CLAIM NO: 3284

UNDER The Weathertight Homes Resolution Services Act 2002

IN THE MATTER of an adjudication

BETWEEN **LISA MICHELE KELLY** and **MARTIN ROSS KELLY**

Claimants

AND **BLACK & FOOTHEAD CONSTRUCTION LIMITED**

First Respondent

AND No Second Respondent, Urban Joinery Company Limited having been struck out

AND No third respondent Christopher Rofe having been struck out

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DETERMINATION OF ADJUDICATOR
(Dated 21st December 2005)

INDEX TO DETERMINATION

1. BACKGROUND

1.1 The Claimants lodged a claim under the Weathertight Homes Resolution Services Act 2002 ("the WHRS Act"). The claim was deemed to be an eligible claim under the WHRS Act. The Claimants filed a Notice of Adjudication under s.26 of the WHRS Act on 8 August 2005.

1.2 I was assigned the role of adjudicator to act for this claim, and a preliminary conference was arranged and held by telephone on 1st September 2005, for the purpose of setting down a procedure and timetable to be followed in this adjudication.

1.3 I have been required to issue five Procedural Orders to assist in the preparations for the Hearing, and to monitor the progress of these preparations. Although these Procedural Orders are not a part of this Determination, they are mentioned because some of the matters covered by these Orders may need to be referred to in this Determination.

1.4 The hearing was held on 22 November 2005 in the meeting rooms of the Mercure Hotel at 345 The Terrace, Wellington. The Claimants were represented by Mr Travis Lamb of Hughes Robertson; the first respondents were represented by Mr Finn Collins of Gibson Sheat; and the third respondent represented himself.

1.5 I conducted a site inspection of the property on 23 November 2005 in the presence of Mrs Kelly and Mr Foothead.

1.6 All the parties who attended the hearing were given the opportunity to present their submissions and evidence and to ask questions of all the witnesses. Evidence was given under oath or affirmation by the following:

- Mr Dougal McLellan, the WHRS Assessor, called by the adjudicator;
- Mr Barry Marsh, of the NZ House Inspection Company, called by the Claimants;
- Mr Shane Harper, a builder, called by the Claimants;
- Mrs Lisa Kelly, one of the Claimants;

- Mr Martin Kelly, the other Claimant;
- Mr Giles Alington, the architect who designed the house, called by the first respondent;
- Mr Chris Foothead, a director of the first respondent company.

1.7 Before the hearing was closed the parties were asked if they had any further evidence to present or submissions to make, and all responded in the negative. All parties were invited to file written closing submissions by 4.00 pm on Tuesday 29 November.

2. THE PARTIES

2.1 The Claimants in this case are Mr and Mrs Kelly. I am going to refer to them as "the Owners". They owned a property at 23 View Road, Melrose, Wellington, and having subdivided this property, they proceeded to build a new house on the front of the land. The Owners employed Mr Giles Alington to design the new house, and entered into a contract with Black & Foothead Construction Ltd to build it.

2.2 The First Respondent is Black & Foothead Construction Ltd, the company that entered into an oral contract to build the house in 2003, which was replaced by a written contract in April 2004. I am going to refer to this company as "the Builder".

2.3 The Second Respondent was Urban Joinery Company Ltd, who manufactured and supplied the window joinery for the house. This company was struck out as a respondent in my Procedural Order No 5 (27 October 2005) as a result of it fixing some leaks in the windows, and agreeing to return to the property to repair some consequential damage that had been caused by these leaks.

2.4 The Third Respondent is Mr Chris Rofe, the plasterer who carried out the plastering to the exterior of the exposed blockwork.

3. THE CLAIMS

3.1 The claims being made by the Owners in this adjudication are that "water is entering the dwelling through the north concrete retaining wall into the entranceway, the stairwell and bedroom one. There is also water leaking from the lounge joinery's (east wall) fixed sash, lower mitre join (exterior left hand side) into bedroom one." They are claiming for the repair costs that are estimated to be $28,762.50 and general damages for inconvenience, stress and discomfort caused, at a sum determined by the adjudicator to be appropriate.

3.2 At the Hearing it was clarified that the repair costs were based on quotations obtained by the Owners, and these were explained to me by Mr Harper when he gave evidence at the hearing. The Owners had withdrawn their claims for leaks in the window joinery because these leaks had been repaired by Urban Joinery, and this did lead to the removal of Urban Joinery as the second respondent.

3.3 I requested the Owners to specify the amount that they were claiming as general damages. This was then entered into the record as a claim of $10,000.00. It was further clarified that the Owners are seeking the sum of $5,000.00 each by way of general damages, or a total of $10,000.00.

3.4 The claims against the Builder are for breach of contract, in that the Builder was required to carry out the work in compliance with the contract plans, specifications and the NZ Building Code. It was confirmed at the Hearing that the Owners claims are in contract only, and not an alternative claim in negligence.

3.5 The claims against Mr Rofe were also for breach of contract, as he was not a subcontractor of the Builder, having been employed directly by the Owners. Mr Rofe is the person who applied the plaster to the exterior exposed surfaces of the concrete block walls. He was joined as a respondent, on the application of the Builder, by Chief Adjudicator Skinner in his Procedural Order No 4 (28 September 2005). He had, during the preparations for the Hearing, applied to be removed on the grounds that there was no evidence to indicate

that any of the leaks were caused by him or his plastering work. This application was not allowed.

3.6 He repeated his application in his Response to the adjudication claim. As the Hearing progressed and further evidence was given by Mr McLellan (the WHRS Assessor) about his very recent revisit of the property. I indicated to the parties that I was struggling to see how it could still be alleged that Mr Rofe had any liability for the leaks that still existed in this building. The Owners pointed out that they had never supported the application to join Mr Rofe, and did not oppose his removal. The Builder, after considering the matter, agreed that Mr Rofe should be removed as a party to this adjudication. Under those circumstances I directed that Mr Rofe would be struck out, and that I would not be considering any claims against him in this adjudication.

4. FACTUAL ANALYSIS OF CLAIMS

4.1 In this section of my Determination I will consider each heading of claim, making findings on the probable cause of any leaks and considering the appropriate remedial work and its costs.

4.2 I will not be considering liability in this section. Also, I will not be referring to the detailed requirements of the New Zealand Building Code, although it may be necessary to mention some aspects of the Code from time to time. Generally, I will be trying to answer the following questions for each alleged leak:

- Does the building leak?
- What is the probable cause of each leak?
- What damage has been caused by each leak?
- What remedial work is needed?
- And at what cost?

4.3 The WHRS Assessor identified in his report that he considered that moisture was entering the dwelling at the following points or areas:

- Through the north concrete block retaining wall into the Entranceway, the Stairwell and Bedroom 1;
- From the Lounge window joinery into Bedroom 1;

As a matter of clarification, the Assessor has described the northern bedroom as Bedroom 1, whereas on the plans this bedroom has been shown as Master Bedroom. I will refer to this room as the Master Bedroom.

North Retaining Wall

4.4 This is by far the main claim in this adjudication. The north wall of the dwelling is a concrete block wall on a strip foundation. Water is finding its way into this block wall, as is evidenced by the dampness on the inside face of the wall in the Entranceway, down the side of the stairs, and in the Master Bedroom. It is accepted by all parties that the wall leaks. However, they cannot agree on the cause or causes of the leaks, or whether water is getting in by more than one entry point.

4.5 The house is built on the slopes of one of Wellington's notorious hills, with sweeping views east across Lyall Bay to the airport. In overly simplistic terms, it is comprised of two rectangular concrete boxes set into the hillside, one box on top of the other, with the top box set back to suit the contours of the slope. The north wall, therefore, is at the end of the two boxes and flows down the slope of the hill. It is a partial retaining wall in that the outside ground levels are sometimes higher than the inside floor levels.

4.6 All those parts of the north wall that retain soil have been "tanked" with waterproofing membrane to prevent moisture getting into the blockwork. Concrete blocks are porous and, if water is allowed to penetrate the outside surfaces, the water will track through the blocks and appear on the inside face. Therefore, it is important that not only are the exterior surfaces waterproofed, but also that any ground water that runs through the backfill on the outside of the wall is drained away from the blockwork.

4.7 The waterproofing system that was nominated by the Architect in the specifications and on the plans was 3 coats of Mulseal or similar approved, with fibreglass mat reinforcing to junctions, protected by 4mm fibrolite flat sheets and 50mm polystyrene drainage board. This was changed on the recommendation of the Builder to a sheet waterproofing membrane. There is no doubt in my mind that this was a prudent recommendation. I was told that, as one of the measures implemented by the Owners to reduce the costs of the construction work, they undertook to apply the waterproofing membrane to the west walls. However, the waterproofing of the north wall was carried out by the Builder.

4.8 The inside surfaces of the north wall in the Entranceway and stairwell are covered with Gibraltar board linings fixed to timber strapping. Therefore, any water that leaks through the blockwork is not immediately apparent. In time, the moisture will be transferred through the strapping into the Gibraltar board, and this will eventually provide visible signs of dampness. The north wall in the Master bedroom, which is below the level of the Entranceway, is fair-faced blocks on the inside, and the signs of moisture penetration will be much more quickly apparent.

4.9 The Owners were concerned about leaks into their house, and these problems were discussed with the Builder. In November 2004, the Architect was asked to assist as a mediator, as the relationship between the Owners and the Builder had deteriorated to the extent that they had trouble communicating effectively. At this time it appears that there was no evidence to suggest that the leaks in the north wall were extensive, although they were noted. In March 2005, the Owners again asked the Builder to stop the leaks around the Entranceway. The Gibraltar board linings immediately below the sill of the main entry door in the Entranceway were removed by the Builder in April 2005, which exposed the extent of the leaking in this area.

4.10 The WHRS Assessor first visited this house in June 2005, and he took photographs of the water that was leaking through the north wall. The Assessor was asked to re-visit the property the week before the Hearing, and he took careful measurements to ascertain the outside ground levels as they

related to the wet areas and the inside floor and stair levels. He then conducted a water test, by directing a garden hose across the concrete slab outside the main entry, and waited to see where water or dampness appeared.

4.11 Based on the results given in his original report, and the results of this recent water test, the Assessor told me that he was reasonably sure that the leaks were as a result of tanking defects, and that there was more than one leak through the tanking on the north wall. The evidence, he says, strongly supports the view that there is one leak at the top of the tanking at the Entranceway, and another leak below the paving outside the Master bedroom. Furthermore, he considers that it is quite possible that there are other leaks through (or around) the tanking outside the stairwell, as high moisture readings were found in the stairwell in the area just above tread level.

4.12 Mr Foothead accepts that there must be a leak at the top of the tanking at the Entranceway. However, he is of the view that the dampness in the stairwell, and the water appearing in the Master bedroom, is probably all originating from the leak (or leaks) at the Entranceway. Other witnesses gave me their views and opinions about the causes of the leaking, but they did not give me any information that differed significantly from the views of Mr Foothead or the Assessor.

4.13 I have already indicated to the parties at the Hearing that I did not notice any evidence that persuaded me that the leaks in this north wall were caused by defects in the external plastering, or in the external painting. Having had the opportunity to carefully consider all of the evidence, and the submissions made by the parties, I am satisfied that there is no reason to find that the external plastering or painting has contributed in any way to the leaks in the north wall. I appreciate that there is a possibility that the lower part of the control joint in the blockwork in the Master bedroom is leaking, but I put that as no higher than a possibility.

4.14 Until the tanking on the outside of the blockwork is exposed to view and inspection, it is not possible to say with certainty where the leaks are, or what

type of defect is causing the leaks. However, I accept the opinion of the Assessor on this matter, and find that the leaks are as a result of defects in the tanking to the north retaining wall. It is probable that there are several points of water entry, and these are mainly at the top or in the top section of the tanking in the vicinity of the ground levels. However, the level of the moisture readings and their frequency down the stairway indicates that there may be some problems further down the tanking. It would foolhardy not to make sure that all of the leaks were found and repaired, which means that it is reasonable to excavate on the outside of this block retaining wall down to the top of the foundations.

4.15 Therefore, I accept that this retaining wall does leak, and the probable cause of the leaks is defects in the application of the external tanking. There is some damage to the internal linings, but this is relatively minor. The remedial work outlined by the Assessor in his report is the scope of necessary work to rectify the leaks, and to repair the consequential damage. I will consider the repair costs later in this Determination.

Lounge Joinery

4.16 As I have already indicated, this claim has been withdrawn by the Claimants. The leaks have been fixed by the joinery manufacturer.

5. THE BUILDING CONTRACT

5.1 The parties entered into a written building contract for the construction of this house. The scope of work was described as the "construction of a dwelling in accordance with the Plans and Specifications attached to and forming part of this agreement." The contract appears to be a standard form of house building contract drafted by the Builder's lawyers.

Lump sum or cost-plus?

5.2 The parties do not agree as to whether their contract was a lump sum contract, or a cost-plus builders margin contract (normally referred to as a cost reimbursement contract). This difference of opinion does affect the

allegations made by both parties about whether the Builder has completed the work, and/or whether the building contract has been terminated.

5.3 The printed version of the building contract anticipates that the parties will be entering into a lump sum contract.

- There is a space for a dollar amount to be written against the Contract Price.
- Progress payments are to be entered as monetary amounts, to be paid when the work reaches certain stages.
- There is a section dealing with Variations and Extras to the Contract Price, and how these are to be claimed and calculated.
- There is a section dealing with prime cost (PC) sums, and how these sums are to be adjusted against actual costs.
- There is a clause allowing for the adjustment of the Contract Sum due to the rise or fall in the prices of labour, materials or services.

All of these are consistent with a fixed price lump sum contract.

5.4 However, the parties have completed the blank spaces as follows,

- Instead of a monetary figure being entered against the space for the Contract Price, the parties have written in "Cost + 6% Based on Schedule".
- Progress payments are not entered as monetary amounts, but as "N/A" or "Fortnightly on Invoice".
- Instead of entering a date for the Builder's quotation, the parties have handwritten in "Original quote with updated Schedule cost + 6%".

5.5 Attached to the contract, and initialled by the parties, are seven costing sheets which I was advised was the Schedule that was referred to above. The sheets are in a spreadsheet format, with a summary on the first sheet, and showing the build-up of the costs for various work sections on the other six sheets. There are two columns of figures – one headed Original, and the other headed Revised. These sheets were printed out on 26/04/2004, which is three days before the building contract was signed.

5.6 I was told that work had actually started on the construction of the dwelling in January or early February 2004, without the parties having signed a building contract. Mr Foothead told me that his original quotation had been just under $500,000 on a fixed price contract, but he was told that this was too high for the Owners. Therefore, he says, he agreed to work on cost-plus which enabled the Owners to do some of the work themselves, and to stop work when they were about to run out of money. He had stopped work in April 2004 because he had not been paid, and only agreed to return after the Owners had signed the contract.

5.7 It is submitted by Mr Lamb on behalf of the Owners that the building contract could not be a cost-plus contract, as there was no agreed criteria or formula set out in the contract by which the payments to the Builder could be calculated. He refers me to ***Construction Law in New Zealand*** by Tomas Kennedy-Grant, pages 377 to 387. I do not wholly accept Mr Lamb's submissions on this point, as the parties do appear to have agreed on a crude formula, that is that the Builder would be reimbursed the actual costs that he incurred plus 6%. I would accept that this was an undesirably simplistic formula, but it is not so uncertain as to render the contract as being meaningless or void.

5.8 I am satisfied that the parties had entered into a cost reimbursement contract, and it was their common intention that the Builder would be paid all of his actual costs, plus a 6% margin. The Schedule obviously was intended to have some bearing on the interpretation that was to be applied to the extent of costs. It provided guidance as to whether sections of work were to be subcontracted. Based on what the parties told me, I would conclude that the Schedule was to be used for budgetary control, as well as identifying the scope of work that the Builder was to organise. The Schedule was as helpful for what it did not include, as for what it did include. For example, it clearly did not include for the external solid plastering of the block walls, nor did it include for the external painting (other than the waterproofing of the retaining walls).

5.9 I do not need to take this matter any further in this adjudication. I find that the terms of the contract are those in the written building agreement, but modified to a cost reimbursement contract. I now need to decide whether the Builder should be ordered to return to carry out any of the remedial work, or whether the Owners can recover the costs of engaging a new builder to carry out the repairs.

The Maintenance Period

5.10 Section 14 in the contract covers the maintenance provisions and the Maintenance Period. This section requires the Builder to remedy all defects in his work at his cost, provided that the Owners have given the Builder a signed list of defects before the expiry of the Maintenance Period. The Period is specified in the contract as being three months. The question that needs to be answered is when does the Maintenance Period start to run?

5.11 Normally one would expect a Maintenance Period to run from the completion date. However, in this contract clause 14.3 says,

> When the Maintenance Work is finished the Builder will be deemed to have completed the Work and the Owner will not be entitled to require the Builder to do any further work.

5.12 This seems to indicate that the Maintenance Period starts to run from a date earlier than completion. In this contract the "Date of Completion" is a term frequently used, but it is not specifically defined. Section 3 in the contract is entitled "Completion of the Work", and this section states that the work will be deemed to be complete when the Builder receives a Code Compliance Certificate either from the Council or a Certifier.

5.13 In most standard forms of building contract commonly in use in New Zealand there are always two completion dates. The first date is the date of Practical Completion, sometimes called the date of Substantial Completion. This is probably the most important milestone that is reached in the project. Practical Completion means that the work has reached a stage when the

buildings can be occupied and used for their intended purpose, albeit that certain minor work may not have been finished. Practical Completion signals,

- the end of the construction period;
- the time when the owner moves in and takes possession of the buildings;
- the date when the owner takes over the risk for the buildings;
- the commencement of the maintenance period (often referred to as the Defects Liability Period); and
- releases the builder from any further obligations to pay damages for late completion.

5.14 The other completion date is Final Completion. This is date when the builder has completed all work including maintenance and remedial work, and provided all information required under the contract, such as guarantees, as-built drawings and maintenance manuals. It signals the time for the final payment to be made, the release of all retentions and bonds, and the termination of the building contract.

5.15 Under this contract, clause 11.1 entitles the Builder to exclusive possession of the site from the commencement of work up to completion. Clause 15.1 makes the Builder solely responsible for the implementation of the health and safety regulations on the site, which is why he needs exclusive possession. Section 5 reads as follows,

> The Owner may take possession of the Site and the Work on or after the Date of Completion if the Owner has paid the Final Progress Payment and all other amounts then due to the Builder
>
> The Work will be at the risk of the Builder until and including the Date of Completion subject to the other provisions in this agreement.
>
> The Work will be at the risk of the Owner after the Date of Completion.

5.16 It would appear that the Date of Completion mentioned in this contract was intended to be the same as the Date of Practical Completion in the standard forms of contract. The Builder would have exclusive possession and control over the site, but would hand the site back to the Owners on the Date of

Completion (i.e. Practical Completion). The Builder was required to have obtained the Code Compliance Certificate ("CCC") before he could claim that the work had been completed, but I note that the contract does not state that the CCC must be obtained prior to the Date of Completion. This would be consistent with the normal practice under the Building Act 1991, when owners would frequently and usually take possession and occupy buildings before the final CCC had been issued.

5.17 The way in which this building contract was actually administered was not the way it was written. The parties had clearly agreed to modify some of the terms of the contract, which is evidenced by their actions and behaviour at the time. I think that the only logical interpretation to put on the date of commencement of the Maintenance Period is to adopt the date on which the Owners occupied the house as a family.

5.18 Mrs Kelly told me that they had not been able to move into the house at the end of August 2004 because there was no power or water, and the internal partitions were not completed. She lived in Christchurch with her children until the house was habitable, in early October 2004. Therefore, I find that the Maintenance Period started to run from early October, and will set the date as being 10 October 2004.

Has the contract been terminated?

5.19 The Owners are claiming that they notified the Builder of the leaks in writing on several occasions and asked the Builder to return and to fix them. I have checked through the documents and find that the leaks were raised by the Owners on page 3 of their letter of 6 October 2004, and were in the list provided on 17 November 2004. Therefore, I am satisfied that the Owners gave proper notice as required by clause 14.1 of the building contract.

5.20 Mr Lamb submits that the Builder refused to return after November 2004 to remedy the leaks. This, he submits, is repudiation of the contract by conduct, in accordance with s.7(2) of the Contractual remedies Act 1979. He says that the Owners accepted this repudiation and gave notice on 2 August 2005 that the contract was at an end.

5.21 In response to these claims, Mr Collins submits that the building contract is still in place because,

- No CCC has been issued,
- The construction works are not yet completed,
- The Builder has not given notice of completion to the Owners.

5.22 He submits that the Builder has made extensive efforts to remedy the leaks. He says that they have had difficulties in identifying the cause of the leaks because of defects in the plasterwork and paint, which have now been largely overcome. He says that there are other issues between the parties, which has led to an irreconcilable breakdown in the relationships between the parties. This has prevented any practical resolution being reached regarding the remedial work to fix the leaks.

5.23 I think that the wording of the letter of 2 August 2005 needs to be looked at carefully. It was written by the Owners lawyers to the Builder, and reads,

> We have now received instructions from Lisa and Martin relating to issues that have arisen as a result of the building contract completed by your company at the above property.
>
> Initially we are concerned simply to ensure that the leaking problems being experienced by our clients are resolved and we have perused correspondence and understand there have been a number of meetings on site in respect to the north face retaining walls.
> On our advice, our clients have obtained a quote in order to effect rectification works and a copy of two quotes provided by Shane Harper are attached.
>
> We are instructed that you were notified regarding these problems from November 2004 and that the problem has been clearly identified by an independent assessor from Wethertight(sic) Homes Resolution Service
>
> This letter is to serve as formal demand for the monies required to complete rectification work In the event that settlement is not forthcoming, we are instructed to issue proceedings for recovery, to recover court costs, interest and of course all legal fees associated with the process

5.24 I do not accept that this letter gave notice that the contract was at an end. It notified the Builder that the Owners had quotes to carry out the remedial

work, and made demand on the Builder for payment of these amounts so that the remedial work could be undertaken. It seems to me that the Owners were exercising their rights under clause 14.4 of the contract. In fact, the letter indicates that, prior to the writing of the letter, the parties had had a number of meetings to try and resolve the leaks in the northern retaining walls. This indicates that they both considered that their contract was still alive.

5.25 The building contract contains a section on contract termination. It involves the giving of written notices, and in the event of an alleged breach of an obligation, allowing 21 days for the default to be remedied. I have been presented with no evidence that shows that the Owners took any of these steps, or made an allegation that the building contract had been prematurely terminated as a result of the Owners alleging that the Builder was in default. I am mindful that the letter of 2 August was written by a lawyer, and not by a layperson.

Builder's right to do remedial work

5.26 Mr Collins submits that there are implied and express terms in the contract that entitle the Builder to carry out any remedial work himself. Whilst accepting that submission, I find that the entitlement must be limited by the provisions of section 14 of the building contract. The Builder must rectify the defects within 21 days, or within an extended time if the parties agree. The Owners appear to have been agreeable to extending the period whilst they were trying to ascertain the causes of the leaks. However, I accept that the relationship between the parties had deteriorated by November 2004, to the extent that constructive dialogue was very difficult. That does not mean that the terms of the contract can be ignored, but it does explain why progress was painfully slow, and co-operative research almost impossible.

5.27 The Builder is asking me to make an order under s.42(1) of the WHRS Act directing the Builder and/or his agents to carry out the necessary remedial work I do have the power to order specific performance. However, as I mentioned at the Hearing, I have no intention of ordering the Builder to undertake further work at this dwelling when I have been told very clearly by

both Mr and Mrs Kelly that they do not want the Builder back on their property. It simply would not be sensible.

5.28 I find that the Builder has failed to carry out the remedial work to stop the leaks within the contractual time periods. I do understand that there have been difficulties in determining the probable cause of the leaks, but that does not justify the work taking so long. If the Builder was reluctant to return to fix the leaks because of other disputes with the Owners, then the Builder could have exercised his rights under the contract. He may have had the right to terminate or suspend the contract. He cannot simply refuse to return on the grounds that two wrongs make a right.

5.29 The Owners are entitled to an award of the reasonable costs to rectify the leaks.

6. REPAIR COSTS

6.1 In section 3 of this Determination I listed the claims being made by the Owners, which included the repair costs of $28,762.50. This figure was amount quoted by a builder, Mr Harper, to carry out the work.

6.2 The WHRS Assessor has estimated the repair costs at $22,950.00, being the estimates in his report, less the $600.00 to seal the window joinery. Mr Harper gave evidence to explain how he had calculated his quoted figures. Mr Foothead told me that he had estimated the costs at $3,595.00, but this did not include the same amount of work allowed for by Mr Harper or the Assessor. On being questioned by myself at the Hearing, Mr Foothead said that he would be prepared to do all the work outlined by the Assessor for a total of $7,200.00.

6.3 Estimating the costs of this type of work is notoriously difficult as there is always an element of the uncertainty of the unknown. Mr Harper's quotation is a lump sum figure and he was unable to give me a breakdown of the component costs or allowances. I gained the impression that he had taken a conservative view based on a worst case scenario. Clearly Mr Foothead was

influenced by his view that the problem lay in the joint or flashing at the top of the tanking. He did not allow to replace the drain coil or the drainage backfill, as he said that this was not necessary. I tend to agree with him that if the existing drain coil is in the correct position and undamaged, it should not need to be replaced; and the backfill could be reused provided that any contaminated backfill is replaced.

6.4 I have formed the view that the Assessor has made some allowances that are in excess of what will probably be required. For example, I am not convinced that a full Building Consent will be required, and his $3,300 for removal of demolition materials is too high. However, I will generally accept the Assessor's figures with some adjustments for the above mentioned items. I have made the appropriate adjustments and find that the probable costs of the repair work will be $17,200.00.

7. GENERAL DAMAGES

7.1 As mentioned earlier in this determination the Owners are claiming a total of $10,000.00 as general damages for the stress, inconvenience and discomfort that has been caused by the leaks in their house.

Power to award General Damages

7.2 It has been held on appeal from other WHRS determinations that the adjudicators have the power and jurisdiction to make awards of general damages. Refer to ***Waitakere City Council v Smith***, Auckland District Court, CIV 2004-090-1757, Judge McElrea, 28 January 2005; ***Young & Porirua City Council v McQuade***, Porirua District Court, CIV 2003-99-392/2004, Judge Barber, 3 March 2005.

7.3 I would refer to awards for general damages that have been made by adjudicators in previous WHRS determinations, and the level of these awards. I am aware that a similar claim was considered by Adjudicators Carden and Gatley in their Determination on *Putman v Jenmark Homes Ltd & Ors* (WHRS Claim 26 – 10 February 2004). In paragraph 14.12 they said:

> The availability of general damages for pain and suffering, humiliation, distress and loss of enjoyment has been part of our law for some time In the context of house construction there was $15,000 00 awarded to the plaintiffs in ***Chase v de Groot*** [1994] 1 NZLR 613. That was a case of defective foundations requiring complete demolition of the house following a fire The recorded judgment does not include Tipping J's detailed consideration The recorded judgment does not include Tipping J's detailed consideration of issues of damages but in ***Attorney-General v Niania*** [1994] 3 NZLR 98 at page 113 122 he refers to his earlier judgment in *Chase* and the fact that the award in that case (and another in 1987, ***Dynes V Warren*** (High Court, Christchurch, A242/84, 18 December 1987) had been made after a detailed examination of a number of comparative authorities. On the basis of what he said there the authors of Todd, *Law of Torts in New Zealand* 3rd edition page 1184 said that his remarks indicated "these amounts [in *Chase* and *Dynes*] were considered to be modest". We do not read those words into His Honour's judgment in *Niania*. We were also referred to ***Stevenson Precast Systems Limited v Kelland*** (High Court, Auckland, CP 3003-SD/01: Tompkins J; 9/8/01 and ***Smyth v Bayleys Real Estate Limited*** (1993) 5 TCLR 454.

7.4 The Owners cannot succeed with a claim that relies upon stress or anxiety caused by litigation, and the stress must be as a direct consequence of a breach of a duty of care, whether the claim is based in contract or in tort.

Clause 17 in the building contract

7.5 The Builder is claiming that the Owners are not entitled to bring a claim for general damages because clause 17 of the building contract excludes the Builder from any such liability. Clause 17 reads,

> **17. Limitation of builders liability**
>
> 17 1 Not withstanding anything in this agreement or at law or in equity to the contrary but subject to clause 17.2 the Builder will not be liable for any indirect or consequential loss incurred by the Owner.
>
> 17.2 Nothing in this agreement affects any legal obligation of the Builder that the Builder may not, by law, contract out of.

7.6 It is submitted by Mr Collins that excluding or limiting liability is commercially legitimate. This has been confirmed by our Court of Appeal in ***DHL v Richmond*** [1993] 3 NZLR 10, in which the Court refused to read down a very robust non-negotiated exclusion clause. Mr Collins also refers me to recent authorities on this matter in "Exclusion of Liability in Contract" on page 383 of the November 2005 issue of *The New Zealand Law Journal*.

7.7 Mr Lamb, on behalf of the Owners, has not raised any objections to the inclusion of the exclusion of liability clause. I can see no reason why this clause should excluded from consideration. Parties are free to negotiate the allocation of risk between themselves, and include the resultant agreements in the terms in their contract.

7.8 On the other hand Mr Lamb submits that the wording of the clause does not exclude a claim for general damages. He says that "consequential" damage or loss usually refers to pecuniary loss consequent on physical damage, such as loss of profit sustained due to fire damage in a factory. He says that when consequential loss is used in an exemption clause in a contract, such as is the case in clause 17.1, the word "consequential" refers to damage which is only recoverable under the second head in ***Hadley v Baxendale***, and does not preclude recovery of loss of profits under the first head in that case.

7.9 He concludes by submitting that general damages are those that arise naturally in the normal course of events. General damages for pain, suffering and discomfort are readily foreseeable and not a class of special or abnormal damages that can be termed as "consequential". Accordingly, he says, clause 17.1 cannot exclude the Owners claims for general damages.

7.10 The two rules enunciated in the case of ***Hadley v Baxendale*** [1843-60] All ER 461, are that loss or damage is within the reasonable contemplation of the parties if,

1. it is such as may fairly and reasonably be considered to arise naturally, that is, according to the usual course of things; or
2. it is such as may reasonably be supposed to have been in the contemplation of both parties because of special circumstances (outside the ordinary course of things) known to both parties at the time they entered into the contract.

7.11 I do accept the submissions of Mr Lamb on this matter. General damages arise directly from a breach of contract. They are not caused indirectly or

consequentially as a result of the breach. I find that clause 17.1 does not prevent the Owners from making a claim for general damages in this adjudication.

Findings on the claim

7.12 It seems to me that much of the stress and tension that has been suffered by Mrs Kelly has stemmed from the frustrations arising out of the building project as a whole. She told me about the considerable time delays and cost overruns. She considered that the Builder caused both of these problems. She told how she had had to move temporarily to Christchurch, as the house was not habitable in August 2003.

7.12 I have no doubt that the situation has caused Mrs Kelly much anxiety and stress, particularly as she was pregnant with her second child in addition to caring for a small toddler. However, I am not convinced that it has been the leaks that have caused this stress, inconvenience and discomfort. They may have contributed to, or further aggravated the situation, but the predominant cause of the stress has been the deterioration of the relationships between the Owners and the Builder. Having carefully considered the evidence, I am not persuaded that the Owners have shown that I should make an award of general damages. I will not allow the Owners claim for general damages.

8. CONTRIBUTORY NEGLIGENCE

8.1 The Builder is claiming that any losses that have been suffered by the Owners have been partially caused by themselves. The Builder claims that any damages awarded in favour of the Owners should be reduced by the amount that they have caused or contributed to their losses. This defence relies upon the provisions of the Contributory Negligence Act 1947, and in particular s.3(1) which states:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

Provided that –

(a) This subsection shall not operate to defeat any defence arising under a contract:

(b) Where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.

"Fault" is defined in s.2 in this way:

> Fault means negligence, breach of statutory duty, or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.

8.2 This claim was raised in the Builder Response to the Notice of Adjudication, but Mr Collins did not elaborate on the claim at the Hearing or in his closing submissions. Therefore, I will deal with the claim as filed, and consider it against the evidence produced by the parties.

8.3 The Builder says that the Owners undertook the day to day responsibility for project managing the construction work. This included the engagement of the plasterer and the painters. It is alleged that the Owners

- overfilled behind the northern retaining wall,
- used an unspecified and unsuitable plaster system,
- failed to correctly apply the waterproof membrane to the rear retaining wall,
- used an unspecified Nupex plaster system and Resene paint system which did not waterproof the wall.

8.4 I do not accept that it has been shown that the plaster or painting have contributed to the leaks in the northern retaining wall. There was no evidence to show that the Owners had overfilled behind the northern wall, although it was admitted that the rear wall (western side) had been filled to a higher level than shown on the building Consent plans. I was told that this backfilling had been removed by the Owners, but it has nothing to do with the

leaks in the northern wall. In short, I do not see that any of these allegations should form a foundation for a claim for contribution.

8.5 I am not satisfied that the Builder has substantiated this claim for contributory negligence, and find that the claim must fail.

9. COSTS

9.1 It is normal in adjudication proceedings under the WHRS Act that the parties will meet their own costs and expenses, whilst the WHRS meets the adjudicator's fees and expenses. However, under s.43(1) of the WHRS Act, an adjudicator may make a costs order under certain circumstances. Section 43 reads:

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

9.2 There is a cost claim that I will need to consider in this adjudication, which has been made by the Owners against the Builder. Mr Lamb submits that an award of costs is justified against the Builder as most, if not all of the allegations made by the Builder were without merit. He provided some examples of these allegations. He submits that this has caused the Claimants to incur unnecessary extra legal costs when these allegations were, at best, merely designed to confuse the issue of where the leaks were occurring and thus divert liability to other parties.

9.3 Mr Lamb says that these extra legal costs are estimated to be in the region of about $6,000 plus GST and disbursements, and suggests that an award of between $2,500 and $3,000 in favour of the Claimants would be appropriate.

9.4 The Owners have been generally successful in this adjudication, in that they have been awarded a reasonable amount on account of their claims. I have dismissed many of the Respondents' arguments on liability, but that does not automatically mean that the arguments were made in bad faith or without substantial merit. I have reviewed the examples provided by Mr Lamb. As the Hearing progresses it did become apparent that some of the arguments raised by the Builder were not going to succeed, but that is in my experience quite normal in these adjudications. For example, I am satisfied that the Builder genuinely thought that some of these leaks were as a result of problems with the plaster and/or paint. He pursued these beliefs and blamed the plasterer. I have found that the plasterer was not responsible, but I would not say that the Builder's claims were unmeritorious. I am not persuaded that the Owners have been caused to incur extra costs or expenses, either by actions of bad faith or allegations that were without substantial merit. I will not award the Owners any of their costs or expenses in this adjudication.

9. ORDERS

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

9.2 Black & Foothead Construction Ltd is ordered to pay to Lisa Michele Kelly and Martin Ross Kelly the amount of $17,200.00 on account of the remedial work necessary to rectify the leaks in the building.

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

NOTICE

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

Dated this 21st day of December 2005.

A M R DEAN
Adjudicator

792-3284-Determination