CLAIM FILE NO: 00134

UNDER	**The Weathertight Homes Resolution Services Act 2002**
IN THE MATTER OF	**an adjudication**
BETWEEN	**PHILLIP LIONEL KELLEWAY and PRITTY SITA KELLEWAY** Claimants
AND	**MANU INSAR** First respondent
AND	**WAITAKERE CITY COUNCIL** Second respondent
AND	**CHRISTINE TENNENT** Third respondent

HEARING:	27 & 28 August 2003
COUNSEL for the Claimants:	D Tui
COUNSEL for the Second Respondent:	S Jameson and D Heaney
DATE OF THIS DETERMINATION:	29 September 2003

DETERMINATION

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INTRODUCTION

[1] This is a claim concerning a "leaky building" as defined under s5 of the Weathertight Homes Resolution Services Act 2002 ("the Act")

[2] A leaky building 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"

[3] The claimants, Mr & Mrs Kelleway ("the Kelleways") are the owners of a dwellinghouse located at 2/50 James Laurie Street, Glendene, Waitakere City (" the property") and it is the Kelleways dwelling which is the subject of these proceedings.

[4] The First and Third respondents, Manu Insar ("Insar") and Christine Tennent ("Tennent") were at all material times the former owners of the property and were responsible for the construction of the single level, plaster clad dwellinghouse.

[5] Insar and Tennent sold the property to the Kelleways upon completion of the construction of the dwellinghouse.

[6] The Second Respondent, the Waitakere City Council ("the Council") was the Local Authority responsible for issuing the Building Consent and Code Compliance Certificate for the dwellinghouse constructed, or arranged to be constructed, by Insar and Tennent.

MATERIAL FACTS

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

[8] In or about 1996 Insar and Tennent, the then registered owners of the property, arranged for the construction of a new dwelling on the property. Insar and Tennent, and/or their duly authorised agent(s) applied to the Council for a Building Consent to erect a dwelling on the property in accordance with the plans and specifications submitted with the application.

[9] The cladding of the proposed dwelling was detailed on the plans as: 'Harditex'.

[10] The Council approved the plans and specifications and issued Building Consent Number 96/1640 on 9 August 1996.

[11] Shortly thereafter, Insar and Tennent commenced construction of the dwelling and it would seem that they employed various subcontractors to undertake work on the dwelling that Insar could not do himself, including builders, painters and roofers.

[12] The exterior of the dwelling was clad in stucco plaster, and the plastering work was undertaken by Ace Plasterers Limited. Both Insar and Tennent were Directors and equal shareholders of that company which was struck off the companies register on 27 June 2000.

[13] Between October 1996 and May 1997 the Council undertook various inspections of the dwelling in the course of construction, including the foundation, bond beam, pre-floor and pre-line inspections.

[14] On 6 April 1997, Insar and Tennent and the Kelleways executed a Sale and Purchase Agreement for the sale of the property to the Kelleways. [Exhibit.A]

[15] Pursuant to the terms of that agreement, Insar and Tennent warranted that the construction of the dwelling would comply with the provisions of the Building Act 1991. Pursuant to clause 6.1(9) in particular, Insar and Tennent warranted that all obligations under the Building Act would be complied with "*at the settlement date*".

[16] On 11 April 1997, the Kelleways confirmed to Insar and Tennent that the Sale and Purchase Agreement was unconditional.

[17] A final building inspection of the dwelling was undertaken by John Cox, Senior Building Inspector for the Council, on 27 May 1997, and a Code Compliance Certificate was issued by the Council on 5 June 1997 certifying that the building works complied with the provisions of the Building Act 1991.

[18] The settlement date for the purchase of the property was 19 June 1997 and the Kelleways took possession of the property on or about that date.

[19] In or about late 1999, the Kellways began to notice various problems with the dwelling including inter alia, cracking of the plaster cladding, peeking and popping of the internal wall linings, and staining of the wall and ceiling linings.

[20] The Kelleways concerns lead them to commission a report by a building consultant, Richard Maiden, who advised them in August 2000, that there were a number of defects with the dwelling arising from it's construction in 1996/97

[21] In November 2000 the Kelleways commenced proceedings against all three respondents in the Waitakere District Court.

[22] The Weathertight Homes Resolution Service ("WHRS") was established when the Act came into force on 27 November 2002 and the Kelleways immediately applied to use the service.

[23] The Kelleways claim was determined to be an eligible claim under s7 of the Act whereupon the District Court proceedings were withdrawn and the adjudication proceedings were commenced.

THE HEARING

[24] This matter was heard at the Crown Plaza, Albert Street, Auckland on 27 & 28 August 2003.

[25] The claimants and the Second Respondent were represented by counsel at the hearing.

[26] Both the First respondent, Insar, and the Third Respondent, Tennent, failed or neglected to serve a written response to the adjudication claim pursuant to s28 of the Act and to serve a reply to any of the parties' written responses pursuant to my Procedural Orders dated 24 June 2003. Neither Insar nor Tennent attended the hearing, nor were they represented at the hearing.

[27] Mr Cook, the independent building expert appointed by WHRS to inspect and report on the Kelleways property, attended the hearing and gave sworn evidence.

[28] The witnesses (who all gave sworn evidence) in support of the claim were:

- Mr Philip Kelleway (Mr Kelleway is a claimant in this matter)

- Mr Richard Maiden (Mr Maiden is a Building Consultant employed by the firm of Prendos Ltd)

[29] The witnesses (who all gave sworn evidence) to defend the claim for the Second Respondent, the Waitakere City Council, were:

- Mr John Cox (Mr Cox is a Building Compliance Officer employed by Waitakere City Council)

- Mr David Hughes (Mr Hughes is a director of Citywide Building Consultants Ltd and was formerly employed by the Auckland City Council as the Team Co-ordinator of the Building Inspection Division)

- Mr Stephen Alexander (Mr Alexander is a Building Surveyor and principal of Alexander & Co, Building Surveyors and Dispute Resolution Consultants)

[30] Pursuant to my Procedural Orders dated 24 June 2003, the parties were required to provide all supporting documents prior to the hearing, however, a number of further exhibits were produced during the hearing and where appropriate they are referred to in this determination as [Exhibit (No.)]

[31] Statements made by witnesses during the hearing will be referred to where appropriate in this determination by reference to the FTR audio recording time viz. [00:00:00]

[32] I undertook a site visit and inspection of the claimants dwelling on the morning of 28 August 2003, in the presence of Mr Kelleway, Mr Tui, Mr Cook, and Mr Cox.

[33] Following the close of the hearing, Mr Tui and Mr Jameson presented helpful closing submissions, and submissions in reply, which I believe canvass all of the matters in dispute.

THE CLAIMS

[34] Essentially the Kelleways seek the sum of $48,900 for remedial work to remedy damage to the dwellinghouse allegedly caused by the penetration of water arising from the construction of the dwellinghouse, based on the reports and recommendations prepared by Mr Cook, and Mr Maiden.

[35] The Kelleways claim against Insar and Tennent is brought in contract and in tort.

[36] The alleged contractual liability arises out of the warranties contained in the Sale and Purchase Agreement.

[37] The Kelleways also allege that Insar and Tennent owed them a duty of care as purchasers of the dwelling that was constructed, or arranged to be constructed by them.

[38] The claim against the Council is based in tort and it is alleged that the Council owed the Kelleways a duty of care as purchasers of the property.

[39] In particular it is alleged that the duty of care owed by the Council includes:-

[a] When purchasing the property the claimants were entitled to rely on the Council having carried out its duties and obligations in a proper and careful manner.

[b] The Council owed a duty to the claimants to ensure that the dwelling erected on the property had been constructed in accordance with the Building Act 1991 and the Building Code.

[40] It is alleged that the Council breached the duty of care owed to the Kelleways by failing to ensure that the dwelling was constructed in accordance with the Building Act 1991 and the New Zealand Building Code ("the building code")

[41] Mr Tui submits that [all] the respondents are jointly and concurrently liable to the Kelleways in full for the entire loss.

THE DEFENCE FOR THE SECOND RESPONDENT (THE COUNCIL)

[42] The Council's primary submission is that the Kelleways suffered their loss prior to the Council's inspection of the stucco plaster system and even if the Council's conduct was negligent (which is denied), it was not causative of the Kelleways loss.

[43] Mr Jameson submits the claimants loss arose because the Kelleways agreed to pay too much for the dwelling as a result of being unaware of the defects in the stucco plaster cladding system.

[44] Mr Jameson also submits that the Kelleways did not rely on the Council's conduct as the alleged negligent inspection was carried out over 6 weeks after the Kelleways had purchased the property and accordingly, the defence is absolute and the Kelleways cannot succeed against the Council.

[45] Notwithstanding that position, the Council also disputes the nature and extent of the remedial work advocated by Mr Maiden and Mr Cook, and in reliance on Mr Alexander's opinion, contends that the appropriate remedial work could be carried out for $11,250 or thereabouts (See: The cost of the remedial work below)

THE DAMAGE TO THE KELLWAYS DWELLING

[46] In general terms, the extent of the damage to the Kelleways dwelling is set out in the reports prepared by Mr Maiden and Mr Cook.

[47] The damage may be summarised as follows:-

- Cracking of the stucco plaster on the external walls
- Saturated timber wall framing (possible decay of timber frames)
- Nail popping on internal walls and ceilings
- Fungal growth (yellowy brown stains on the internal walls and ceilings)

[48] The Council does not dispute that there has been damage to the Kelleway's dwelling of the kind referred to above

THE CAUSE(S) OF WATER PENETRATION INTO THE KELLEWAYS DWELLING

[49] It is common ground among the experts that the Kelleway's dwelling is suffering a moisture ingress problem associated with the stucco plaster cladding system.

[50] What is disputed however, is the extent of the problem and the cause(s) of the water ingress.

[51] The alleged cause(s) of the damage have been variously described and identified by the experts to include:-

- The stucco plaster mix and curing of the stucco plaster
- Incorrect placement of reinforcing mesh
- Lack of control joints
- Application of stucco plaster to ground level (and below) on the external walls of the dwelling
- Lack of drainage to base of plaster cladding
- Lack of sill and jamb flashings
- Entrapped moisture

[52] The Council has been quite critical of the effort made by Mr Cook and Mr Maiden to properly ascertain the extent and cause(s) of the moisture

ingress and this point was clearly made by Mr Alexander in his evidence at paragraphs 22 & 23 wherein he opines:-

> " I am not satisfied that there has been enough investigation of this property to determine the full extent of water entry….There should have been far more investigation of this and such investigation does not need to be complex or expensive. The true extent of timber framing damage could have been clarified far more than we understand at present.

[53] At paragraph 6.1 of Mr Cook's report he has listed the causes of water entering the house, however, it is remarkable that there has been no direct connection made between various defects and actual water entry."

[54] Whilst I have some sympathy for the views expressed by Mr Alexander, a fairly clear indication as to the reason for the modest approach to investigation and repair was given by Mr Kelleway when he said in evidence that the cost of repair was estimated at $30,000 plus GST and that he and his wife simply did not have the money do the necessary repair work as they had only been in the house for a couple of years and were paying off a large mortgage. [10:47:30]

[55] Mr Kelleway explained that he had done what he could by removing soil from the gardens at the base of the house, and paying for the installation of a manhole into the ceiling space and extractor fans in the kitchen and bathroom, but he could not afford the $30,000 to undertake the balance of the recommended remedial work.

[56] Mr Maiden advised that he had done the best that he could in the circumstances given the limited budget available and the Kelleways reluctance to have destructive testing carried out.

> "…the clients did not wish their house to be knocked apart… and I can't tell [the extent of the damage] without removing all the

> cladding… to enable me to do that I would have to take the lining off the outside of the building [12:00:05]

[57] I don't think for one minute that Mr Alexander was suggesting the cladding should be removed, rather I understood his criticism to be directed to the extent of material testing and the extent of the (moisture meter) analysis of the moisture penetration of the external walls carried out by Mr Cook and Mr Maiden.

[58] This case has certainly been notable for the theories of causation and there has undoubtedly been an absence of clear and direct scientific evidence linking the water penetration to specific defects, but nonetheless, my criticism applies equally to all parties including the Council, and notwithstanding the overarching requirement for a claimant to prove its case on the balance of probabilities, there is nothing in my view (save for the fungal growth) that is inherently new or novel about this case that would have obliged the Kelleways or their advisers to do substantially more (by way of testing) in the circumstances.

The stucco plaster mix and curing of the plaster

[59] The Council submits that it is clear that an inappropriate stucco plaster mix and inadequate curing was a significant cause of the stucco plaster failure (ie cracking leading to moisture ingress)

[60] In support of this contention, Council rely on the evidence of Mr Alexander at paragraph 26 of his brief of evidence wherein he states:-

> "This plaster cracking is quite severe in these locations and I believe that the problem has been caused by a poor plaster mix combined with inadequate curing of the plaster."

[61] Furthermore, Mr Jameson contends that the evidence of Mr Maiden and Mr Cook supports that contention, but I do not think that that is so.

[62] Whilst the importance of the plaster mix is acknowledged by Mr Maiden in his report dated 17 August 2000 at page 3:-

> "Stucco plaster has inherent problems in that, unless the initial mix of the sand and cement is correct, there will be inevitable cracking and crazing of the surface. This is not unusual but can be excessive when the product is not applied, mixed and cured correctly."

[63] And, Mr Cook confirmed in evidence that the curing of the stucco plaster is an important part of the construction of the stucco plaster:-

> "As each coat is applied, curing is important."

[64] Both said that they did not consider the cracking in this case was caused by a poor mix, and that other defects, particularly the (alleged) lack of control joints was the primary cause

[65] Mr Alexander was undoubtedly of the opinion that the cracking was caused by poor plaster mix but in the end he was unable to direct me to any specific evidence of poor mix and accordingly I found his argument unconvincing.

[66] It would seem clear to me that this was one discrete matter that would have benefited by, and been easily determined by, simple chemical analysis, leaving no further room for speculation or debate on the issue, but it was not.

[67] Whilst I accept as convincing on balance, (indeed to a higher standard even) that the cracking of the plaster has caused water ingress, there is simply no evidence to support the contention that the plaster mix was inappropriate and/or the plaster was inadequately cured, and accordingly I am not persuaded that plaster mix and curing inadequacies have caused the cracking of the plaster in this case.

Incorrect placement of reinforcing mesh

[68] Reinforcing is used to resist shrinkage stresses, to hold the plaster together and to fix the plaster to the framing. For the reinforcing to perform these functions it is essential that it is embedded in the plaster. If it is not spaced out from the backing, but sits behind the plaster, it is useless and cannot do its job. (para 6.01 Branz Good Stucco Practice 1996) [Exhibit I]

[69] It would seem clear to me that the correct placement of the reinforcing mesh is critical to the performance of the plaster cladding system and certainly none of the experts suggested otherwise.

[70] Mr Cook, in his report at para.2.2.1(e) advised:-

> "The reinforcing mesh has not been positioned within the plaster correctly. Photo 29 clearly depicts an area where the mesh is exposed on the back of the stucco plaster, whilst photos 21 to 14 depict areas where the reinforcing mesh is close to the surface and is corroding"

[71] Mr Alexander states in his brief of evidence at paragraph 20:-

> "Placing of mesh can also influence cracking but we do not know the extent to which it has been a factor here."

[72] Mr Jameson submitted that there is insufficient evidence to conclude whether the general installation of the mesh is correct and further destructive testing would be required to determine the matter, however he did acknowledge that with the passage of time, it is becoming more apparent that the mesh may not have been properly installed.

[73] That acknowledgment was based largely on Mr Cooks evidence subsequent to the site visit to the dwelling during the adjudication, when he confirmed that more rust stains were becoming evident with time:-

> "We saw more today than I had seen before, rust marks from mesh on the surface now showing through the bland surface. So through the passage of time, this is becoming more and more evident that the plasterer/builder has done a lousy job. It is an inadequate job in my opinion." [11:25:55]

[74] It was certainly clear to me from my visit, that the installation of the mesh was incorrect in a number of locations spread over the whole of the cladding, evidenced by rust marks and reinforcing wire exposed on the surface of the plaster, and conversely, at the location of the plaster sample removed by Mr Cook, the mesh was on the rear face of the cladding with little or no embedment at all.

[75] Notwithstanding the physical evidence, Mr Jameson submits that without carrying out uniform destructive testing, the adequacy of the installation of the mesh cannot be fully ascertained.

[76] I accept that more destructive testing would clearly disclose the true extent of the improperly installed mesh but I am satisfied on balance that it is reasonable to conclude the installation of the mesh has not been undertaken properly, based on the extensive physical evidence already available.

Lack of control joints

[77] Guidance as to the meaning, purpose , and importance of control joints in stucco plaster cladding is provided at Clause 3.8 of the Branz Good Stucco Practice Guide published in February 1996 [Exhibit I]

> "A control joint is a deliberately induced line of weakness in the plaster which predetermines the position, and allows effective waterproofing of larger cracks should they occur. The location is chosen to avoid detracting from the appearance. Control joints can also accommodate thermal stresses….
>
> The sensible provision of control joints is good insurance against uncontrolled unsightly cracking…
>
> Vertical control joints should be formed above and below the sides of openings such as doors and windows and at 4.0m intervals. In some parts of the country where the temperature range from summer to winter is large, plasterers form joints at 2.5m spacings between openings…
>
> Horizontal control joints (15mm wide) should be formed at inter-storey levels….this is the location at which timber shrinkage movement is most easily accommodated…"

[78] Mr Cook identifies the lack of control joints as being the primary cause of the cracking and water ingress in his report dated 4 April 2003 and states at paragraph 2.2.1(d)

> "The stucco plaster has cracked extensively. Refer to photos 6 to 22 appended. There are no control joints provided in the stucco.

> This is contrary to NZBC Acceptable Solutions Clause 2.3.2 which states: The essential requirements are: e) Control joints spaced at no greater than 4.om, both vertically and horizontally."

[79] Mr Cook reaffirmed his view during his evidence in chief and cross – examination during which he stated:-

> " …if you have a look at the other photos where I have highlighted the cracks, almost all the cracks originate, or quite a few of the cracks originate from the bottom corner sometimes the top corner of the window….I personally believe that it is because of the lack of control joints that you have the crack there….and I believe myself that the water has ingressed through the cracks and having got in there, there is no way for it to exit at base plate level." [4:24:32]

[80] Mr Alexander disagrees that the lack of control joints is the primary cause of the stucco plaster cracking and stated in his brief of evidence at paragraph 26 that the cracking would have occurred regardless of whether control joints were installed:_

> "There is no doubt that there has been extensive cracking of the plaster mainly on the north elevation and a lesser amount on the east elevation. It is not accurate to state that this matter is purely caused by the absence of control joints. This plaster cracking is quite severe in these locations and I believe that the problem has been caused by a poor plaster mix combined with inadequate curing of the plaster. The installation of control joints at normal spacings would not have prevented this severe cracking that has occurred. Control joints cannot fully compensate for a bad plaster mix and inadequate curing."

[81] Mr Jameson submits that because no destructive testing was carried out to confirm or discount the presence of control joints, there is insufficient evidence to conclude that there are no control joints and, therefore at best, the lack of control joints 'may' have been a contributing cause of the stucco plaster cracking.

[82] It is accepted by all the experts that it is not possible to conclude absolutely whether control joints exist in the stucco plaster because this may not always be ascertained by a visual inspection.

[83] However, of the two competing views, I must say having viewed the property, that I find Mr Cook's opinion more compelling and convincing in relation to this issue and I am satisfied on balance that control joints have either not been installed, or if installed have not been properly formed to the extent that they have failed to perform as intended, and that that absence or failure of control joints has caused or contributed to the cause of the plaster cracking and associated moisture ingress.

Application of stucco plaster to ground level

[84] The plaster cladding has been applied to the exterior walls of the dwelling from the underside of the soffit to the foundation, unbroken by horizontal control joints or drainage plane, to provide a monolithic appearance.

[85] Mr Cook stated in his report that one of the main causes of the moisture ingress was the stucco plaster extending below ground level resulting in surface water being transmitted by capillary action and absorbed into the wall framing.

[86] In his evidence-in-chief, Mr Cook confirmed his opinion that the plaster should not have been carried down to ground level and that the building work therefore did not comply with the building code.

[87] However, Mr Cook also stated that it was most unlikely that ground water would have risen by 'wicking' or capillary rise to the level of the

bottom plate on the northwest and southwest corners of the dwelling where the height of the floor above ground level was the greatest.

[88] In the end, Mr Cook concluded that whilst capillary rise [of ground moisture] was likely to be an issue where the floor of the house was closest to the ground along the eastern wall and by the front door steps, there was no direct evidence of excessive moisture at those locations and it therefore remained only a potential problem and a contributory one elsewhere.

[89] I should note that only one of the moisture meter recordings taken by Mr Cook around the entire perimeter of the dwelling exceeded the level [24%] required for compliance with the building code, although it is acknowledged that the moisture meter reading taken on 10 July 2001 by Mr Maiden, when he removed a section of wall lining in the northwest corner of the lounge, was 30%.

[90] Mr Maiden notes at page 5 of his report dated 17 August 2000 that the continuation of the stucco plaster down to ground level is contrary to the building code, but he does not (and has not done so since) provide any evidence of this detail causing moisture ingress.

[91] Mr Alexander does not consider the stucco plaster extending into the ground as being causative of moisture ingress into the exterior wall cavity.

[92] None of the experts have presented scientific evidence in relation to the potential for capillary rise in media of varying porosity vis. stucco plaster or masonry, and it would seem on the face of it, that discussion regarding the potential for more than 400mm capillary rise is simply speculation.

[93] In the end there is no conclusive evidence that the stucco plaster extending into the ground is causing moisture ingress into the dwelling by capillary action, and whilst I accept that it is possible for moisture to be drawn up between two surfaces, or to 'wick' up porous material such as masonry or plaster by capillary action, on balance I am not persuaded that capillary rise, or wicking is a direct cause of water penetration in this case, other than perhaps on the southern side of the dwelling in the region of the front door.

[94] According to the experts, the more significant effect of carrying the plaster to ground level was to inhibit or prevent drainage from the plaster cladding.

Lack of drainage to base of plaster cladding

[95] Mr Alexander states the cause of the dampness at the bottom plate is the plaster being continuous between the timber framed walls and the masonry foundation without any provision for drainage:-

> "The single most detrimental defect in the construction of this house is the stucco plaster being continuous between the timber frame walls and the masonry foundation. It has always been normal for a certain amount of moisture to enter stucco plaster and correct building ensures that there is always an opportunity for such water to drain to the exterior.
>
> The way this house has been built, water entering the stucco from any cause will, fall to floor level where it will reach the point at which the plaster is directly adhered to the masonry foundation of the house. At this point the water would not be able to escape and it will cause dampness of the bottom plate of the timber framed wall."

[96] Neither Mr Cook, nor Mr Maiden made any direct reference in their reports to the absence of drainage in the stucco plaster cladding system

as being a cause of the dampness around the bottom plate, but during the hearing, Mr Cook acknowledged the lack of drainage provision necessary to allow moisture to escape, and in his evidence-in-chief Mr Cook explained that the reference to incorrect installation of the stucco plaster cladding at paragraph 6.1.3 of his report was a reference to:-

> "..a lack of a drip area, or a way for the water to get out from behind the stucco, at say 50mm below the bottom plate…" [4:20:30]

[97] Mr Tui submits that the lack of this drainage provision is contrary to clauses 7.4.8 and 7.4.9 of NZS 4251 the Code of Practice for Solid Plastering, and clauses E2.2 and E 2.3.2 of the building code.

[98] I accept the evidence of all the experts in this matter, that the lack of a drainage provision at the base of the cladding (above ground level) prevents moisture that has entered the stucco plaster from draining to the exterior and is causative of the damage, being the moisture penetration of the bottom plate.

Lack of sill and jamb flashings

[99] An inquiry into this issue raises three distinct questions.

[100] The first concerns whether the provision of sill and jamb flashings was a mandatory requirement under the Building Act 1991 in 1997.

[101] Mr Maiden stated in his report dated 17 August 2000 that the lack of jamb and sill flashings to window and door openings is contrary to the building code.

[102] Against that, Mr Alexander stated at paragraphs 35 & 36 of his brief of evidence:-

> "The acceptable solution E2/AS1 current at the time of construction was the July 1992 version. The applicable provisions under section 3 exterior joinery are as follows:-
>
> 3.0.1 Windows and doors, and the joints between them and the cladding materials shall be as weatherproof as the cladding itself.
>
> 3.0.2 Windows and doors shall have head flashings, and scribers or proprietary seals between facings and the building cladding.This does not make the provision of flashings mandatory. At the time it was considered acceptable to seal between the cladding and the facing of the aluminium windows. This is the document that council inspectors would have taken guidance from."

[103] I accept Mr Alexander's evidence that the installation of sill and jamb flashings was not mandatory under the building code in 1997. However, it is pertinent to note that the relevant functional requirement of the building code was to prevent the ingress and accumulation of outside moisture, and irrespective of which means of sealing the joint between the windows and cladding was employed, that joint was required to be as weatherproof as the cladding itself.

[104] The second question concerns whether moisture is entering the dwelling as a result of the means employed to seal the joint between the window and the cladding.

[105] Mr Cook stated in his report that the absence of sill or side (jamb) flashings was a cause of moisture ingress but the only evidence of moisture in the framing surrounding the windows, other than the bathroom and living room windows, was introduced by Mr Cook during the hearing when he referred to moisture levels of between 16-20% moisture content.

[106] Mr Jameson submits that the readings in the bathroom and living room were not accompanied by any detailed investigation to discount the possibility of the slightly elevated readings having been caused by other sources (i.e. cracking in the stucco)

[107] I can find no direct evidence of moisture ingress as a result of inadequate waterproofing around the windows. However, it is certainly arguable that if the sealant around the windows and doors has not been applied properly, moisture could penetrate the dwelling, particularly as Mr Jameson has suggested, through the cracks that emanate from nearly every corner of every window and which would act as conduits for moisture in the absence of an appropriate (sealant) moisture barrier

[108] The third question concerns whether or not the windows were properly sealed.

[109] The question of whether or not any of the experts had adequately investigated the matter occupied a significant proportion of the evidence.

[110] Mr Cook advised that he had slipped the blade of a knife behind the flanges of several windows and could not detect the presence of sealant.

[111] During my visit to the Kelleways dwelling, I instructed Mr Cook (with the consent of Mr Kelleway) to remove a section of plaster adjoining the window nearest the garage on the eastern wall to ascertain whether sealant had been used correctly under the flange of the window and to ensure the window had been adequately waterproofed (Mr Alexander later provided a useful drawing to show the proper means of applying sealant to windows which in effect allows the sealant to act as a gasket between the window and the plaster and creates a barrier to the penetration of moisture)

[112] That investigation by Mr Cook disclosed that no sealant had been applied between the back of the window flange and the stucco plaster (as Mr Alexander recommended) and the only sealant that had been used was that which was visible and which had been smeared over the joint between the plaster and the edge of the window flange after the plastering was complete.

[113] The experts concur that such application of sealant is ineffective as a means of waterproofing the joint between windows and plaster cladding.

[114] On the basis of Mr Cook's evidence and my own observations, I have no hesitation in concluding, on the balance of probabilities, that the windows and doors have not been adequately or properly sealed and the installation and waterproofing of the windows in the Kelleways dwelling does not comply with the building code.

Entrapped moisture

[115] Mr Maiden opined that the cause of the cracking may have been due to excessive moisture entrapped in the timber framing at the time of plastering/lining which, particularly on a north facing wall where there is high heat gain in a wall, could cause wet timber to expand and move [11:54:00]

[116] Mr Maiden conceded that moisture entrapment was only a possibility that he had considered and that there was no direct evidence to support this theory.

[117] No other experts considered water entrapment to be a likely cause of the plaster cracking, and in the circumstances, I can only say that I do not find Mr Maiden's theory persuasive.

Summary of causes of water penetration

[118] After considering the interesting and extensive evidence in relation to the cause(s) of water penetration, I have come to the conclusion, that:

- Water is entering the dwelling through the cracks in the plaster in the body of the wall and around the window and door openings, and to a lesser extent, perhaps by capillary action where the floor level is close to the ground, (i.e the southern wall by the front door steps)

- Water that has penetrated the plaster cladding through the cracks has been prevented from draining (to the outside of the dwelling) from the cladding because of the absence of any drainage provision in the cladding system and instead that water has penetrated the external timber wall cavity and has been absorbed by the timber framing

- The cracking in the plaster has been caused by:

  [a] The failure to provide any, or adequate, provision for managing and controlling expansion and movement in the plaster cladding system (control joints);and,

  [b] The incorrect placement of the reinforcing mesh

THE CAUSE OF NAIL POPPING ON THE INTERIOR WALLS AND CEILING LININGS OF THE DWELLING

[119] Mr Cook stated in his report at paragraph 2.2.3 that:-

> "There is popping of plasterboard fixing nails to many of the walls and/or ceilings of the residence both to internal and perimeter walls. It is likely that the wall linings were installed with the timber wall framing having too high a moisture content."

[120] Mr Alexander advised that the Council was entitled to pass a pre-line inspection when the moisture content of the timber is 24% or less and advised that nail popping can result from the continued shrinking/drying of the timber.

[121] Mr Alexanders opinion was corroborated by Mr Cox who confirmed that every building inspector had a moisture meter and furthermore, the pre-line inspection would not be passed unless the moisture content was measured and found to be below 24% as required by the building code.

[122] Mr Cook accepted that there was an anomaly between the Council inspector's obligation to check that the moisture content of the timber framing was at or below 24% before internal lining could proceed, and the wallboard manufacturer's requirement that the moisture content of the timber framing be 18% before fixing internal linings. [11:39:58]

[123] Following the site visit, Mr Cook gave evidence of the moisture level readings he had taken from three different locations on the interior walls ranging from 12.8% to 16.8% and confirmed that those readings were consistent with what he would have expected given the age of the dwelling.

[124] Mr Cook referred to three potential causes for the nail popping on the interior linings including:-

- Framing timber shrinking leaving a gap between the back of the wall lining and the stud until someone leans on the wall pushing the lining in and the head of the nail pops out.

- Shrinkage of the blue wall board adhesive to about a third of it's thickness on drying

- Tradesmen having their screw guns set too deep and punching the screws through the surface paper of the wall linings

[125] In the circumstances, all that I can say, is that the extent of the nail popping evident in the Kelleway's dwelling is not acceptable, that the actual cause of the nail popping at the Kelleway's dwelling is inconclusive, and that there is no evidence to support a finding that the moisture content of the timber was in excess of 24% at the time of the pre-line inspection.

[126] On balance, I would have to conclude that the nail popping has been caused by one or more of the reasons stated by Mr Cook.

THE CAUSE OF THE MOULD GROWTH ON THE INTERIOR WALLS AND CEILING LININGS OF THE DWELLING

[127] It is the claimants case that the mould growth on the interior of their dwelling was caused as a result of moisture ingress through the stucco plaster cladding system.

[128] Mr Jameson submits that the Kelleways have not established the mould growth was a consequence of the moisture ingress into the stucco plaster.

[129] It is abundantly clear, and accepted by all observers that there is widespread fungal growth throughout the interior of the dwelling.

[130] Mr Cook states at paragraph 2.2.2 of his report:-

> "The interior walls of the residence are extensively covered with a fungal growth which appear to have originated at the northwest corner where rain water has penetrated to the timber framing then spread to now be present in all rooms of the residence.
>
> Samples of the interior wall lining plasterboard facing paper were taken from two positions i.e. from the lounge west wall and from adjacent to the front door. These samples were taken to Biodet Service Ltd ("Biodet") for analysis."

[131] A copy of the Biodet report dated 26 March 2003 was appended to Mr Cook's report.

[132] In essence, the author of that report, Nigel Copas, determined that the species of fungus was *Scopulariopsis*, and concluded that "the presence of fungi indicates that moisture is present in the house at levels that enable active growth."

[133] In his report, Mr Copas advised that superficial mould can grow in homes in response to slight moisture.

[134] Under the heading of 'General Recommendations for fungi in Homes', Mr Copas advised inter alia:

- The growth of fungi on the walls indicate that there is a damp atmosphere inside the house

- Any external sources of moisture should be located and eliminated

- Internal sources of moisture may be steam from cooking, laundry, bathrooms etc. This should be vented away. Showers should be dried after use

[135] Mr Maiden had also obtained a report from Biodet in July 2001 confirming the existence of the fungus, Scopulariopsis sp.

[136] Attached to that report was an article by Claude Blackburn of Dri-Eaz Products Inc, entitled, 'Factors that contribute to mould growth indoors after water damage'. The article provides at page 1, inter alia:-

> "That abnormal moisture is the major contributor to indoor microbiological activity is well documented in the scientific community and by practical experience in the restoration industry. Nutrients for spore germination and growth are readily available in dust, dirt, and in complex materials such as wood, paper, adhesives, acoustical fibre, paints and textiles."

[137] Mr Alexander stated as paragraphs 40 & 43 of his brief of evidence:-

> "Currently there is no basis to conclude that the internal mould is a consequence of water entry to the external walls.
>
> This is the first home that I have found that has widespread growth of Scopulariopsis and it is interesting that it has grown on most wall, ceiling and door surfaces uniformly throughout the house. It is a giant leap in logic to conclude that because there has been some limited water entry to exterior walls(not fully evaluated) that this mould growth has resulted."

[138] Mr Alexander was only able to speculate as to the possible causes of the mould growth in the Kelleway's dwelling:-

> "That possibly we have an inferior cost of internal paint, secondly, we have a house that had no extractor fans from the bathroom or kitchen and so moisture was largely retained in the house, and I understand there were periods when the house was locked up during the day for long periods. If indeed the internal paint was inferior, and that hasn't been tested, that could bring about the conditions under which this mould could flourish." [16:19:25]

[139] Mr Kelleway gave evidence that he had removed soil from the gardens on the southern side of his home, installed extractor vents in the kitchen and bathrooms to remove steam from cooking and showers, and scrubbed the walls and ceilings of his home, but he and his wife could not stop the mould growing on the wall and ceiling surfaces.

[140] It would seem that Scopulariopsis is not a particularly common species of fungus and neither is the extent of mould growth evident in the Kelleway's dwelling as Mr Alexander confirmed in his brief of evidence at paragraphs 41 - 43:-

> "In recent years, I have investigated many homes with leaking far more severe than this property….In other properties I have encountered moulds growing in isolated places around the home and the mould species would typically include Aesergillus, penicillin, Cladosporium, Chaetomium and Stachybotrys, to name the most common….
>
> While mould growth may be severe in places, I have never seen it uniformly distributed across most of the interior surfaces as is present at this house….
>
> This is the first home I have found that has widespread growth of Scopulariopsis…."

[141] Mr Maiden advised that high levels of moisture are not necessarily required for Scopulariopsis to grow:-

> "I'm not sure what levels and in fact I have been unable to find what levels of moisture content levels [Scopulariopsis] survives at but it could be extremely low, fungi do survive at very low moisture content.' [12:33:13]

[142] Mr Maidens comments would seem to be corroborated by advice contained in the article by Claude Blackburn referred to earlier, wherein it is recorded:-

> "The germination of fungal spores and mold growth is influenced by a number of factors. These include moisture, available nutrients….
>
> Of these, substrate moisture condition is the most important. When materials are obviously damp or wet there is greater opportunity for germination and growth.
>
> Mold growth in wood is well known and the opportunity for mold increases when the MC is above 24%. For sufficient safety margin, the minimum recommended target to prevent wood decay is 20% MC."

[143] It would seem clear from the technical writings at least, that irrespective of whether a suitable source of nutrients exists, i.e. wood, paper, paint etc, moisture, albeit at relatively low levels, is an essential ingredient for fungal growth.

[144] The nutrients; wood, paper, paint etc, are readily available in every home. So too is steam from cooking and bathrooms in many cases, because not every home has extractor fans installed.

[145] On the face of it, one would expect to find mould growth as a widespread, if not universal occurrence, but according to the advice of the experts, it is not commonplace, and certainly not to the extent evidenced in this case.

[146] Despite having installed extractor fans and removed soil from against the plaster cladding the Kelleway's still have significant mould growth.

[147] It would seem that the distinguishing (and critical) factor in this case however, is that additional moisture (to that commonly found in the typical dwellinghouse) is present in the Kelleways dwelling as a result of water penetration through the cracks in the plaster cladding, and according to the technical writings provided in evidence, the amount of moisture required to promote fungal growth is relatively low, and the recommended threshold level of 20% was equalled or exceeded in nearly 50% of the readings taken by Mr Cook and evenly distributed around the perimeter of the dwelling.

[148] I am satisfied on the balance of probabilities that the claimants have established a sufficient casual link between [the] fungal growth and [the additional] moisture in their dwelling to hold that the growth of the mould has been caused by the moisture ingress through the stucco plaster.

THE REMEDIAL WORK

The law

[149] Damages in tort are intended to compensate the victim to the extent that a claimant should be placed in the same position as if the wrong had not been suffered, whereas, damages for breach of contract are intended to place the claimant in the position, he or she would have been in, had the contract been performed, so far as money can do it.

[150] In essence however, damages are compensatory and whilst the principles relating to the calculation of damages are relatively simple to express, the application is often more difficult in practice.

[151] Mr Jameson submits that a claimant can only recover the cost of the cheapest solution to remedy the damage suffered, and relies on *Lester v White* [1992] NZLR 483 wherein it was determined that:-

> "A plaintiff can be entitled to no more than the costs of the cheapest remedy for the damage caused."

[152] Mr Tui argues that whilst the Council relies on *Lester V White* to suggest that the cheapest remedy to repair the damage is appropriate, the remedy must still be sufficient to ensure the proper repair of all the damage.

[153] In the end, where liability is established, the assessment of damages, being the measure of what the claimant has lost (and nothing more), will be a question of fact, determined by the appropriate basis for quantification in the circumstances of the matter, and subject to the overriding principle, that an award of damages should be reasonable and be linked directly to the loss sustained *Ruxley Electronics Limited v Forsyth* [1996] AC 344

[154] In this case, it is the cost (and the scope) of the reinstatement of the Kelleways dwelling that has been claimed, and which is at issue.

The proper remedial work

[155] Mr Cook, Mr Maiden, and Mr Alexander each put forward options for the remedial works required.

[156] Mr Cook recommended that the entire stucco plaster cladding be removed and replaced with a ventilated cavity system.

[157] Mr Maiden also recommended the complete removal and replacement of the plaster cladding with a ventilated cavity system.

[158] Mr Alexander disagrees with both Mr Maiden and Mr Cook as to the extent of the remedial work required for the reasons set out at paragraph 48 of his brief of evidence, and recommends far less extensive removal and replacement of the plaster cladding as an appropriate solution to the problem.

[159] Mr Maiden conceded that a cavity is not required to remedy the moisture ingress problem but asserts that perhaps by the time any remedial work is to be carried out, a cavity will be mandatory. [paragraphs 2.25 & 2.26, Maiden response dated 25 August 2003]

[160] Mr Cox confirmed that Waitakere City Council does not, and will not, require a ventilated cavity to be installed as a requirement of a building consent involving the installation of stucco plaster cladding, unless there is a change to the Building Act. [2:38:58]

[161] I must say that I was initially attracted to Mr Alexander's proposal for the remedial work as being a practical and cost effective remedy, subject always to there being no residual loss vis. diminution in property value, as a result of its execution.

[162] However in the final analysis, it became clear that the defects in the plaster cladding system were more extensive than Mr Alexander's proposal provided remedy for; and furthermore, damage has occurred to the interior of the dwelling as a result of moisture ingress through the exterior plaster cladding, which damage has not been taken into consideration to any significant extent by Mr Alexander.

[163] I have found that:-

- There has been a failure to provide any, or adequate provision for managing and controlling expansion and movement in the plaster cladding (control joints)

- The reinforcing mesh in the plaster cladding has been improperly installed

- There had been no provision made for drainage in the plaster cladding system

- The plaster cladding has been carried down to the foundation with the potential for some capillary rise

- The windows have not been adequately or properly sealed

- There is fungal growth to the interior of the dwelling caused by additional moisture resulting from the cracks in the plaster cladding system

- There is unacceptable nail popping to the interior linings of the dwelling

[164] Accordingly, I accept Mr Cook's recommendations for the scope of the remedial work as being appropriate in the circumstances, except in respect of the provision of a ventilated cavity. I can only find that such a provision is in excess of what might properly be required to remedy the damage to the Kelleways dwelling on the basis of Mr Cox's evidence that the Council will not require a ventilated cavity unless there is a change to the Building Act.

[165] No evidence has been given in these proceedings that a change to the Building Act 1991 requiring the provision of a ventilated cavity as an integral component for stucco plaster cladding, is imminent.

QUANTUM

The cost of the remedial work

[166] The cost of the remedial work recommended by Mr Cook was established by Mr Hill, a Quantity Surveyor, with the firm of Hughes Hill & Co., Quantity Surveyors and Construction Cost Consultants.

[167] The rates used by Mr Hill to calculate the cost of repair were not challenged in these proceedings, and furthermore, Mr Alexander confirmed in his brief of evidence at paragraph 52:-

> "I have calculated the cost of this alternative repair using the same rates (or higher) as that promoted by Mr Cook where pricing work has been provided by Hughes Hill & Co."

[168] Mr Tui submits the cost of repair is $48,900 being the cost of repair estimated by Mr Cook, plus $1,400 for the reasonable costs of supervision as assessed by Mr Maiden.

[169] Mr Hill's costings provide for supervision and contract administration. I can see no good reason for the inclusion of an additional supervision allowance and no evidence was provided as to why this additional allowance was considered necessary, so the claim is effectively reduced to $47,500.

[170] Neither Mr Hill nor Mr Alexander made any provision for building consent fees in their calculations of the cost to undertake the remedial work on the Kelleways dwelling.

[171] When I asked Mr Alexander about [the need for] building consent fees, Mr Heaney confirmed that Building consent fees would not be required if the Kelleways were to replace like with like, viz. If the remedial work did not include additional work associated with the construction of a ventilated cavity.

[172] I have determined that a ventilated cavity is not required, and accordingly, a building consent will not be required to enable the Kelleways to undertake the necessary remedial work to their dwelling.

[173] Mr Hills costings, prepared on the basis of Mr Cook's report and recommended scope of remedial work, included the cost of constructing a ventilated cavity.

[174] Mr Cook gave evidence that the costs associated with the construction of the ventilated cavity were: $1,650 for battens and $675 for building paper (one layer) plus margin and GST.

[175] By my estimation, the aggregate value of the ventilated cavity amounts to $2,877.19 and should be deducted from the estimated cost of repair leaving a revised total repair cost of $44,622.81

[176] Mr Hills costings also include a contingency sum of $3,832.20 plus GST.($4,311.23)

[177] There is no basis for claiming a contingency sum in the setting of this adjudication, so the claim is effectively reduced to $40,311.58

[178] Breaking that sum down into the respective heads of damage (including margin, contract administration and GST for each) I arrive at the following values:-

[a]	Nail popping (Net cost: $220.00)	$ 288.59
[b]	Remedy Fungal growth (Net cost: $1,350 + $2,250)	$ 4,722.30
[c]	Remedy plaster/waterproofing defects	$35,300.69
Total		$40,311.58

The claim for the costs of alternative accommodation

[179] The Kelleways seek an unspecified sum in relation to the costs of reasonable accommodation while the property is being repaired.

[180] There has been no evidence that the Kelleways will be required to vacate their dwelling whilst the remedial works are effected.

[181] I have no doubt that there will be a degree of inconvenience associated with the repair work, but that is an inevitable corollary to the relief sought in these proceedings.

[182] Whilst I have considerable sympathy for the Kelleways who understandably and justifiably expected to quietly enjoy their new home, the evidence falls short of establishing any entitlement to an award under this head of claim.

The claim for Interest

[183] The Kelleways seek interest on the sums claimed from the date the District Court proceedings were filed in November 2000, to the date of this Determination.

[184] The provisions relating to an adjudicators power(s) to award interest are contained in Clause 15 of The Schedule to the Weathertight Homes Resolution Services Act 2002, which provides:-

> **15 Power to award interest**
>
> (1) Subject to subclause (2), in any adjudication for the recovery of any money, the adjudicator may, if he or she thinks fit, order an inclusion, in the sum for which a determination is given, of interest, at such rate, not exceeding the 90-day bill rate plus 2%, as the adjudicator thinks fit, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the judgement.
>
> (2) Subclause (1) does not authorise the giving of interest upon interest.

[185] Interest is generally awarded to compensate a successful claimant for delayed payment; or alternatively, interest will be a special head of damages which a successful claimant is entitled to recover to compensate for interest paid on borrowings and/or interest forgone on funds utilised because of a claimant's breach.

[186] In this case; the Kelleways have not been kept out of monies to which they were otherwise entitled, the cost of repair has been calculated as at today's costs, there is no claim by the Kelleways to be compensated for the cost of monies expended on remedying damage to their dwelling,

and accordingly, I can only conclude that there is no entitlement to interest and the claim fails.

L IABILITY FOR THE DAMAGE TO THE KELLEWAYS DWELLING

[187] The Kelleways claim against Manu and Tennent is both in contract and in tort

[188] The alleged contractual liability arises out of the warranties contained in the Sale and Purchase Agreement.

[189] The Kelleways also allege that Insar and Tennent owed them a duty of care as purchasers of the dwelling that was constructed, or arranged to be constructed by them.

[190] The claim against the Council is based in negligence and it is alleged that the Council owed the Kelleways a duty of care as purchasers of the property.

[191] Mr Tui submits that if the First, Second, and Third Respondents are each jointly responsible for the damage to the Kelleways property it is irrelevant (as between the respondents and the Kelleways) what proportion of contribution exists between each of the respondents, and that the respondents are jointly and concurrently liable to the Kelleways for the full loss. Mr Tui relies on the judgement of Tipping J in *Cashfield House Ltd v David and Heather Sinclair Ltd* [1995] 1NZLR 452, at page 456, where it was held:-

> "It is a longstanding and uncontroversial proposition that a plaintiff who establishes liability against two or more joint tortfeasors is entitled to judgement for the whole of his damages against each tortfeasor: see London Association for Protection of Trade v Greenlands Ltd [1916] 2AC 15,31 per Lord Atkinson and Cassell &

Co Ltd v Broome [1972] AC 1027, 1063 per Lord Hailsham of St Marylebone LC."

The liability of the First and Third respondents, Insar and Tennent, in Contract

[192] Mr Tui referred me to the Court of Appeal decision in Riddell v Porteous [1999] 1NZLR 1 and submitted that the liability of Riddell to Bagley is identical to the liability of Insar and Tennent to the Kelleways.

[193] In that case Mr and Mrs Riddell contracted Mr Porteous to undertake construction of a house on their property. Riddell had no great knowledge of building or construction techniques. The Council were responsible for the building permit. Following the construction of the house the Riddells' sold the property to Mr and Mrs Bagley who some time later discovered that the deck had rotted.

[194] The Bagleys sued the Riddells pursuant to Clause 6.1 (10) of the REI/NZLS Agreement and succeeded (it being common ground that the work in question was not carried out in compliance with the permit issued by the Council). The Riddells filed a Statement of Claim and Third Party proceedings against Porteous and the City Council. The claim against the Council was in respect of allegations that the Council breached its duty of care *"in carrying out inspections* of *the house pursuant to the building permit, in failing to notice that the construction did not comply with the permit and was not fit for the purpose for the particular design* of *the house and in failing to notify them accordingly"* [page 3 of decision].

[195] The District Court allowed the Riddells' claim against Mr Porteous and the City Council.

[196] On appeal to the High Court the decision was reversed.

[197] The Court of Appeal accepted that the City Council and builder had a duty of care to the Riddells as well as to the Bagleys (on appeal to the Court of Appeal the parties did not challenge the Bagleys' right to relief in those proceedings.) At page 9 the Court of Appeal held:-

> "Should it make a difference that because the title to the house passed to a third party before damage was discoverable no loss was directly suffered by the Riddells? We think not. Applying the test of Lord Wilberforce in Anns v Merton London Borough Council [1978J AC 728, which this Court continue to affirm (South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd [1992] 2 NZLR 282 and Attorney-General v Prince and Gardner [1998] 1 NZLR 262 at p 268), there are two inquiries directed to determine whether a duty of care should be imposed in particular circumstances. First, is there a sufficient degree of proximity or closeness of relationship between the alleged tortfeasor and the plaintiff who claims to have suffered damage? Obviously there would have been if the damage had emerged when the Riddells were still the owners. We do not think that the relationship was significantly distanced or reduced by the subsequent sale. All the acts and omissions of the alleged tortfeasor happened when the proximity was very close. It was the Riddell's house on which the work was done by Mr Porteous under contract to the Riddells (which contractual liability continued after the sale) and which the council was supposed to inspect competently. The building permit was issued by the council to the builder employed by the Riddells. The warranty was related to the compliance of the work with a permit. It was always on the cards that any negligence might not come to light until after the Riddells sold the house.
>
> The second inquiry concerns whether, nevertheless, there are policy considerations which should lead the Court to negative, reduce or limit the scope of the duty or; more pertinently in this case, should limit the persons to whom it is owed. At this second stage the potential stumbling block for the Riddells is of course the fact that they would not have suffered any loss were it not for their voluntary assumption of the contractual obligation to their purchasers.
>
> This is, however, a situation in which the loss was always going to be suffered, in the first place, by whoever was the current owner of the house. That loss was passed back to the Riddells by means of the contract, which required them, in effect, to indemnify the persons who directly suffered the effects of the negligence."

[198] The Court of Appeal proceeded to determine at page 12:-

> "Similarly in this case. no one who has not been an owner of the property and sold it with a warranty to the purchasers about the work done or inspected by the first and second respondents can bring a claim. In fact, under the particular form of warranty only vendors who themselves caused the work to be done are exposed to a contractual liability and thus may have reason to sue the builder and the council. Theoretically, intermediate owners could be liable if a wider form of warranty were used but we have no reason to believe that, as a matter of conveyancing practice, that is ever done. In reality, therefore, the present respondents are exposed only to a claim by one party - either the current owners or their immediate vendors who had the work done. There is no in determinative liability for an unlimited amount and the possible plaintiffs are readily defined.
>
> So far as relative ability to protect against loss is concerned, the balance is also slightly in favour of the Riddells:-A builder and the local authority charged with inspecting the builder's work both have a potential liability in tort to the owner for the time being of the property...". The builder and the council have expertise in construction matters. Most homeowners who have work done on their properties do not. Invercargill City Council v Hamlin [1994] 3 NZLR 513 at pp 524 - 529 Richardson J discussed the New Zealand practice and experience concerning the reliance by such owners on their local authority, The position may be different where the home in question is less modest or where the work is being carried out on a commercial or industrial building, for it may be expected that an architect or an engineer will be employed by the owner; but we are not concerned with such a case.
>
> Theoretically, the Riddells could have excluded their liability to their purchasers by striking out the warranty clause, but if they had attempted to do so they might well have prejudiced the sale."

[199] I accept that the decision of the Court of Appeal demonstrates 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.

[200] The circumstances in *Riddell v Porteous* do bear a remarkable resemblance to this instant matter.

[201] On 6 April 1997, Insar and Tennant executed a sale and purchase Agreement with the Kelleways for the sale of the property.

[202] Pursuant to clause 6.1(8) & (9) Insar and Tennent warranted and undertook with the Kelleways that:-

> "(8) Where the vendor has done or caused or permitted to be done on the property any works for which a permit or building consent was required by law, such permits or consent was obtained for those works and they were completed in compliance with that permit or consent and where appropriate a code compliance certificate was issued for those works.
>
> (9) All obligations imposed on the vendor under the Building Act 1991 ("Act") shall be fully complied with at the settlement date, and without limiting the generality of the forgoing, the vendor further warrants and undertakes that:
>
> (a) the vendor has fully complied with the requirements specified in any compliance schedule issued by a territorial authority under section 44 of the Act in respect of any building on the property,
>
> (b) any building on the property which is the subject of a compliance schedule issued by a territorial authority under section 44 of the Act has a current building warrant of fitness supplied under section 45 of the Act and the vendor is not aware of any reason, that the vendor has not disclosed in writing to the purchaser, which would prevent a building warrant of fitness complying with section 45 of the Act from being supplied to the territorial authority when the building warrant of fitness is next due; and
>
> (c) the territorial authority has not issued any notice under section 45(4) of the Act to the vendor or to any agent of the vendor which has not been remedied by the vendor; and the vendor is not aware of any reason, that the vendor has not disclosed in writing to the purchaser; which could entitle the territorial authority to issue such a notice." [Exhibit.A]

[203] Manu and Tennent and/or their authorised contractors had done, caused or permitted the house to be constructed in 1996 and 1997. A building consent was required for the construction of the dwelling, and Manu and Tennent were required to ensure that the construction of the dwelling complied with the provisions of the Building Act 1991 [Exhibit.O]

Compliance with the Building Act 1991

[204] Pursuant to s7(1) of the Building Act 1991 all work is required to comply with the Building Code.

[205] The Building Code is found in the First Schedule to the Building Regulations 1992.

[206] The Building Code contains mandatory provisions for meeting the purposes of the Building Act, and it is performance based, that is to say, the building code states what objectives and functional and performance requirements are to be achieved in respect of building work.

[207] The clauses of the Building Code relevant to the matters at issue in this case are: BI Structure, B2 Durability, E2 External moisture, and E3 Internal Moisture, and read inter alia:-

> "**CLAUSE B1 - STRUCTURE**
>
> OBJECTIVE
>
> (a) Safeguard people from injury caused by structural failure
>
> (b) Safeguard people from loss of amenity caused by structural behaviour, and…
>
> FUNCTIONAL REQUIREMENT

B.1.2 Buildings, building elements and site work shall withstand the combination of loads that they are likely to experience during construction or alteration and throughout their lives.

PERFORMANCE

B 1.3.1 Buildings, building elements and sitework shall have a low probability of rupturing, becoming unstable, losing equilibrium, or collapsing during construction or alteration and throughout their lives.

B 1.3.3 Account shall be taken of all physical conditions likely to affect the stability of buildings, building elements and sitework, including:…..

(e) Water and other liquids

(m) Differential movement

B1.3.4 Due allowance shall be made for:

(b) The intended use of the building

CLAUSE B2 - DURABILITY

OBJECTIVE

The objective of this provision is to ensure that a building will throughout its like continue to satisfy the other objectives of this code.

FUNCTIONAL REQUIREMENT

Building materials, components and construction methods shall be sufficiently durable to ensure that the building, without reconstruction or major renovation, satisfies the other functional requirements of this code throughout the life of the building.

PERFORMANCE

From the time a code compliance certificate is issued, building elements shall with only normal maintenance continue to satisfy the performances of this code for the lesser of; the specified intended life of the building, if any or:…..

CLAUSE E2 - EXTERNAL MOISTURE

OBJECTIVE

E.2.1 The objective of this provision is to safeguard people from illness or injury which could result from external moisture entering the building.

FUNCTIONAL REQUIREMENT

E.2.2 Buildings shall be constructed to provide adequate resistance to penetration by, and the accumulation of moisture from the outside.

PERFORMANCE

E.2.3.2 Roofs and exterior walls shall prevent the penetration of water that could cause undue dampness, or damage to building elements.

E.2.3.3 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.

E.2.3.5 Concealed spaces and cavities in building shall be constructed in a way which prevents external moisture being transferred and causing condensation and the degradation of building elements.

CLAUSE E3 - INTERNAL MOISTURE

OBJECTIVE

E3.1(a) Safeguard people against illness or injury which could result from accumulation of internal moisture, and…

FUNCTIONAL REQUIREMENT

E3.2 Buildings shall be constructed to avoid the likelihood of:

(a) Fungal growth or the accumulation of contaminants on linings and other building elements….

(c) Damage to building elements being caused by use of water”

[208] The Building Code also contains a number of Acceptable Solutions, which if used, will result in compliance with the New Zealand Building Code. They also serve as guidelines for alternative solutions which may, if approved by a Territorial Authority, be used if they comply with the Building Code.

[209] At the time of construction, Clauses 3.0.1 and 3.0.2 of Acceptable Solution E2/AS1 to the New Zealand Building Code, provided as follows in relation to Exterior Joinery:-

> 3.0.1 Windows, doors and the joints between them and cladding material shall be as weatherproof as the cladding itself
>
> 3.0.2 Windows and doors shall have head flashings and scribers or proprietary seals between facings and the building cladding."

[210] I have already found that moisture has entered the dwelling through the cladding, the windows have been inadequately sealed, and there is fungal growth on the internal wall and ceiling linings.

[211] It can clearly be seen that water ingress contravenes Clause E2 External Moisture; fungal growth contravenes Clause E3 Internal moisture; and, water damage to timber framing contravenes Clauses B1 Structure & B2 Durability

[212] Therefore it is readily concluded that the building work does not comply with the Building Code and accordingly, the claimants have established a prima facie case that Manu and Tennent were in breach of the terms of the Sale and Purchase Agreement.

[213] The Kelleways seek damages, being the costs of the remedial work assessed by Mr Cook, from Insar and Tennent resulting from the breach.

[214] A claim for damages raises two distinct questions. The first concerns an inquiry into whether the loss or damage in respect of which the claim is made is a loss or damage in respect of which the law permits recovery of damages; and the second concerns the principles upon which damage must be evaluated or quantified.

[215] In general, if a claimant has suffered damage that is not too remote, he or she must, so far as money can do it, be restored to the position he or she would have been in, had the breach not occurred.

[216] The law relating to the remoteness of damage has been established under a series of cases commencing with the case of *Hadley v Baxendale* (1854) 9 Exch 341, [1843-60] All ER Rep 461, which defined the kind of damage that is the appropriate subject of compensation, and excluded all others as being too remote.

[217] Under the rules established in that case, damages are only recoverable for loss or damage which was in the reasonable contemplation of the parties to the contract at the time the contract was entered into, as likely to arise from a breach.

[218] Accordingly, certain kinds of loss or damage, whilst admittedly caused as a direct result of a respondent's conduct, simply do not qualify for compensation.

[219] I am satisfied that any objective bystander considering the evidence would be driven to the conclusion that it was entirely in the hands of Insar and Tennent to ensure the building work complied with the Building Code, and moreover, that it was entirely foreseeable at the time the Sale and Purchase Agreement was entered into, that in the event of a failure

(breach) by Insar and Tennent to ensure the building work complied with the building code, the Kelleway's would suffer loss.

[220] Obviously, it is only the loss that results from a breach of the obligation requiring the building work to comply with the building Code that can be claimed as damages by the Kelleways in respect of the breach.

[221] Whilst it is undeniable that nail popping has occurred on the interior linings, the Kelleway's have not established on the balance of probabilities, that the defect has arisen as a result of a failure to comply with the building code (the building code only required the moisture content of the timber framing to be 24% or less at the time of lining) and accordingly the damage does not arise as a result of a breach of the obligation and the claim (in contract) for damages relating to the nail popping fails accordingly.

[222] To summarise the position therefore, I find the First and Third respondents, Insar and Tennent, breached the terms of the Sale and Purchase Agreement, and are therefore jointly and severally liable to the claimants for damages in the sum of $40,022.99, calculated as follows:

[a]	Nail popping (Net cost: $220.00)	$ NIL
[b]	Remedy Fungal growth (Net cost: $1,350 + $2,250)	$ 4,722.30
[c]	Remedy plaster/waterproofing defects	$35,300.69
Total		$40,022.99

The liability of the First and Third respondents, Insar and Tennent, in Tort

[223] It is submitted by Mr Tui, for the Kelleways, that Insar and Tennent owed the Kelleways a duty of care, as purchasers of the dwelling they constructed, or caused to be constructed, and moreover, Insar and Tennent were entirely responsible for, and therefore liable for, the poor workmanship and breaches of the building code, and by reason of the said breaches, the Kelleways have suffered loss and damage to their property.

[224] Carelessness is undoubtedly the cornerstone of negligence, however, other factors are relevant to a determination of whether legal liability for the tortious duty of care should be imposed, and in any particular situation, the standard of care required by the law is that which is objectively reasonable in the circumstances of the case.

[225] For the Kelleways to succeed with a claim against Insar and Tennent in negligence, they must prove:

- Insar and Tennent owed them a duty of care
- Insar and Tennent breached that duty of care
- The breach by Insar and Tennent caused their loss

The duty of care

[226] Mr Tui cited *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA) and relied substantially on the decision of Tipping J in *Chase v De Groot* [1994] 1 NZLR 613

[227] Mr Tui argued that the High Court decision in *Chase v De Groot* is relevant to this case.

[228] The relevant facts were that De Groot built a house in 1986. He had very little building experience. During the construction the building was inspected three times by Council inspectors. In April 1989 Chase purchased the property from De Groot. It was subsequently learnt that the foundations were 700mm lower than required in the building permit and the property had to be demolished. Chase sued the builder and the Local Authority.

[229] The High Court proceeded to consider a number of authorities in relation to the scope of the duty of care owed by builders and Councils. Such authorities included the Court of Appeal decision in *Stieller v Porirua City Council*(supra). At page 619 the High Court acknowledged that it was bound by the decisions of the Court of Appeal *"and in particular the decision in Stieller's case".,* In relation to the duty owed by a builder/vendor to a purchaser the High Court held as follows at pages 619 and 620:-

> "…In this respect the law can be stated as follows:
>
> 1. The builder of a house owes a duty of care in tort to future owners.
>
> 2. For present purposes that duty is to take reasonable care to build the house in accordance with the building permit and the relevant building code and bylaws.
>
> 3. The position is no different when the builder is also the owner. An owner/builder owes a like duty of care in tort to future owners…"

[230] In that case it was established that an owner/builder owes a duty of care to future owners. Similarly, it was found a developer/builder owed a duty

of care to subsequent purchasers in *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548

[231] I see little distinction between a developer/builder and an owner/builder. Each undertakes, or arranges to have undertaken, building work for financial gain; the developer/builder does so for immediate financial gain, and the owner/builder does so to achieve immediate savings which must, on the sale of the property ultimately translate into financial gain .

[232] On the basis of the authorities cited it is well settled in New Zealand, that an owner/builder owes a duty of care to a subsequent purchaser.

Breach of the duty of care

[233] I have already determined that Insar and Tennent failed to ensure that the building work on the Kelleways dwelling was carried out in accordance with the building code.

[234] That failure constitutes a clear and unequivocal breach of the duty of care owed to the Kelleways.

Was the breach causative of loss?

[235] Insar and Tennent were responsible for the construction of the dwelling and for ensuring compliance with the building code. They failed or neglected to do so.

[236] In this case, the loss to the Kelleways is the reasonable cost to repair the damage to the dwelling and to make the building work comply with the building consent and the building code.

[237] Insar and Tennent's failure (negligence) was clearly causative of the loss suffered by the Kelleways.

[238] I am also constrained to the view that the duty of care owed by Insar and Tennent (as owner/builders) to the Kelleways (as purchasers of the new dwelling) extends to ensuring that all work done will be carried out with reasonable care and skill, and that all materials supplied will be reasonably fit for the purpose for which they are required.

[239] In traditional building contracts these terms will be implied as a matter of law unless excluded.(See: Kennedy-Grant on Construction Law in New Zealand, 1999, pp 341-342)

[240] I am satisfied that in this case there was a sufficient relationship of trust, confidence, and proximity between the parties (owner/builder and future owner) such that it must have been in the reasonable contemplation of Insar and Tennent, that carelessness on their part in ensuring the dwelling was constructed in accordance the Building Code and recognised building standards, was likely to cause damage to future owners and that they would be liable for any breach of the duty of care.

[241] Whilst it has not been established that the nail popping is the result of a failure to comply with the building code, it is most certainly a result of negligent construction (Refer Mr Cooks evidence at [11:13:10])

[242] Accordingly, I find the First and Third respondents, Insar and Tennent, breached the duty of care that they owed to the Kelleways, and accordingly I find them jointly and severally liable to the claimants for damages in the sum of $40,888.76, calculated as follows:

[a]	Nail popping (Net cost: $220.00)	$	288.59

[b]	Remedy Fungal growth (Net cost: $1,350 + $2,250)	$ 4,722.30
[c]	Remedy plaster/waterproofing defects	$35,300.69
Total		$40,311.58

The liability of the Second respondent, the Council, in tort

[243] It is submitted by Mr Tui, that the Council owed the Kelleways a duty of care as purchasers of the property.

[244] In particular, it is alleged that the duty of care owed by the Council includes:-

(a) When purchasing the property the claimants were entitled to rely upon the Council having carried out its duties and obligations in a proper and careful manner.

(b) The Council owed a duty to the claimants to ensure that the dwelling erected on the property had been constructed in accordance with the Building Act and the Building Code

[245] It is alleged the Council breached the duty of care owed to the claimants by failing to ensure that the dwelling was erected in accordance with the Building Act 1991 and the Building Code.

The Council's submission

[246] In short, Mr Jameson submits that the Council could not have identified any of the causes of the stucco plaster cracking (i.e leading to the

moisture ingress) or the inadequate waterproofing around the window joinery by visual inspection of the stucco plaster after completion.

[247] The Council's primary submission is that the claimants suffered their loss prior to the Council's inspection of the Stucco plaster system, and even if the Council's conduct was negligent (which is denied) it was not causative of the claimants' loss.

[248] Mr Jameson argues that the Kelleways did not rely on the Council's conduct as the alleged negligent inspection was carried out over 6 weeks after the claimants had purchased the property.

[249] Mr Jameson maintains the defence is absolute and the Kelleways cannot succeed against the Council.

The Kelleway's submission

[250] Mr Tui submits that it is evident from the Submissions for the Council that the Council is preoccupied with what a building inspector could have ascertained during his or her inspections, and the Council has therefore confined its focus to the final inspection on 27 May 1997.

[251] Mr Tui says the focus by the Council is too limited and the scope of the Council's duties were far wider.

[252] The Council has a duty of care to home owners to ensure that the construction complies with the Building Code. The Kelleways were entitled to expect proper inspections (both prior to its sale and purchase going unconditional and subsequent thereto). The Kelleways were entitled to require the Council to put in place proper inspection processes, at sufficient intervals and stages during the construction, to

maximise the inspectors ability to ensure such compliance. If the building inspector had properly undertaken an inspection at the time of plastering and before the final coat) the Council would have ascertained the alleged defective plaster mix and lack of control joints. The fact that the Council did not, it is submitted, amounts to negligence.

[253] To my mind a fundamental issue in relation to this case must be to identify the Council's duties and obligations, and the appropriate standard of care to be exercised by the Council in the discharge of those duties and obligations; and, apply the legal consequences of those obligations to the claim.

The duty of care

[254] Mr Jameson accepts that it is well established in New Zealand that a Council owes a duty of care when carrying out inspections and referred to the decision in *Hamlin v Invercargill City Council* [1994] 3 NZLR 513:-

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

The Obligations of the Council under the Building Act 1991

[255] The Councils obligations relevant to this matter include, inter alia:

- Process building consent applications (s24(b))

  The Territorial Authority must only grant the building consent if satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in

accordance with plans and specifications submitted with the application.

- Inspect building work (s76(1)(a))

  Inspection is defined as “the taking of all reasonable steps to ensure….that any building work is being done in accordance with the building consent…

- Enforce the provisions of the Act and the Regulations made under it (s24(e))

  The building code is the First Schedule to the Building Regulations 1992

- Gather information and monitor (s26)

  Every Territorial Authority shall gather such information, and undertake or commission such research, as is necessary, to carry out effectively its functions under the Act

- Issue Code Compliance certificates (s24(f))

  A Territorial Authority may only issue a code compliance certificate if it is satisfied on reasonable grounds that the building work to which the certificate relates complies with the building code in all respects…

The appropriate standard of care to be exercised by a Council (inspector)

[256] Mr Jameson submits:-

- The duty of care owed by a council in carrying out inspections of building works during construction is that of a reasonably prudent building inspector.

> "The standard of care in all cases of negligence is that of the reasonable man. The defendant, and indeed any other Council, is not an insurer and is not under any absolute duty of care. It must act both in the issue of the permit and inspection as a reasonably prudent Council would do. The standard of care can depend on the degree and magnitude of the consequences which are likely to ensue. That may well require more care in the examination of foundations, a defect in which can cause very substantial damage to a building."
>
> *Stieller v Porirua City Council* (1983) NZLR 628

- That a Territorial Authority is not a Clerk of Works and the scope of duty imposed upon Council building inspectors is less than that imposed upon a clerk of works.

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

- The duty of care imposed upon Council building inspectors does not extend to identifying defects within the building works which are unable to be picked up during a visual inspection. This principle was confirmed by the High Court in Stieller where it was alleged the Council inspector was negligent for failing to identify

the omission of metal flashings concealed behind the exterior cladding timbers.

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

- The extent of a Council inspector's duty does not extend to include an obligation to identify defects in the building works that cannot be detected without a testing programme being undertaken. In *Otago Cheese Company Ltd v Nick Stoop Builders Ltd*, CP18089 the High Court was considering the situation where no inspection of the foundation was carried out prior to the concrete pour. The Court held as follows:-

> “I do not consider that any inspection of the sort which a building inspector could reasonably be expected to have undertaken would have made any difference. There is no question that the builder faithfully constructed the foundation and the building in accordance with the engineer's plans and specifications. No visual inspection without a testing programme would have disclosed to the inspector that the compacted fill was a layer of peat and organic material. If there was a failure to inspect I do not consider that any such failure was causative of the damage which subsequently occurred.”

[257] In reliance on the authorities cited, Mr Jameson contends that It is clear the extent of the duty owed by a reasonably prudent Council inspector will not include an obligation to identify defective construction details incorporated into a stucco plaster cladding system which are unable to be identified by visual inspection after completion of the building work.

[258] Against that, Mr Tui submits:-

- Imposing a duty to put in place proper inspection processes at sufficient intervals and stages during the construction, to maximise the inspectors ability to ensure compliance with the building code does not amount to the building inspector being a 'Clerk of Works'. It is no more than one of the aspects that make up a Council's duty to ensure compliance with the Building Act. It is intrinsic in that duty that the Council put in place a reasonable inspection process to discharge its duties and responsibilities to home owners. The duty is entirely consistant with the Court of Appeal decision in *Steiller v Porirua City Council* [1986] 1 NZLR 84 (CA)

- Such duty is particularly relevant to the negligence of the Council for the alleged inappropriate plaster mix and the lack of control joints. Both Mr Hughes and Mr Cox stated that the stucco plaster was inspected at the final inspection after all work was completed. The purpose of that inspection, according to Mr Cox "was to finalise the building inspection process which included a review of the exterior cladding system to ensure compliance with the building code. [Paragraph 10 of Mr Cox's brief of evidence]

- Mr Cox could not have reasonably or properly ensured that the cladding complied with the Building Code by undertaking such an

inspection at the final inspection. It is submitted that the timing of this inspection was completely unsuitable in order to achieve the said purpose as it could not have allowed a building inspector to reasonably or properly ensure compliance. The building inspector ought to have arranged an inspection before the final coat was applied. In fact an inspection ought to have been arranged during the plaster mix to ensure, inter alia, that the quality of the workmanship was of the standard required. Again reliance is made on the Court of Appeal decision in *Stieller*. The Court of Appeal determined that *"the construction of houses. .. in a workmanlike manner is a matter within the Council's control"*

[259] Whilst Mr Jameson has referred me to the High Court decision in *Stieller v Porirua City Council* (1983) NZLR 628 in relation to the standard of care to be exercised by a Council inspector, I note that the subsequent Court of Appeal decision in 1986 cited by Mr Tui, also includes some helpful guidance on the subject.

[260] The Court of Appeal noted that the statutory Scheme in New Zealand was distinct from that in the United Kingdom, the New Zealand legislation providing for a far broader and wider responsibility on Councils in relation to the construction of dwellings. The Court of Appeal held inter alia, at page 94:-

> "While para (8) is clearly directed at matters of public health, paras (21) and (22) are wide enough to cover the construction of soundly built houses and the resultant safeguarding of persons who may occupy those houses against the risk of acquiring a substandard residence. The construction of houses with good materials and in a workmanlike manner is a matter within the Council's control. Both it and residents in its district benefit from such regulations which make for the economic and social well- being of the community and the creation of a pleasant environment …Section 684 of the Local Government Act is concerned with wider issues of general building

construction. It should not be read down to limit the liability of the Council to matters affecting only safety and public health. A Council may be liable for defects in exterior cladding even though questions of safety and health do not arise. . ..

A further point made on behalf of the Council by Mr Hancock was that the standard code did not make inspections by the Council mandatory at the stage where the exterior of the house was being clad in the weatherboards. And, he took issue with a passage in the judgment where Greig J said that the fact that the case did not relate to foundations or the resultant effect on a building of defects in those did not make any difference; that liability did not depend upon the part of the structure which is at fault although it may have some effect on the standard of care and its exercise. Mr Hancock said that the Judge had failed to take into account that it might be common practice for the local authority to make no inspections at all at certain stages and yet it might be fixed with liability for work done thereafter. The short answer to this submission is that the Council's fee for the building permit is intended to include its charges for making inspections in the course of the construction, and it does not limit these in number or by stages."

[261] It would seem to me therefore (and using my own terminology) that the standard (and nature) of the care owed by a Council charged with carrying out inspections of building work during construction can be summarised thus:-

- A Council (inspector) must act as a reasonably prudent Council (inspector) would act

- The standard of care in relation to any given inspection, or in relation to a decision whether or not to inspect building works at any given interval or stage of construction, may depend on the degree and magnitude of the consequences which are likely to ensue

- The Council building inspector is not a clerk of works.(A clerk of works may be described as a person employed by an owner or

principal, whose full time attendance on and responsibility for, any given building project, is directed to ensuring all workmanship and materials incorporated into the building works are of the required and appropriate standard for the project)

The Council's obligation on the other hand, is to ensure that the works are carried out in accordance with the building consent and the building code and the quality of certain materials or workmanship may be immaterial to a proper consideration of compliance with same (i.e interior finishing and decorating)

- The Council building inspector is not an architect or engineer responsible for designing any or all of the component elements of a building; or, approving and certifying construction where such construction has been undertaken in accordance with specific engineering design

- The standard of care does not extend to identifying defects within the building works which cannot be detected without a testing programme being undertaken

- The Council is obliged to put in place proper inspection processes, at appropriate intervals and stages during the construction of a building to maximise the inspectors ability to ensure compliance with the building code

- The Council must ensure that it undertakes such research and gathers such information as is necessary to ensure it's officers and inspectors are suitably qualified, experienced, and informed in relation to current building standards and practices, to enable them to effectively carry out the Council's functions under the

> Building Act 1991; including, but not limited to, inspecting building works during construction in respect of which the Council has issued a building consent.

[262] Accordingly, if a Council ensured that its building inspectors were adequately informed in relation to current building standards and practices, if inspections were carried out at appropriate intervals and stages during the construction of a building to ensure compliance with the building code and the building consent, and if building inspectors undertook their inspections exercising reasonable care and diligence, a Council would be acting prudently, and its obligations under the Building Act, and its duty of care to house owners, would be discharged absolutely.

[263] It follows then, to consider, in relation to any particular building defect, whether the Council, has caused, or contributed to the defect, by dereliction of those ordinary and proper duties and obligations.

Did the council exercise the requisite standard of care?

[264] In short the Council submits that it could not see or be expected to see any of the causes of the stucco plaster cracking (i.e leading to the moisture ingress) or the inadequate waterproofing around the window joinery by visual inspection of the stucco plaster <u>after completion</u>.(my emphasis added) which on the face of it would seem both patently obvious for the most part, and entirely avoidable at the sole discretion of the Council on the other (if it were aware that a dwelling was to be clad in stucco plaster)

[265] This is indeed the very point Mr Tui has been making throughout, because, Mr Tui submits that Mr Cox could not have reasonably or

properly ensured that the cladding complied with the Building Code by undertaking such an inspection at the final inspection; that the timing of this inspection was completely unsuitable in order to achieve the said purpose as it could not have allowed a building inspector to reasonably or properly ensure compliance; and, the building inspector ought to have arranged an inspection before the final coat of plaster was applied to ensure the quality of the workmanship was of the standard required.

[266] It is common ground between the experts that it would have been difficult, if not impossible, for a building inspector to have identified the defects which have caused the stucco plaster cracking (i.e. lead to moisture ingress) in the Kelleway's dwelling by a visual inspection after completion of the building work. viz. without a testing programme.

[267] The standard of care owed by the Council does not extend to identifying defects which cannot be detected without a testing programme being undertaken (See: *Steiller v Porirua City Council* (1983) NZLR 628 supra.)

[268] Therefore, the consideration of whether or not the Council exercised the requisite standard of care raises two further and distinct questions. The first concerns whether or not the Council could have identified the defects which have caused the stucco plaster cracking if it had inspected the works before completion?. The second question involves an inquiry into whether or not the Council's decision not to inspect the works before completion was reasonable?

[269] The experts opinions varied as to whether the building inspector could have, or indeed, would have, detected the defects which have caused the stucco plaster cracking if he had inspected the work before completion.

[270] Of the inconsistent opinions and evidence, I prefer on the balance of probabilities, that:-

[271] The inspector could have identified the extension of the plaster cladding into the ground and the associated omission of adequate drainage to the plaster cladding system:-

> "The Council inspector should have noticed the failure to provide for this drainage at the time of the final inspection and it is for this reason rather than any others that the council should share in the liability for this claim."
>
> [paragraph 33, Alexander brief of evidence]

> "I don't believe from what I have seen there is any casing bead on the bottom of the stucco, when the stucco jumps across to the foundation it is simply plastered direct onto the existing foundation…"
>
> [Mr Cook - 4:18:50]
>
> "..what he [the inspector] should have picked up was the lack of the drainage space at approximately 50mm below the bottom plate.."
>
> [Mr Cook - 4:28:53]

[272] The absence of a casing bead would have been obvious upon a visual inspection before or during the application of the plaster mix, as would the extension of the plaster into the ground and the lack of drainage.

[273] The inspector could have identified the incorrect placement of the reinforcing mesh upon a visual inspection before or during the application of the plaster mix:-

> " Without opening it up as you have, you wouldn't be able to reach the conclusion you have now reached about the [mesh placement] workmanship (Heaney)….. Certainly not (Cook)
> [4:27:56]

[274] The inspector could have identified the inadequate waterproofing around the window joinery:-

> "When inspecting a completed stucco plaster cladding system, it is not possible to tell whether appropriate sealants have been adequately applied, as this is a concealed detail."
> [paragraph 36 Cox brief of evidence]

> "There are a number of construction details associated with stucco plaster that are not able to be confirmed by visual inspection once the stucco plaster has been completed, including …, and the adequacy of the jamb and sill waterproofing."
>
> [paragraph 16 Hughes brief of evidence]

> "the sealant would be most effective if it is placed behind the aluminium flange of the window and forms a bond between that flange and probably the second coat of plaster before the final coat of plaster is applied…"
>
> [Alexander 4:54:09]

[275] The inspector could have identified the lack of proper provision for expansion and movement of the plaster cladding system (lack of control joints)

> "Flush finish control joints are commonly used and cannot be seen during a visual inspection because the final layer of the plaster coating conceals that detail."
>
> [paragraph 43, Cox brief of evidence]
>
> "We have heard evidence from Mr Cook that the only time you would, upon inspection by a building inspector, notice control joints is if it was during the plastering, if you were there during plastering, or alternatively before the final paint – would you agree with that? Not the final paint, before the final coat of plaster."
>
> [Tui/Cox 2:18:43]

> "There are a number of construction details associated with stucco plaster that are not able to be confirmed by visual inspection once the stucco plaster has been completed, including mix of the stucco plaster, the presence to control joints (i.e flush finished control joints)…."
>
> [paragraph 16 Hughes brief of evidence]

[276] For completeness, I confirm that I have not found the plaster mix or curing of the plaster causative (on the balance of probabilities) of the cracking in the plaster on the Kelleways dwelling. But even if I had, I can state unhesitantly, that I accept Mr Alexanders opinion at paragraph 28 of his brief of evidence, that these were matters that could only have been regulated by a person performing the role of a clerk of works and that is not the role of the Council:-

> "Council inspectors cannot perform the functions of a clerk of works and the Courts have held that council inspectors cannot be expected to have a clerk of works function. Regulating plaster mix and the adequacy of plaster curing is a matter that is completely beyond the ability of Council inspectors to control. Those matters can only be regulated by a person performing a clerk of works function."

[277] A building inspector is not a clerk of works (See: *Sloper v WH Murray Ltd & Maniapoto CC* supra) and therefore cannot be considered negligent in the event of a cladding failure/moisture ingress caused by improper plaster mix or inadequate curing of the plaster.

[278] Accordingly, I have no doubt that all of the defects that have caused the stucco plaster cracking (i.e. moisture ingress) could have been identified by the Council if it had inspected the works before completion, and turn now to consider whether the Councils decision not to inspect the works before completion was reasonable.

[279] The reasons advanced by the Council for not inspecting the work before completion included, inter alia: the cost of providing inspections, the number and duration of inspections; the usual practice of Councils at the time (1997); reliance on contractors; and, the lack of knowledge concerning the installation of stucco plaster and the problems associated with poor detailing/construction.

The cost, number, and duration of inspections

[280] In his opening statement, Mr Heaney submitted:-

> "The Council simply did not have the resources, and nor for that matter when people apply for building consents do they pay a sufficient fee to justify the type of inspection that might be expected from a clerk of works, or an architect engaged to undertake supervision, or at the far end of the spectrum, a builder who is on site all of the time carrying out the work." [12:00:02]

[281] Mr Cox stated in his brief of evidence that:-

> "The Council's inspection process, in so far as residential dwellings are concerned, usually comprises of between 3 to 4 building inspections of the building works during construction.
>
> Each inspection would usually consist of a 10-12 minute inspection of the building works at various stages during the construction with a view to checking that the building works completed at each stage was in accordance with the building consent documents and complied with the building code requirements."
>
> [paragraphs 15 & 16 Cox brief of evidence]

[282] That evidence was explored during the hearing and whilst Mr Cox stated that the time allowed for inspections was short, he confirmed that the Council was, subject to its obligations under the Building Regulations, the sole arbiter of when inspections were carried out and the duration of each inspection:-

> "That is something that the Council decides of its own accord, it decides how many inspections and the duration of those inspections?…Yes it does.."
>
> [Adjudicator/Cox 2:31:35]

[283] When the Court of Appeal addressed similar issues in *Steiller v Porirua CC* some ten years previous to the Council's inspections of the Kelleway's dwelling, the matter was summarily dealt with at page 94 where the Court held:-

> "A further point made on behalf of the Council by Mr Hancock was that the standard code did not make inspections by the Council mandatory at the stage where the exterior of the house was being clad.…
>
> Mr Hancock said the judge had failed to take into account that it might be common practice for the local authority to make no inspections at all at certain stages and yet it might be fixed with liability for work done thereafter. The short answer to this submission is that the Council's fee for the building permit is intended to include it's charges for making inspections in the course of construction, and it does not limit these in numbers or by stages."

[284] And accordingly any argument that the number of inspections was limited in any way by the cost of providing the services is simply without substance.

[285] It can readily be concluded in this case that the number and timing of the Councils inspections were matters solely at the Council's discretion and the number and duration of the inspections were not limited in any way by cost, policy, or legislation.

The usual practice of Councils in 1997

[286] Mr Heaney submitted that the Councils conduct should be judged by the conduct of other reasonable Councils.

[287] Mr Jameson has argued that the Council's inspection regime was more than adequate by reference to the usual and common practice of Territorial Authorities as at the time, and that specialist stucco plaster inspections were not carried out by Council in 1997

> "In 1996/1997, it would be usual for 4 to 5 building inspections to have been undertaken during the construction process for a dwelling of this design. That 9 building inspections were undertaken indicates the Council's building inspection regime was more than adequate by reference to the usual and common practice of Territorial Authorities at the time. In my opinion, the Council carried out a sufficient number of appropriate building inspections.
>
> John Cox has confirmed in his brief of evidence that special stucco plaster inspections were not carried out during the actual construction of the stucco plaster system. I confirm that it was not the usual practice for such inspections to be undertaken at the time in question, as the moisture ingress problems now attributed to poor detailing in stucco plaster construction had not been recognised by Territorial Authorities, or the building industry generally, at that time."
>
> [Paras. 12 & 13, Hughes brief of evidence]

[288] Whilst I accept the general principle behind Mr Heaney's submission that the conduct of the Council is to be judged by the conduct of other reasonable Councils, I consider Mr Jameson's submission; that the duty of care owed by a council in carrying out inspections of building works during construction is that of a reasonably prudent building inspector (*Stieller v Porirua City Council*), is probably more pertinent and to the point.

[289] The common conduct of Councils in respect of any particular matter, viz. stucco plaster inspections, cannot be of itself, a definitive measure of reasonableness and prudence, particularly where that conduct is, in the eyes of any independent and objective bystander, clearly not reasonable or prudent in the circumstances.

[290] I turn now to consider the question of why the Council(s) did not carry out inspections of stucco plaster work before it was completed, and whether that conduct was prudent in the circumstances.

Reliance on the plaster applicator

[291] In essence, it is claimed that the Council did not conduct inspections of stucco plaster cladding in 1997, and relied on the expertise of stucco plaster applicators in so far as ensuring plaster cladding work was carried out in accordance with the building code.

[292] It is submitted that this was also the practice of other Councils in 1997.

[293] Mr Cox stated in his brief of evidence at paragraph 28:-

> "Council inspectors were required to make an assessment, based on the visual evidence available at the final inspection, as to whether the as-built stucco plaster complied with the building code."
>
> and, further, at paragraph 37 of his brief of evidence:-
>
> "…the building inspector is necessarily reliant upon the tradesman responsible for carrying out the works to ensure that the waterproofing around the external joinery has been completed in accordance with good trade practice and complies with the building code."

[294] Mr Hughes also stated in his brief of evidence at paragraph 16:-

> "In 1997, building inspectors necessarily relied on specialist skills and competency of the plastering applicators to ensure these aspects of the construction detail were properly completed."(my emphasis added)

[295] That is not strictly so – the Council was not necessarily required to make an assessment based on the visual evidence available at the final inspection, it simply elected to do so.

[296] The Council's practice in 1997 in relation to ensuring stucco plaster cladding work complied with the building code, was more fully disclosed by Mr Cox when he stated:-

> "I assumed the plasterer would have incorporated the requisite number of control joints into the plaster…"
>
> [paragraph 44 of Mr Cox's brief of evidence]

[297] Mr Hughes affirmed in his view, the legitimacy of that practice, when he stated:-

> "I am of the view that Mr Cox was entitled to assume, in the absence of any evidence to the contrary that the stucco plaster applicator would have attended to those aspects of the works in accordance with the building code and good trade practice."

[298] To suggest the practice of relying on the plastering contractor to ensure the stucco plaster work was undertaken in accordance with the building code was necessary or essential for any reason other than pure convenience, is simply fallacious, and moreover, to simply assume that concealed [stucco plaster] work complies with the building code falls well short of any objective test of being satisfied on reasonable grounds.

[299] In my view, the adoption by the Council (or any other Council) of the practice of assuming the concealed [stucco plaster] work complied with the building code based solely on reliance on the unknown, and therefore questionable, skills and practices of the plaster applicator, was a clear abrogation of the Council's obligations and duties and renders the purpose of independent inspection and certification by the Council nugatory.

[300] Consequently I consider the reliance placed by the Council on the plastering contractor to ensure the stucco plaster work was undertaken in accordance with the building code, and the assumption that concealed stucco plaster work complied with the building code based on that reliance was both misplaced and misconceived

The lack of knowledge concerning the installation of stucco plaster and the problems associated with poor detailing/construction

[301] It has been argued for the Council, that it was reasonable for the Council not to conduct inspections of the stucco plaster work before it was completed, because:-

> "..the moisture ingress problems now attributed to poor detailing in stucco plaster construction had not been recognised by Territorial Authorities, or the building industry generally, at that time."
>
> [Paras. 12 & 13, Hughes brief of evidence]

[302] This issue occupied a significant portion of the evidence given by Mr Cox during cross-examination by Mr Tui, and involved the introduction of a number of exhibits including:-

- BRANZ Bulletin 283 Sealed joints in external claddings –1. Joint design, dated October 1991 [Exhibit C]

- BRANZ Bulletin 284 Sealed joints in external claddings –2. Sealants, dated October 1991 [Exhibit D]

- NZS 4251:1974 The Code of Practice for Plastering, pg.18 [Exhibit E]

- NZS 3604:1990, Appendix G, Solid Plaster Exterior Wall Covering [Exhibit F]

- Copy: Buildright article,Build magazine February 1995, Solid Plaster-Have we forgotten how to do it ? [Exhibit G]

- BRANZ Bulletin 353 Ground Clearances dated February 1997 [Exhibit H]

- BRANZ - Good Stucco Practice, dated February 1996 [Exhibit I]

[303] In short, it was submitted by Mr Tui that there was adequate, significant, and credible technical information produced specifically by and for the building industry available well before the Kelleway's dwelling was constructed, and which information moreover, clearly identified moisture ingress problems attributed to poor construction practices and detailing of stucco plaster.

[304] Mr Tui also referred Mr Cox to the BRANZ Stucco seminars in February-April 1995 but Mr Cox stated that he had not personally attended those seminars.

[305] Mr Cox confirmed that as a building inspector, he was expected to keep up with building developments and to read building publications. Mr Cox stated that he read BRANZ Appraisals, Standards and amendments, Technical Bulletins and the BIA News. Mr Cox advised that his employer (the Council) subscribed to those publications , that the publications were available as soon as they came out, and that he would read them shortly after they were published. [12:25:18]

[306] Mr Cox accepted that the BRANZ publications were reputable publications that the Council should be familiar with and that they were prepared for the building industry, including building officials, building inspectors, builders, plasters etc.[12: 39:24]

[307] Notwithstanding Mr Cox's evidence that the Council subscribed to the BRANZ publications et al, and that he read them soon after publication, it was both telling and damming that Mr Cox should confirm that he was not aware that stucco plaster should not be carried to the ground until a few years ago, and that the Council had not purchased the BRANZ Good Stucco Guide or the other relevant BRANZ Bulletins until 1998/1999 or later, being after the final inspection of the Kelleway's dwelling. Mr Cox stated that he did not know why the Council had not purchased the publications at the time they were published and that he was not responsible for purchasing [12:27:43]

[308] I do not propose to traverse all of the evidence, suffice to say, it is readily established that the moisture ingress problems now attributed to poor detailing in stucco plaster construction had clearly been recognised by the building industry well before the Kelleways dwelling was constructed, but not, it seems, by the Council.

[309] The true situation in 1997, in fact much earlier than that, is helpfully recorded in the Build February 1995 article; Solid Plaster – Have we forgotten how to do it?:-

> " The recent trend for solid plaster/stucco finishes has shown some disappointing results. The traditional knowledge and skills are available; they just need to be revived and put into practice….
>
> The performance of solid plaster on light timber framed buildings constructed during the past three or four years has in many instances been poor. Although there are many good jobs out there, an alarming number of buildings have been clad with solid plaster that displays severe and uncontrolled cracking, causing leakage. This also spoils the look of the building and the owners look to others for remedial action which is usually costly."

[310] The article identifies as principal causes of failure of stucco plaster, all of the reasons put forward in this case for the failure of the plaster cladding on the Kelleway's dwelling, including: the lack of movement control joints; incorrect mix proportions; the use of two coats rather than three; and, the location of the reinforcing.

[311] It is also notable and portentous that in the concluding section, the author advises:-

> "With the resurgence of solid plaster comes the need for techniques and standards to be reviewed. This is necessary to highlight the apparent lack of experienced tradespeople in the industry…" [Exhibit G]

[312] The Council has a statutory duty to gather such information, and undertake or commission such research, as is necessary, to carry out effectively its functions under the Building Act (s26)

[313] Whilst Mr Cox has deposed that the Council had a policy of purchasing technical information for the use of its building officers, he has also

confirmed that the Council failed to obtain any of the publications that were produced for the building industry in response to an industry problem identified in the early and mid 1990's relating to the failure of stucco plaster cladding and moisture ingress problems attributed to poor detailing in stucco plaster construction.

[314] I am driven to conclude that the failure by the Council(s) to conduct inspections of the stucco plaster work and weatherproofing of the exterior joinery before the work was completed, was born of a woeful, but avoidable lack of knowledge by the Council's building officers brought about by the failure of the Council to gather and provide such information as was necessary to enable the Council officers to effectively carry out its duties under the building Act, and that failure was in breach of its Statutory obligations.

[315] Therefore, in my view it could not be said even hesitantly, that the council's argument that its conduct was prudent and reasonable in the circumstances has been made out, and in the end, I am bound to find that the Council breached the duty of care it owed to home owners by failing to conduct inspections of the stucco plaster work before it was completed.

[316] Notwithstanding that position, the Council's decision not to inspect the Kelleway's dwelling during the construction of the stucco plaster cladding system was not negligent.

[317] It could not have been so, because the building consent was issued to Insar and Tennent in respect of a dwelling that was to be clad in 'Harditex' not stucco plaster, and no inspection of the Harditex cladding would have been required prior to completion in 1997 [See: Building Plans: Exhibit M]

[318] Mr Cox and Mr Hughes confirmed that the practice of changing the cladding after a building consent was issued was commonplace and accepted by Council without any formality, but in the absence of any knowledge of the change in cladding systems (and no evidence was given that Council was aware, or ought to have been aware of the change in cladding) it was entirely reasonable for the council not to require or provide any further inspections of the Kelleway's dwelling during construction.

The final inspection

[319] Whilst much of that which I have directed myself to so far relates to the Councils decision not to inspect stucco plaster cladding before completion, my consideration of the Council's conduct in this matter must by necessity address the final inspection upon which the decision to issue a code compliance certificate was based.

[320] It is submitted by Mr Tui that Mr Cox negligently approved the building work as being compliant with the building code when he conducted his final inspection on 27 May 1997, because the work was complete and the construction detail concealed from view.

[321] Mr Alexander also considered that Mr Cox was negligent when he approved the building work on 27 May, 1997, but for a different reason.

[322] Mr Alexander was of the view that Mr Cox should have identified the lack of adequate drainage/plaster carried into the ground during his inspection:-

> "The Council inspector should have noticed the failure to provide for this drainage at the time of the final inspection and it is for this

> reason rather than any of the others that the council should share in the liability for this claim."
>
> [paragraph 33 Alexander brief of evidence]

[323] I have no hesitation in accepting Mr Alexander's opinion as convincing in relation to that narrow issue.

[324] But in short, and based on my findings that the reliance placed by the Council on the plastering contractor to ensure the stucco plaster work was undertaken in accordance with the building code and the assumption by the Council that concealed stucco plaster work complied with the building code based on that reliance, was misplaced and misconceived; it follows, that Mr Cox could not have been reasonably satisfied that the work complied with the building code when he inspected the Kelleways dwelling on 27 May 1997 because the stucco plaster cladding work was completed and, save for the obvious lack of drainage, the construction and weatherproofing detail necessary to establish or confirm compliance with the building code was concealed.

[325] I am driven to conclude that Mr Cox's inspection and approval of the building works was negligent.

Causation/reliance

[326] For the Kelleways to recover against the Council, the Council's conduct must be causative of the loss suffered by the Kelleways.

[327] The Councils primary submission in this proceeding is that the Council's conduct, even if negligent, was not causative of the Kelleways loss.

[328] Mr Jameson referred me to the Court of Appeal decision in *Sew Hoy & Sons Ltd v Coopers & Lybrand* where The Court recently considered the test for causation. In that case, Henry J held a plaintiff must establish in a commonsense practical way the loss claimed was attributable to the breach of duty (at 403). In emphasising the causal connection, Thomas J summarised the issue of causation in the following terms:-

> "The basic question remains whether there is a causal connection between the defendant's default and the plaintiff's loss…the answer to this question will not be resolved by the application of a formula but by the application of a Judge's common sense. The Judge needs to stand back from the case, examine the facts closely, and then decide whether there is a causal link between the default and the loss in issue which can be identified and supported by reasoned argument" (408-409)
>
> *Sew Hoy & Sons Ltd v Coopers & Lybrand* [1996] 1 NZLR 392

[329] Mr Jameson submits:-

- The Kelleways suffered the loss on 6 April 1997 when they entered into a sale and purchase agreement to buy the property for an amount in excess of its true value (taking into account the defects in the stucco plaster cladding system) and/or on 11 April 1997 when the agreement went unconditional.

- The sale and purchase agreement was not conditional upon the final inspection by the Council and/or issue of the Code Compliance certificate and any breach of duty by Mr Cox in carrying out his inspection of the stucco plaster cladding was not causative of the Kelleways loss because that inspection was carried out by Mr Cox on 27 May 1997, after the claimants had purchased the property.

- If the Council had picked up the defects in the stucco plaster, the Council could only have issued a notice to rectify those defects to the owners of the dwelling (i.e. the Kelleways) pursuant to section 42 of the Building Act 1991.

- In conclusion, Mr Jameson submits that the Councils conduct was not causative of the Kelleways loss and that defence constitutes an absolute answer to the Kelleways case against the Council.

[330] With respect, the argument seems to me to suffer from an inherent flaw in that it leads from the premise that the loss was suffered when the Kelleways became bound to pay Insar and Tennent the agreed price for the dwelling, rather than from any breach of duty by Mr Cox when he carried out his final inspection.

[331] I accept that the Sale and Purchase Agreement was not conditional upon any special terms relating to the completion of the inspection process or the issue of a code compliance certificate by the Council that would have entitled the Kelleways to cancel the contract for non-compliance, but the price to be paid was unequivocally conditional on the building work being completed in compliance with the provisions of the Building Act, and the Kelleways would have had remedies against the vendors/builders in May/June 1997, including inter alia; requiring the vendors to immediately repair the defects, or, having the defects repaired by others and deducting the cost of the repair from the monies otherwise payable to Insar and Tennent under the Sales and Purchase Agreement.

[332] Put simply, commonsense and reason would suggest that the Kelleways would not have paid the purchase price in full on 19 June 1997 if the building work had not been certified by the Council, and/or if they had

been aware of the defects in the plaster cladding, which, if the Council had properly discharged its duties and functions under the Building Act, they would have been aware of on or before 27 May 1997, being the date of the final inspection.

[333] In conclusion, the Kelleways loss was suffered on 19 June 1997 when they paid Insar and Tennent the purchase price in full for the non-compliant and defective dwelling in reliance on the Council having properly discharged its duties and functions under the building Act which would seem to me to establish in a commonsense and practical way the loss claimed is attributable to the breach of duty and the causal link is thus readily established.

[334] In this case, the loss to the Kelleways is the reasonable cost to repair the damage to the dwelling and to make the building work comply with the building consent and the building code.

[335] The Council's position in tort is distinct from that of the owner/builder. The Council is not a clerk of works or an insurer of the quality of workmanship and the merchantability of all materials, save as for that workmanship and those materials necessary to ensure compliance with the building code. Whilst the nail popping in the kelleway's dwelling is the result of negligent construction, it is not the result of a failure to comply with the building code, the Council owes no duty to home owners in relation to matters beyond compliance with the building code and therefore has no liability for the cost of repair of such matters.

[336] Accordingly, I find the Council breached the duty of care that it owed to the Kelleways, and in respect of which the Kelleways have suffered loss in the sum of $40,022.99, calculated as follows:

[a]	Nail popping (Net cost: $220.00)	$ NIL
[b]	Remedy Fungal growth (Net cost: $1,350 + $2,250)	$ 4,722.30
[c]	Remedy plaster/waterproofing defects	$35,300.69
Total		$40,022.99

CONCURRENT OR JOINT TORTFEASOR?

[337] Mr Tui has submitted that the Council is a joint tortfeasor with the first and third respondents (Insar and Tennent) in respect of the defects in the plaster cladding and consequently liable to the Kelleways for the entire loss.

[338] Mr Jameson submits that the Council is a concurrent tortfeasor with the first and third respondents and not a joint tortfeasor.

[339] The difference between the two concepts is aptly set out by Todd:-

> "Joint tortfeasors in law commit the same tort whereas concurrent tortfeasors are responsible for different torts producing the same damage."
>
> [Todd, The law of Torts in New Zealand, 3rd Ed., page 1142]

[340] Concurrent liability arises where there is a coincidence of separate acts which by their conjoined effect cause damage (*Allison v KPMG Peat Marwick* [2000] 1 NZLR 560 at 584 (CA))

[341] The Council was not involved in the construction of the stucco plaster system and is therefore not a joint tortfeasor in that regard. Insar and

Tennent were not involved in the inspection process and are not joint tortfeasors in that regard.

[342] The Council, and Insar and Tennent are 'concurrent tortfeasors', because they are responsible for different torts (i.e. 'negligent construction' and 'negligent inspection') that have combined to produce the same damage giving rise to concurrent liability.

[343] Whilst Mr Jameson has correctly described the parties as concurrent tortfeasors, in the end the position remains the same:-

> "Joint or concurrent tortfeasors are each liable in full for the entire loss….
>
> Actual satisfaction of the full amount by one tortfeasor discharges claims against other tortfeasors whether joint or concurrent, because there is no loss left to compensate."
>
> [Todd, The law of Torts in New Zealand, 3rd Ed., page 1144]

CONTRIBUTION

[344] Mr Jameson submits that the maximum the Kelleways can recover against the Council is 20% of the cost of those works required to fix the building defects for which the Council could be held liable and cited *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA)

[345] For the reasons set out in this determination, and based on the principles enunciated in *Todd* (supra), the Council, and Insar and Tennent, are concurrent tortfeasors and are jointly liable in full for the entire loss suffered by the Kelleways.

[346] Notwithstanding that position, the Council is entitled to claim a contribution from Insar and Tennent pursuant to s17 of the Law Reform Act 1936, in respect of the amount to which it would otherwise be liable, and I understand the extent of the contribution sought is 80%

[347] The basis of recovery of contribution provided for in s17(1)(c) is as follows:

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

[348] The liability of Insar and Tennent to make contribution to the Council arises because all three respondents are tortfeasors and Insar and Tennent, who are joint tortfeasors on the one hand, are concurrently liable with the Council on the other hand, in respect of the same damage.

[349] Notwithstanding that Insar and Tennent are concurrently liable to the Kelleways in contract and tort, the Council's action for contribution can be maintained.

[350] The approach to be taken in assessing a claim for contribution is provided in s17(2) of the Law Reform Act 1936. It says in essence, that the amount of contribution recoverable shall be such as may be found by the Court to be just and equitable having regard to the relevant responsibilities of the parties for the damage.

[351] What is a 'just and equitable' distribution of responsibility is a question of fact, and although guidance can be obtained from previous decisions of the Courts, ultimately each case will depend on the particular circumstances giving rise to the claim.

[352] Mr Jameson has referred me to the decision in *Mt Albert BC v Johnson* which case bears strong similarities to the instant one and involved the owner of a defective building suing the builder for constructing the defective building, and the local authority for negligence in inspecting it.

[353] As in *Mt Albert BC v Johnson* , primacy for the damage must lay with Insar and Tennent in this case as the owner/builders, whose responsibility it was, to carry out the building works in accordance with the building code and the building consent. It was a condition of the building consent that the building work was to be undertaken in accordance with the plans and specifications so as to comply with the building code and the observance of that requirement was Insar's and Tennent's primary responsibility.

[354] The Council's role, on the other hand is essentially supervisory and to that extent I consider that it's role should be significantly less than that of the principal author(s) of the damage.

[355] Having considered the matter carefully, I see no compelling reason to depart from the general principle in this case, and accordingly the Council is entitled to an order that Insar and Tennent jointly, bear 80% of the total amount to which the Kelleways would otherwise be entitled to obtain from the Council in damages pursuant to this determination.

COSTS

[356] Mr Tui submits that whilst adjudicators have a limited power to award costs, this is an appropriate case to make an award of costs against the council.

[357] The thrust of Mr Tui's argument is that in his view, the Council's conduct has been highhanded throughout.

[358] Mr Tui directed me to consider: the Council's refusal to take any responsibility for the damage to the Kelleway's dwelling despite its manifest negligence and the concession of its own expert on the question of liability; the Council's attempt to hijack the adjudication and

turn it into an adversarial hearing when the process was intended to be more inquisitorial; the Council's attempt to narrow the scope of the proceedings in relation to the negligence and conduct of the Council; and, the disregard shown by the Council to the Kelleways.

[359] Mr Jameson, in reply, submitted that the issue of costs should follow the adjudicator's decision and that it would be inappropriate for the parties to make submissions on costs until the decision was published.

[360] The power to award costs is addressed at clause 43 of the Act, which provides:-

> **43 Costs of adjudication proceedings**
>
> (1) An adjudicator may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if the adjudicator considers that the party has caused those costs and expenses to be incurred unnecessarily by-
>
> (a) bad faith on the part of that party; or
> (b) allegations or objections by that party that are without substantial merit
>
> (2) If the adjudicator does not make a determination under subsection(1) the parties must meet their own costs and expenses.

[361] I think it is fair to summarise the legal position by saying that an adjudicator has a limited discretion to award costs which should be exercised judicially, not capriciously.

[362] I have carefully considered the Kelleways claim in principle, (because no actual sum has been claimed to date) and, whilst I am only too conscious that this has been a most unpleasant and expensive saga for

the claimants, I am not persuaded that the Council has necessarily acted in bad faith, or that its case was without substantial merit such that an award of costs against the Council would be appropriate in this case

[363] I therefore find that the parties shall bear their own costs in this matter.

CONCLUSION AND ORDERS

For the reasons set out in this determination, and rejecting all arguments to the contrary, I determine:-

[a] Insar and Tennent (the First and Third respondents respectively) are in breach of contract and are jointly and severally liable to the Kelleways (the Clamants) in damages for the loss caused by that breach in the sum of $40,022.29

[b] Insar and Tennent (the First and Third respondents respectively) are in breach of the duty of care owed to the Kelleways (the claimants) and are jointly and severally liable to the Kelleways in damages for the loss caused by that breach in the sum of $40,311.58

[c] The Council (the Second respondent) is in breach of the duty of care owed to the Kelleways (the Claimants) and is liable in damages for the loss caused by that breach in the sum of $40,022.29

[d] As a result of the breaches of the duty of care referred to in [b] and [c] above, Insar and Tennent on the one hand, and the Council, on the other, are concurrent tortfeasors

[e] As between Insar and Tennent on the one hand, and the Council, on the other, the Council is entitled to a contribution from Insar and Tennent jointly and severally, for 80% of the same loss that each has been found liable for, being 80% of the sum of $40,022.29

Therefore, I make the following orders:-

(1) Insar and Tennent and the Council, are jointly and severally liable to pay the Kelleways the sum of $40,022.29

(s42(1))

(2) Insar and Tennent are jointly and severally liable to pay the Kelleways the further sum of $289.29

(s42(1))

(3) The Council is entitled to a contribution of $32,017.83 from Insar and Tennent, jointly and severally, being 80% of the sum to which the Council has been found liable for breach of the duty of care, in the event that the Council should pay the Kelleways that sum

(s29(2)(a))

(4) The parties shall bear their own costs in this matter

(s43)

Dated this 29th day of September 2003

_____

JOHN GREEN
ADJUDICATOR

STATEMENT OF CONSEQUENCES

IMPORTANT

Statement of consequences for a respondent if the respondent takes no steps in relation to an application to enforce the adjudicator's determination.

If the adjudicator's determination states that a party to the adjudication is to make a payment, and that party takes no step to pay the amount determined by the adjudicator, the determination may be enforced as an order of the District Court including, the recovery from the party ordered to make the payment of the unpaid portion of the amount, and any applicable interest and costs entitlement arising from enforcement.