach of the contractual obligations that the first and second respondents had to the claimants. The claim against them is dismissed.

2.6 The claim against the third respondent is in tort and under the Fair Trading Act 1986. The third respondent is found to have engaged in misleading conduct in his description of himself as a building inspector/consultant having regard to his lack of qualifications and relevant experience but that the report is otherwise not of itself deceptive or misleading. It is found that there were no direct damages flowing from the misdescription by the third respondent of himself in this context. The claim against him is dismissed.

2.7 No order for costs is made.

3. The Claim

3.1 The claimants (**Steven Hutchison** and **Dawn Hutchison** (**Mr & Mrs Hutchison**)) are owners of 75 Matipo Road, Mairangi Bay, and on 7 September 2005 gave notice of adjudication under s26 of the Weathertight Homes Resolution Services Act 2002 (**the WHRS Act**) in respect of the property making a claim against the first and second respondents (**Arvind Solomon** and **Pauline Solomon** (**Mr & Mrs Solomon**)) claiming the estimated cost of repair work to the dwellinghouse as estimated by the Weathertight Homes Resolution Service (**WHRS**) assessor, interest, loss of rent and personal damages.

3.2 Their claim under the WHRS Act had been made on 19 December 2003 and a report from the appointed assessor was completed on 22 August 2004.

3.3 Having been appointed as the adjudicator in the claim I have held several conferences and on 14 November 2005 I added the third respondent (**Mr Pratt**) as a respondent on the application of Mr & Mrs Hutchison.

3.4 I conducted a hearing of the claim commencing 20 March 2006 attended by:

3.4.1 Mr Michael Keall, counsel for Mr & Mrs Hutchison;

3.4.2 Mr A Solomon, the first respondent, in person;

3.4.3 Mrs P Solomon, the second respondent, in person;

3.4.4 Mr R G Pratt, the third respondent, in person.

Also present was the assessor and an expert witness for Mr & Mrs Hutchison, Mr Norm Williams.

3.5 The hearing commenced by an inspection of the subject dwelling and all persons mentioned above were present. There then continued a hearing at the WHRS offices in Auckland.

3.6 By the time of that hearing all reconstruction and remedial work had been carried out by Mr & Mrs Hutchison and their claims were then articulated as:

Item	**Amount**
Materials	10,558.57
Contractors	30,631.19
Purchases (such as toilet, vanity, taps, shower fittings, laminated flooring and carpet)	3,210.11
Fees	3,315.00
Interest paid	10,011.51
Loss of income	8,200.00
General damages	15,000.00
Total	$80,926.38

4. The Subject Dwellinghouse

4.1 The dwellinghouse commenced life in 1958 when the then owner, Mr D J Chapman, obtained a permit on 29 January 1958 naming Keith Stick Limited as builder for a "new residence". The approved plans showed at basement level a Water Reservoir and otherwise the basement undeveloped except for a central stairwell leading to the first floor. The cross section to the drawings shows the bottom level as undeveloped bare earth.

4.2 There were changes of ownership of the property from time to time until December 1984 when it was purchased by Mr & Mrs Solomon. Mr Solomon said that at the time of purchase there was a downstairs bedroom with adjacent lounge/games room, bathroom/shower, WC, water tank, laundry, workshop and garage. There was no Council record of any permit

being sought or given for that work. Mr Solomon said that the 1958 Council permit drawings differed markedly from the condition of the dwelling when he and Mrs Solomon bought it. Apparently they did not make enquiry of permit history for works done at the time. Mr Solomon said that a complete refurbishment was contemplated because of corroding roof, blistering weatherboards, "that 50's look" wooden joinery and an old kitchen. His case was that the conversion of the basement into a "habitable area" occurred during the period before the ownership by Mr & Mrs Solomon. He referred to a number of construction factors which affirmed that, such as the predominant use of "softboard", timber stamped "TTT", timber with imperial measurements, flat head steel nails and Winstone gib sheets.

4.3 Mr & Mrs Solomon made improvements to the dwellinghouse over the period of their ownership from 1984 to 1998. In 1984/85 there was general maintenance. In 1985/88 Mr Solomon said there was miscellaneous works to the basement, extensions to the north wall, a carport to the east wall and rerouting of the sewer around the north extensions.

4.4 In 1989 they had drawings prepared by Mr John d'Anvers, architect, for proposed alterations. These plans showed walls and improvements to the basement area, largely the same as had been described by Mr Solomon as having been already completed at the time of purchase by him and Mrs Solomon (and indeed the plan that Mr Solomon used in his evidence to demonstrate that was an adapted copy of Mr d'Anvers' drawing).

4.5 A Mr L Blanc, a senior inspector with North Shore City Council (**NSCC**), in a letter dated 16 October 2002 stated that at a 20 March 2002 site visit it was observed that the basement layout was very similar to the existing lower floor layout drawing lodged with the Council in November 1989.

4.6 That was when on 8 November 1989 the building permit for the redevelopment of the basement, alterations to the ground floor and

construction of the first floor area over the existing lounge was issued by the NSCC.

4.7 Mr Solomon described the work that was done following the issue of that permit between 1989 and 1991 as:

> "1. Basement laundry: deletion of the door to the games room, refurbishment and upgrading of the bath/shower.
> 2. Games/bedrooms: providing new door opening from workshop, refurbishment, removal of stairs, installation of hot water cylinder.
> 3. Front entry: breaking the water reservoir for access, demolition of the existing stairs and block wall, frame, lining and installation of new internal stairs."

4.8 Mr Solomon also described that Council inspections were made for:

4.8.1 foundations;

4.8.2 preline;

4.8.3 plumbing;

4.8.4 electrical.

4.9 Between 1991 and 1998 there was more work done which included completion of the workshop and garage area, new tilta doors, a concrete slab to the outer garage and painting (which was still in progress when Mr Pratt inspected the property).

4.10 There was evidence of linings dated 1997 having been used in the downstairs area. Mr Solomon acknowledged that that was so. He also acknowledged that a piece of carpet with his name on it had been laid during the ownership by him and Mrs Solomon. The pieces of lining with the 1997 dateline were obtained by Mr & Mrs Hutchison from all rooms in the basement area.

5. Purchase by Mr & Mrs Hutchison

5.1 Mr & Mrs Hutchison purchased the property from Mr & Mrs Solomon pursuant to an agreement dated 5 December 1998 for $420,000.00. The agreement included the clauses:

> "6.1 The vendor warrants and undertakes 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 permit or consent was obtained for those works and they were completed in accordance 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 ("[the Building Act]") shall be fully complied with at the settlement date …
>
> This agreement is also conditional upon the purchaser obtaining and being satisfied with a report from a registered builder that the property is [structurally] sound in all respects by 4.00pm 11th December 1998."

5.2 A report was obtained from Auckland Property Services Limited of which the author was Mr Pratt dated 10 December 1998 and Mr & Mrs Hutchison treated the condition mentioned above as satisfied and proceeded to settlement of the purchase.

5.3 They started noticing musty smells in the basement some three years later in December 2001 and contacted their insurer but were told they were not covered by insurance.

5.4 They then had a report prepared by Belgravia Building Consultants Limited of which the author was Mr Williams dated 18 January 2002 to which I shall refer.

5.5 They applied to the WHRS on 19 December 2003 and, as I have said, gave notice of adjudication on 7 September 2005.

5.6 They have proceeded with remedial work and there were produced a bundle of invoices as part of the adjudication. Their claims are, as I have said, based on costs actually incurred. Mrs Hutchison said that the claims were limited to remedial costs only. She acknowledged that there were

improvements carried out at the same time such as installation of a new window but they have not included the costs of this in the claim.

6. Liability: A & P Solomon

6.1 The principal ground for claimed liability is in contract being a claimed breach of clause 6.1 of the agreement for sale and purchase between Mr & Mrs Solomon and Mr & Mrs Hutchison dated 5 December 1998 referred to in paragraph 5.1 above. There are also claims for breach of duty of care and negligence, it being claimed that Mr & Mrs Solomon were owners/developers or alternatively the builder and owed the duty of care to build in accordance with the provisions of the Building Act 1991 and to a reasonable and workmanlike standard. My view on the authorities is that there can be a concurrent duty of care owed by a person who becomes a vendor to the person who becomes a purchaser additionally to the contractual obligations in the agreement for sale. Often this would be the same standard.

6.2 Mr & Mrs Solomon can only have a liability in respect of the alleged duty of care that any work done by them is to a reasonable and workmanlike standard in respect of the work that they have in fact done. They cannot have a duty of care in respect of work done by someone else.

6.3 As to their contractual and allegedly tortious duties to ensure compliance with the Building Act 1991 it is necessary to look at those obligations. The contractual warranty in clause 6.1(8) related only to work done or caused or permitted to be done by Mr & Mrs Solomon and was an obligation for completion in accordance with the required building permit or consent and a warranty that a code compliance certificate was issued for those works.

6.4 The contractual obligation in clause 6.1(9) was for full compliance with obligations imposed on Mr & Mrs Solomon under the Building Act 1991.

6.5 That Act includes as s7:

> "(1) All building work shall comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work."

6.6 It is the Functional Requirements of clause E2.2 of the Building Code under the Building Regulations 1992 that the claimants rely on which reads:

> "E2.2 Buildings shall be constructed to provide adequate resistance to penetration by, and the accumulation of, moisture from the outside."

6.7 There are also the performance criteria relied on in clauses E2.3.2 and E2.3.3, namely:

> "E2.3.2 Roofs and exterior walls shall prevent the penetration of water that cause undue dampness, or damage to building elements.
>
> E2.3.3 Walls, floors and structural elements in contact with the ground shall not absorb or transmit moisture in quantities that could cause undue dampness or damage to building elements."

6.8 Mr N M Williams, an architect and building consultant who gave evidence for the claimants, said that "the 1989 alterations" were carried out prior to the introduction of the Building Act 1991 and the requirements of the Building Code. He said that the concrete slab had the appearance of having been laid "piecemeal" over a period of time.

6.9 He said that when the Building Code came into effect following the Building Act 1991 the functional requirement of clause E2.2 and performance criteria of clauses E2.3.2 and E2.3.3 applied and these were not met because of the hydrostatic pressure of water in the ground forcing moisture into the basement area through the walls and the concrete floor.

6.10 He said that Mr Solomon as a builder should have known that:

> " • The concrete floor in its original condition would not be waterproof and that applying a levelling coat to achieve a smooth level surface

suitable for laying a carpet would not provide any damp proofing resistance.

- Applying a bituminous paint-on application on the inside of the block wall would not provide a dry interior suitable for habitation.

- Converting a non-habitable space into a habitable space required building consent. As a builder [Mr Solomon] ought to have known that undertaking such unauthorised work was an offence under s80 of the Building Act 1991."

6.11 He said that in order to achieve compliance with the Building Code Mr & Mrs Solomon should have:

„ • Lodged plans with North Shore City and obtained a building consent.

- Applied an appropriate damp proof membrane to waterproof the external block walls and laid a soakage drainage along the western and northern walls.

- Removed the existing concrete floor, excavate[d] and provided compacted base coarse material, damp proof membrane and concrete slab to a depth of at least 100mm with a 20MPa compression strength after 28 days. Allowed the slab to dry and laid carpet.

- Fix[ed] strapping to the inside face of the external walls, line[d] with gibraltar board and paint[ed]."

6.12 These matters were more extensively mentioned in his 18 January 2002 report to the claimants in the context of remedial works that he said they should undertake and he adopted those comments in his sworn evidence as being the type of work that Mr Solomon himself should have done.

6.13 It is the case for the claimants that, based on Mr Williams' evidence as mentioned above, Mr Solomon has not complied with the obligations on

him under the Building Act 1991 and he and Mrs Solomon have thereby breached their obligations under the agreement for sale and purchase and any tortious duties of care owed by them to Mr & Mrs Hutchison. In respect of work done by Mr Solomon since the Building Act 1991 came into force and imposed the requirement for compliance with the Building Code, they rely on the definitions of "building work" and "alter" in s2 of the Building Act 1991 and say that even if there had been only relining of the interior of the basement walls this required to comply with the Building Code and it is therefore immaterial whether the basement was first converted into a habitable space in 1997 or earlier. They say that the work in 1997 had to comply with the Building Code and did not. They claim that there was never a permit for development of the basement area into a habitable unit and that any work done by Mr Solomon after the Building Act 1991 came into force, whether this was lining or relining of the basement area, was unauthorised work and in breach of the Code.

6.14 Mr Solomon acknowledged that there was lining work done and carpet laid by him in 1997. He accepted the evidence that Mr & Mrs Hutchison had collated which showed the "1997" date stamped on the back of gibraltar board lining that was removed from all walls in the basement area and he accepted the evidence that the carpet had been provided in 1997 that had his name written on the underside.

6.15 What he did not accept, however, was that he converted the basement area from a non-habitable area into a habitable one. I have outlined above the work that he said he did to the basement area between 1989 and 1991. The plan for proposed alterations dated March 1989 drawn by Mr John d'Anvers, architect, showed the existing layout for the basement area as quite comprehensively including walls, partitions, doors, a shower, a WC and a workshop/garage. The NSCC permit issued 8 November 1989 included redevelopment of the basement and alterations to the ground floor. Mr Blanc, a senior inspector with NSCC, in a letter dated 16 October 2002 stated that:

> "On the 20 March 2002 a site visit was undertaken and it was observed that the basement layout was very similar to the "existing" floor plan that was lodged with the Council in November 1989."

From that I have come to the conclusion that there were no significant structural changes to the basement between 1989 when the John d'Anvers lower floor layout plan was drawn and 20 March 2002 when the site inspection by NSCC observed little change.

6.16 It follows, in my view, from that that any work undertaken by Mr Solomon after the Building Act 1991 came into force was not of a nature of conversion of a non-habitable space into a habitable space.

6.17 Accordingly I have concluded that the view expressed by Mr Williams that:

> "… It is clear that the conversion of the basement from a non-habitable space to a habitable space was undertaken in 1997 or later after the introduction of the Building Act and that the work should have been the subject of a Building Consent"

does not apply. He based that statement on the discovery of the date on the gibraltar board and the date of purchase of the carpet. My view is that neither of those matters constitutes evidence of a **conversion** of a non-habitable into a habitable space. Indeed Mr Williams in his 18 January 2002 letter had come to the conclusion that the subdivision of the basement area had been carried out prior to 1989. It follows that the work undertaken by Mr Solomon since 1991 did not, in my view, require a building consent and the third bullet point from Mr Williams' evidence referred to above in that context at paragraph 6.10 does not apply to this situation.

The best that can be said from the evidence is that in 1997 Mr Solomon relined the existing partitions to the downstairs rooms and installed new carpet. That does not, in my view, of itself require a building consent. In his evidence Mr Solomon described the work that he had done between

1991 and 1998 and I have mentioned that above and there is no evidence that any of that work as such required a building consent.

6.18 There remains then the question whether, having regard to the work that Mr Solomon did since 1991 and the statutory obligation on him then to comply with the Building Code, he has failed to achieve the functional requirements and performance criteria of clause E2.

6.19 I have looked carefully through the list of the work done between 1991 and 1998 referred to above from Mr Solomon's evidence and none of that, in my view, constitutes work which would bring clause E2 into play. It is all effectively interior work and nothing is being done to the **exterior** such as to require that there be External Moisture considerations.

6.20 Mr Williams' evidence cited above as to things that should have been done by Mr Solomon to achieve compliance with the Building Code do not, in my view, relate directly to the work that he was doing. The first refers to lodgement of plans and obtaining building consent and I have mentioned that. The second refers to a damp proof membrane to the external block walls and a soakage drain along the western and northern walls but none of that was required for the works that Mr Solomon was undertaking as such. The third refers to removal of the concrete floor, provision of base coarse material and a damp proof membrane on concrete slab but there is nothing in the evidence to say that work was being done which required that. Mr Solomon does refer to "conc[rete] slab to outer" and "garage" and "complete workshop and garage area" but there was nothing in the evidence, in my view, that affirmed positively that he was applying the "levelling coat" to which Mr Williams referred. In the WHRS assessor's report there is reference to the construction of the concrete floor but no dates or timing is given and there is no evidence that this was during the ownership by Mr & Mrs Solomon. The fourth item referred to strapping to the inside face of the external walls but again, in my view, there was nothing Mr Solomon was doing that would necessitate consideration of that.

6.21 While I accept Mr Williams' views on compliance requirements, at the same time he was not in any position to say what Mr Solomon as such had done or not done since the Building Act 1991 came into force and Mr Solomon has given evidence on that to which I have referred.

6.22 I have come to the conclusion that there was nothing in the work that Mr Solomon did since the Building Act 1991 came into force that required him to have consideration for or meet the functional requirements and performance criteria referred to in clauses E2.2, E2.3.2 or E2.3.3 of the Building Code.

6.23 The next matter to consider is whether Mr or Mrs Solomon had obligations to the claimants in relation to the work done by them outside the requirements of the Building Act 1991 or the Building Code and the contractual requirements of the agreement for sale and purchase that referred to these.

6.24 Again Mr Williams in his evidence has referred to the need for compliance with a reasonable standard of workmanship. It is in that context also that he has referred to matters that Mr Solomon should have known that I have quoted above. The first of these refers to the application of the levelling coat and that this would not be sufficient to waterproof the concrete floor or provide damp proofing resistance. My view expressed above that Mr Williams does not himself know whether Mr Solomon did that, and Mr Solomon's denial of his having done so, apply and I accept that there is insufficient evidence that Mr Solomon applied the levelling coat so as to attract liability on him.

6.25 The second refers to application of a bituminous material to the **inside** of the block wall. There is no doubt that application of bituminous material **inside** a block wall is inadequate to waterproof that wall and prevent water entry and it is required to the **outside**. I am satisfied too that Mr Solomon must have seen the bituminous lining to the inside of the block wall when

he did the lining (assuming that it was already applied then – and his evidence was that it was). I think that he should have been aware that that bituminous material on its own would not have provided sufficient waterproofing for that block wall. He does have building qualifications and should have known that. The point at issue, however, is whether at that stage there was bituminous lining to the **outside** of that block wall and whether Mr Solomon should have taken responsibility to check that because it would not have been obvious without removal of the path, fill etc. In the context that he was not converting the basement area from a non-habitable space to a habitable space but was rather just replacing linings to that area, I had formed the view that it was not incumbent on him to check out the waterproof nature of the lining to the exterior of that wall and there was not a duty of care owed to subsequent purchasers for him to do so.

6.26 Other factors that are relevant are first that there appears to have been a false wall installed in the cupboard/wardrobe area adjacent to this block wall and there was no apparent explanation for it. In fact there was dampness and decay behind that false wall and the suggestion is that the false wall was installed to hide dampness and decay. Mr Solomon acknowledged to me that he had relined this false cupboard but did not see signs of dampness or decay and he explained the presence of that wall as possibly to support the new deck. I have my suspicions about that but on balance I am not persuaded that that was a sufficiently significant factor to have alerted Mr Solomon to leaking problems sufficiently to have imposed a duty of care on him to check whether there was bituminous material to the exterior of the block wall.

6.27 The second factor which is significant is that Mr & Mrs Solomon denied there was ever symptoms of leaking or dampness or any difficulties with those during their ownership over many years. Combined with that is the fact that the claimants, Mr & Mrs Hutchison, did not become aware of dampness issues until some three years after they purchased the property

which all suggests to me that any problems there may have subsequently been found were not apparent during the ownership by Mr & Mrs Solomon.

6.28 Accordingly I find there was no duty of care owed by Mr & Mrs Solomon in respect of the work they have done to the basement during their ownership which extended to the matters now said to be causative of leaks either in relation to the garage floor and its surfacing or in relation to waterproofing the exterior to the concrete block wall.

6.29 It may well be that there was a liability for these matters by the previous owner of the property which according to the title was Auckland Speedways Limited from 1971 to 1984 as it may be that the conversion of the basement from a non-habitable to a habitable area and the other works of which there is now complaint was carried out during that time. That company is not, of course, a party and there would be no point in joining it as a respondent given the significant limitation issues.

7. Result: Liability Mr & Mrs Solomon

7.1 I am not persuaded that the conversion of the basement area from a non-habitable to a habitable area was carried out by Mr or Mrs Solomon or during the period of their ownership and I am not persuaded that the work they did carry out required a building consent under the Building Act 1991 or a building permit under previous legislation.

7.2 Although there was work done in 1997 I am not persuaded that the work done then by Mr and/or Mrs Solomon or on their behalf or indeed work done before or after that time was sufficient to impose a duty of care on them in relation to works which they did not do including enquiry concerning the adequacy of the flooring to the garage or the adequacy of waterproofing to the exterior of the block work.

7.3 There was not therefore a breach of their contractual obligations under clause 6.1(8) or (9) of their agreement for sale to Mr & Mrs Hutchison dated 5 December 1998.

7.4 There has been no breach of any duty of care that Mr or Mrs Solomon may have owed to Mr & Mrs Hutchison in respect of work done by them to the subject dwellinghouse.

7.5 I find that Mr & Mrs Solomon have no liability in this matter.

8. **Liability: R G Pratt**

8.1 The claims against Mr Pratt are under the Fair Trading Act 1986 (**the FT Act**) for deceptive or misleading conduct and/or for negligent breach of a duty of care. It is claimed that he has personal liability despite the report having been provided by Auckland Property Services Limited.

8.2 Subsequent to the hearing I have had the benefit of submissions on behalf of Mr Pratt, submissions in reply on behalf of the claimants and a letter of further response from Mr Pratt.

8.3 The issues raised concerning him are:

8.3.1 Was the report dated 10 December 1998 misleading or deceptive or was there other misleading or deceptive conduct?

8.3.2 If so, to what relief are the claimants entitled?

8.3.3 Does Mr Pratt have a personal liability in that regard?

8.3.4 Did Mr Pratt owe a duty of care to the claimants?

8.3.5 Has he been negligent in the discharge of that duty?

8.3.6 If so, what are the damages to which the claimants are entitled?

Misleading or deceptive conduct?

8.4 The submissions from counsel for Mr Pratt accept that so far as a claim under the FT Act is concerned Mr Pratt may have a personal liability additional to the liability of the company, Auckland Property Services Limited. That concession is in my view properly made because of the inclusion of the word "**also**" in s45(2) for the reasons that I stated in claim 1240 *Auckland City Council v Russell*.

8.5 The aspects of the 10 December 1998 report on which the claimants rely are various references in the report to work or condition being "OK", "Good" or "Sound". They refer to a failure to state that inspection is visual and a failure to state that Mr Pratt "had looked for but been unable to locate any membrane attached [sic] to the exterior of the block wall" and rely on the omission of those matters.

8.6 The submissions for Mr Pratt refer to the fact that the report was based on visual inspection and the absence of evidence that a visual inspection would have revealed, there having been no damp coarse membrane, a submission which I readily accept because the wall was completely covered on the exterior by fill and paving.

8.7 The report was foreshadowed by the agreement for sale and purchase with the condition I referred to at paragraph 5.1 above. That condition referred to a report from a "… registered builder that the property is [structurally] sound in all respects …". The claimants were clearly addressing structural issues but required a report from a builder appropriately registered and competent to address those issues.

8.8 Mr Hutchison said that he found Mr Pratt from the Yellow Pages but cannot recall whether this entry was in a company name or personally to Mr Pratt. Mr Pratt's evidence was that it was Auckland Property Services Limited

that had the Yellow Pages listing but he could not recall any telephone conversation. I note that the report actually refers to Mrs Hutchison by name which might suggest that Mr Pratt's evidence about the telephone call from Mr Hutchison should be preferred. There was no real evidence before me as to the specific instructions given to Mr Pratt for his report except that Mr Hutchison himself said that the claimants "needed a structural report on the property and [Mr Pratt] agreed to provide it". Clearly again structural issues were emphasised.

8.9 The substantive report dated 10 December 1998 is only two pages long but has nine succeeding pages of "Check-List". That long checklist has individual entries for each item in it. It is divided into categories which appear to be "structural", "site", "services" and other specified matters. The first category relates to structural matters and would have been of greatest relevance to a "structural report". It includes "Dampness - NIL". Under the entry "Rooms (interior)" is the entry "Damage – NIL" and under "Ceilings" is "Moisture Stains? Moisture? NIL". Under "Wardrobes" is "Mould×".

8.10 The substantive part of the report is headed "Building Inspection/Structural Report" and refers to Mr Pratt's inspection of the property. It refers to the "Foundation" as follows:

> "Concrete floor with block perimeter walls – in sound condition. No evidence of structural stress or movement."

8.11 It is signed:

> "Yours faithfully
> AUCKLAND PROPERTY SERVICES LIMITED
>
> [Signature]
>
> ROD PRATT
> Building Inspector/Consultant"

8.12 In his 18 January 2002 letter to the claimants which he affirmed at the hearing Mr Williams said:

> "We also believe that the pre-purchase inspection should have alerted you that there was a possibility that spaces below ground may have dampness problems and the basement non-complying. Paint flaking in the external garage wall and the poor state of the garage slab should have raised suspicion without resorting to lining removal. The laundry window and the original concrete steps retained below the deck are further examples of undesirable building practice."

8.13 At the hearing the WHRS assessor said that in 1998 when the report was completed there were no guidelines for reporting except through the disciplines of the NZ Institute of Building Surveyors and that there was a huge range of quality in reports at that time. He described Mr Pratt's report as "not at the top end" of this range. He said that he was not sure that most pre-purchase inspectors at that time would have picked up issues such as treatment of a block wall. He said one would not expect invasive testing in 1998 nor even that standard equipment would include a moisture meter. As to the false cupboard alongside the block wall, he said that only a minority of especially good inspectors would have enquired about this. He said that there was very unlikely evidence of movement of the floor slab; but he also said that the average inspector would have looked for and made comment about the fact that he could not find evidence of waterproofing to the exterior of the block wall.

8.14 In his evidence Mr Pratt said that the report did not include any invasive or destructive testing, removal of linings, carpets or cladding and was based on a visual inspection only. That revealed that the linings, trim and carpets were relatively new and fresh and there was no odour, smell or evidence of ingress of water during the inspection. He said that he drew attention to the note at the end of the report:

> "This report does not purport to certify the soil stability or condition of underground services. It assumes compliance in all respects with Territorial Authority Ordinances/The Building Act 1991 and does not certify that all building improvements lie within title boundaries. Furthermore this report assumes that a Territorial Authority Land Information Memorandum/Project Information Memorandum would not reveal any non-complying features and/or requisitions."

8.15 As to his qualifications, he told me at the hearing that he was not a carpenter, that he had supervised some membrane work and had a successful record of maintenance. As to his appellation in the report "Building Inspector/Consultant" he said that he had been engaged for several years as such. He acknowledged he has not ever been a building certifier. In a subsequent letter (which was uncalled for and has not been the subject of cross-examination) he refers to the fact that he has no formal tertiary qualifications in building inspections but that his experience in the building industry and construction is for 20 years, he claiming to have "successfully supervised on large sites right throughout this time, including building renovation/restoration projects such as Auckland Town Hall, the Civic Theatre, Spencer on Byron Hotel, the Viaduct Point Apartments and the upgrading of 750 homes for Housing New Zealand during 1993-1997". He says he attended BRANZ seminars and various inspection courses. It is surprising to me that he did not give that information when I asked him the question at the hearing.

8.16 In submissions on Mr Pratt's behalf attention is drawn to the three steps to be followed in questions arising under s9 of the FT Act as found in *AMP Finance NZ Ltd v Heaven* (1997) 8 TCLR 144 (CA), namely:

(a) Asking whether the conduct was capable of being misleading.

(b) Deciding whether the plaintiffs were in fact misled by that conduct.

(c) Deciding whether it was reasonable for the plaintiffs to have been misled by that conduct.

Reference was also made to the extract from *Taylor Bros Ltd v Taylors Group Ltd* [1988] 2 NZLR 1, 39:

> "As to when conduct is to be characterised as misleading or deceptive, judicial exegesis probably can do little at a general level to expand upon the ordinary words of the section; and obviously it cannot be allowed to supersede them. In the end one must always return to them and apply them to the particular facts."

8.17 Following those judicial guidelines I have come to the conclusion that the misleading part of the 10 December 1998 report is its statement of what it purports to be. It purports to come from the "Property Inspection Division" of Auckland Property Services Limited. The heading refers to the work of that company as including "Structural Reports". The report itself is headed "Building Inspection/Structural Report". The signatory to the report, Mr Pratt, has described himself as "Building Inspector/Consultant".

8.18 Having regard to the qualifications that Mr Pratt in fact had at the time, even if I take into account what he said in his letter of 3 April 2006, I have formed the view that those factors all combine to overstate the qualifications and ability for the report that has been provided. Mr & Mrs Hutchison's expectations were for a structural report from a registered builder. Mr Pratt was not at the time a registered builder. The expressions "Inspector" and "Consultant" both connote to me a measure of seniority, experience and training which I find Mr Pratt did not have.

8.19 I think it is misleading and deceptive for Mr Pratt and the report to hold himself and it out as being the report that it purports to be. He may not have known that Mr & Mrs Hutchison were looking for a "registered builder" but, having held himself out in this way with this expertise, it was, in my view, reasonable for Mr & Mrs Hutchison to assume that he would have the necessary qualifications to provide the report they were looking for.

8.20 As to the content of the report itself, it was submitted by counsel for Mr Pratt that he must have known something in order to mislead or deceive and that the defect was unknowable at the time of and in the circumstances of Mr Pratt's inspection. It was submitted that knowledge is fundamental to the cause of action whether this be actual knowledge or a level of knowledge that a reasonable and competent individual could have had in the circumstances that pertained at the time. The test is whether the conduct itself is misleading or deceptive rather than the knowledge or

absence of knowledge of the person so conducting himself, as Gibbs CJ said in *Parkdale Custombuilt Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 198:

> "One meaning that the words 'mislead' and 'deceive' share in common is 'to lead into error'.
>
> That does not in any way infer culpability on the part of the person engaged in the conduct.

In *Weitnann v Katies Ltd* (1977) 2 FLR 336 Franki J referred to the:

> "… word 'deceive' in the Oxford Dictionary [as] to cause to believe what is false; to mislead as to a matter of fact, to lead into error, to impose upon, delude, take in …"

and again there is no element of culpability on the part of the person engaging in the conduct.

8.21 In *Comité Interprofessionnel du Vin de Champagne v Wineworths Group Ltd* [1992] 2 NZLR 327, 334 Gault J said this:

> "Jeffries J was not prepared to hold the appellant in breach even though he found its conduct deceptive. He said the appellant should not be 'branded' as in breach suggesting that contravention of the section involves an element of culpability. That is not so."

There is no suggestion of that being a factor in the three tests in *Heaven* referred to at paragraph 8.16 above.

8.22 Having regard to those authorities and the evidence I heard, I have formed the view that the report was probably reasonably accurate for what could be seen at the time.

8.23 I am mindful of the range of expectations and testing that pre-purchase inspection reports comprised in 1998 as outlined by the assessor. I am mindful of the fact that six years passed between when Mr Pratt inspected the property and Mr Williams did so and made the criticisms that he did. I am mindful of the fact that Mr & Mrs Hutchison were there for three years before they noticed signs of dampness or moisture.

8.24 I am satisfied that on the wide range that there was at the time of pre-purchase inspections and reporting there was no indicator that would have alerted Mr Pratt to a problem or something requiring further enquiry. The Weathertight Homes assessor's evidence that an inspector on average would have looked for and made comment on the need for further investigation of waterproofing to the block wall seemed to me to be something which could have happened rather than something which must have happened.

8.25 I am satisfied that the report did cover the range of matters that it purports to and was as accurate as could reasonably be expected in the circumstances of the inspection and enquiry made by Mr Pratt. I do not find the content of the report in itself misleading or deceptive and I do not think that the fact that it does not state it is only a "visual report" is not of itself deceptive or misleading particularly given the exclusion note at the conclusion of the report.

8.26 My view is that Mr Pratt completed the report in the context of his experience in the industry and without the necessary training or qualification properly to hold himself out as an "Inspector" or as a "Consultant"; that the content of the report satisfied Mr & Mrs Hutchison on the matters to which the condition in their agreement for sale and purchase referred and they proceeded with the purchase.

9. **Relief**

9.1 That means that it is a question of the relief that Mr & Mrs Hutchison are entitled to by virtue of the deceptive and misleading aspects of the report and qualifications and status of it and its author, Mr Pratt.

9.2 Any claim for relief under the FT Act is required by s43(5) to be made within three years after the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have

been discovered. That issue was not raised by or on behalf of Mr Pratt and I am taking it that he accepts that the claim under the WHRS Act was made within three years of when the claimants ought reasonably to have discovered their claimed loss or damage from his misleading conduct.

9.3 Under s43(2)(d) an order can be made directing payment of the amount of loss or damage to the person suffering the same as the result of the misleading or deceptive conduct. Although the section refers to a Court or Disputes Tribunal, that jurisdiction is extended by s42(1) of the WHRS Act which gives an adjudicator jurisdiction to make any order that a Court could.

9.4 In submissions on behalf of Mr Pratt reference is made to extracts from Gault on Commercial Law and specific references to *Harvey Corp Ltd v Barker* [2002] 2 NZLR 213 and *Gunton v Aviation Classics Ltd* [2004] 3 NZLR 836. *Harvey* was a case of a real estate agent having been misled by the vendors of a property which was found to have "unwittingly promoted the property" in a misleading way as to the entrance and part of the driveway having been constructed on an unformed paper road. The Court of Appeal found that there was no adverse consequence because the property was still valued, despite the existence of the paper road, at the purchase price.

9.5 In *Gunton* certain warranties were made concerning a helicopter sold and the High Court found, in relation to a claim under s43(2) of the FT Act, that an award was intended to award reliance losses only and put the wronged party in the position it would have been had the loss-causing cause of action never been embarked upon.

9.6 It was submitted for the third respondent on the basis of those authorities that there was no evidence allowing a proper assessment of the alleged loss if there were any and that "it is conceivable … that the claimants have not suffered a loss of the type recognised in tort". That appears to confuse the loss or damage for which compensation is sought under the FT Act.

9.7 The position for the claimants is that they relied on the report obtained from the third respondent in their decision to purchase the property. Had the third respondent not held himself out to have qualifications and experience which I have found that he did not have, then they may have either elected to proceed without a report at all or they may have gone to a person with appropriate qualifications and experience or they may have negotiated the terms of their purchase on the basis of their proper understanding of the limits of the qualifications and experience that the third respondent had.

9.8 The claimants in reply submissions say that were it not for the report they would not have purchased the dwelling and therefore would not have incurred the cost of remedial work; and that the intrusion of water and the attendant health and structural issues could not be ignored and the cost of remedial work was unavoidable. They claim that had they known the true position they would not have proceeded. Mr Hutchison in his evidence said that had there been a hint of matters subsequently identified in the WHRS assessor's report they would not have proceeded. They were not cross-examined on this by Mr Pratt.

9.9 I think, however, that there is a two stage process. The first is what steps the claimants would have taken had the misleading conduct on the part of the third respondent that I have found not occurred and I have given the three alternatives above. The second, however, is whether, having followed one of the three courses mentioned, that would have revealed the defects to which the assessor's report subsequently referred and would have resulted in the claimants' not proceeding with their claim. It is one thing to say that had they known Mr Pratt's lack of qualifications or relevant experience they might have obtained another report but it is another to say that that report would have in fact revealed the defects.

9.10 The evidence from the assessor about the level of reporting at the time was informative. The claimants were expecting a report from a registered

builder. There is no evidence that a registered builder would have done more than Mr Pratt did or indeed would have carried out sufficiently extensive enquiries to have revealed the defects. They were latent defects. There was apparently no sign of water entry or dampness at the time. Mr & Mrs Hutchison did not experience these symptoms for some years. The lack of waterproofing to the outside wall was not apparent at the time. The unevenness to the surface of the garage floor apparently gave no cause for concern of itself. I am not convinced on the evidence that even if Mr & Mrs Hutchison had taken alternative advice they would have learned of the issues and not proceeded. There is no evidence either that, even if they had learned of the defects, the purchase price would have been reduced by the same amount as the expected cost of repair work.

9.11 Accordingly I find that there is no evidence of the misleading conduct by Mr Pratt having caused Mr & Mrs Hutchison direct loss which entitles them to compensation under the Fair Trading Act.

10. Claim in Tort

10.1 The same principles apply to any claim that Mr & Mrs Hutchison may have against Mr Pratt in tort. Leaving aside the question of whether they have a claim against him personally despite having contracted with his company (and cases such as *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 are relevant), any duty of care that Mr Pratt may have personally owed to them was for him to have reported on matters as he found them and I have found that his report was comprehensive and not misleading as to the matters reported and that it is only his self description of qualification and experience that is open to challenge. That matter does not of itself cause damage.

11. Liability

11.1 Accordingly I find that Mr Pratt has no liability to Mr & Mrs Hutchison and I decline their claim against him.

12. **Result**

12.1 All claims made by the claimants are declined against all respondents.

12.2 I decline to make any order for costs against the claimants in favour of any respondent. The grounds are set out in s43 of the WHRS Act which requires that I need to be satisfied that the claimants have caused a respondent to incur costs and expenses unnecessarily by bad faith or allegations that are without substantial merit. I do not find that to be the case here. Mr & Mrs Solomon were not legally represented and did not incur legal costs. Mr Pratt has incurred legal costs only to the extent of the submissions made but I find that the allegations against all three respondents did have substantial merit even although I have not upheld them in the result.

12.3 Because I have not determined that any party is liable to make a payment I do not include any statement pursuant to s41(1)(b)(iii) of the WHRS Act.

DATED at Auckland this 20th day of June 2006

_____
David M Carden
Adjudicator