CLAIM NO: 02089
UNDER The Weathertight Homes Resolution Services Act 2002

IN THE MATTER OF an adjudication

BETWEEN:	**Warren Lewis and Bronwyn Lewis as Trustees of the Warren and Bronwyn Lewis Family Trust** Claimants
AND	**Auckland City Council** First Respondent – Now Struck Out
AND	**Compass Building Certification Ltd** Second Respondent – Now Struck Out

(Intituling continued next page)

Hearing:	18th September 2006 and 26th to 29th February 2007
Appearances:	Mr M Lawlor and Ms C English – Counsel for Claimants and Twelfth Respondent Mr MJ Rynbeck – Representing Third and Fourth Respondents Mr M J McNie – Representing Eighth and Ninth Respondents Mr E Telle – Counsel for Tenth Respondent
Determination	14 June 2007

DETERMINATION

AND **Tim Rynbeck Holdings Limited**
Third Respondent

AND **Martin John Rynbeck**
Fourth Respondent

AND **May Plastering Limited**
Fifth Respondent – Now Struck Out

AND **Plastering.co.nz Limited**
Sixth Respondent – Now Struck Out

AND **Michael Gregory May**
Seventh Respondent – Now Struck Out

AND **Premier Roofing Products New Zealand Limited**
Eighth Respondent

AND **Michael John McNie**
Ninth Respondent

AND **Riasat Ali**
Tenth Respondent

AND **Vero Liability Insurance Limited**
Eleventh Respondent – Now Struck Out

AND **Aluminium Systems (NZ) Limited**
Twelfth Respondent

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SUMMARY OF DETERMINATION

Dwelling construction: Monolithic clad design, stucco cladding, Respondents building company, director, roofing company, director, liability of building company and director and window manufacturing company. Leaks: the result of poor workmanship, particularly balustrade tops, guard rails, painting.

[a] The claim is by a family trust against a building company, its director, a roofing company, its director, a plasterer (a sole trader) and a window manufacturing company.

[b] The claim relates to a monolithic clad design.

[c] The claim is for the cost of re-cladding the dwelling, for costs associated with re-location while this work is undertaken , for medical expenses, for stress and for legal costs.

[d] Liability is determined with regard to breach of contract, the tort of negligence and breach of statutory duty.

[e] Liability is attributed to the building company and its director and also to the window manufacturing company (but in respect of affixing guard rails to decks only).

[f] There is no liability attributed to any other party and no contributory negligence by the Claimants.

[g] The appropriate remedy is the cost of re-cladding. The evidence of the director of the building company is accepted as the best evidence available in respect of quantum.

[h] Damages in respect of re-location (of the family) are awarded. There is no award for general damages (for stress), or for medical expenses. There is no award for costs.

BACKGROUND

[1] This is a claim concerning a leaky building as defined by Section 5 of the Weathertight Homes Resolution Services Act 2002 ("the Act"). The Claimants ("the Claimants"), Warren Lewis and Bronwyn Lewis are trustees of the Warren and Bronwyn Lewis Family Trust ("the Trust") and owners of a dwelling house located at 41a Panapa Drive, St Johns, Auckland ("the dwelling").

[2] The remaining Respondents are:

(a) Tim Rynbeck Holdings Limited – the Third Respondent ("Rynbeck Holdings"), the incorporated company responsible for constructing the dwelling.

(b) Martin John Rynbeck – the Fourth Respondent ("Rynbeck"), the director and shareholder of Rynbeck Holdings.

(c) Premier Roofing Products New Zealand Limited – the Eighth Respondent ("Premier Roofing"), the incorporated company which undertook the roofing subcontract in respect of the dwelling.

(d) Michael John McNie – the Ninth Respondent ("McNie"), the director of Premier Roofing.

(e) Riasat Ali – the Tenth Respondent ("Ali"), the plasterer who undertook the subcontract for plastering work on the dwelling.

(f) Aluminium Systems (NZ) Limited – the Twelfth Respondent ("Aluminium Systems"), this is an incorporated company in respect of which one of the trustees, Warren Lewis, has an interest. It supplied the window joinery and gave the builder (Rynbeck Holdings) advice in respect of the installation of the first window – the laundry window.

[3] In late 1998, the Claimants determined to contract the construction of a dwelling on a section owned by the Trust at St Johns, Auckland.

[4] The Claimants inspected another dwelling and as a result, purchased from the architect responsible for that dwelling's design, the plans for that dwelling.

[5] Some alterations to the plans were made by a draftsman (Parlane).

[6] The Claimants accepted a contract with Rynbeck Holdings to construct the dwelling. One of the reasons the Claimants accepted the contract was that, they had confidence in the ability of (for want of a better description at this stage), the man behind the company, Rynbeck. He is self described as a meticulous builder who was at one time known as the mayor of St Johns because of number of houses he constructed in the area. Never the less, it is quite clear that the building contract was entered into between the Claimants and Rynbeck Holdings. It was not entered into with Rynbeck personally.

[7] In 2004 – approximately five years after the construction of the dwelling – the Claimants determined that there were weathertight issues relating to the dwelling and dealt in a preliminary way in respect of these issues with Rynbeck Holdings and Rynbeck. A notice of adjudication was filed with Weathertight Homes Resolution Service ("WHRS") and is dated the 24th day of March 2005.

[8] It is "common ground" that there are weathertight issues in respect of the dwelling, namely:

(a) In respect of the two decks. In particular, the two balustrades and the hand rails.

(b) Kick out and apron flashings on the roof.

(c) The Chimney

(d) The garage

[9] The Claimants say that there are major weathertight issues relating to the plaster. As a consequence, the whole dwelling needs to be re-clad. This is denied by the Respondents, except Aluminium Systems. The Respondents (except Aluminium Systems) say that there are problems with the design of the dwelling, with the window joinery and with maintenance, this is denied by Aluminium Systems – in respect of joinery – and by the Claimants – in respect of design the joinery and maintenance.

THE CLAIM

[10] The Claimants claim:

(a)	for remedial costs	$372,365.00
(b)	for consequential loss	$29,374.05
(c)	for general damages	$10,000.00
		$411,739.05

(d) Such amount for legal costs as may be awarded.

FIRST INSPECTION

[11] I undertook an inspection of the dwelling – together with a Claimant, Mr W Lewis, Counsel for the Claimants, Rynbeck, and Counsel for Ali. This occurred on Saturday the 1st day of July 2006.

MEETING OF EXPERTS AND THE ASSESSOR'S EVIDENCE

[12] On Monday the 18th day of September 2006, a meeting of experts and the assessor, the Claimant's expert Mr Alexander and Ali's expert, Dr Walls occurred at Auckland and thereafter the assessor's evidence was taken. A special date for the taking of the assessor's evidence was arranged because he resides in the United States of America and is only in New Zealand from time to time. Accordingly, it was not possible for him to attend the hearing in the usual way.

DATE OF HEARING

[13] It was anticipated that the hearing of the claim would be completed at Auckland late in 2006, but for various reasons, this did not happen. The hearing commenced at Auckland on Monday the 26th day of February 2007 and was held over four days.

SECOND INSPECTION

[14] Prior to the hearing, I had signaled an intention to briefly re-inspect the dwelling on the evening of either the first or second hearing day. My intention was to conduct a walk past inspection of brief duration to refresh my memory, as the

first inspection occurred some seven months prior. I anticipated inspecting an "un-repaired" dwelling. When the hearing commenced, Respondents and Counsel indicated a desire to attend as well and arrangements were made to inspect at the conclusion of the first hearing day.

[15] At that stage, something totally unexpected occurred. One of the Claimants, Mr W Lewis, indicated that he could drive me out to the dwelling when the hearing concluded on day one. He stated that he and his family were living close to the dwelling. When I asked him what he meant by that, he explained that repair work was now underway and because of this, he and his family had now moved out. I was totally unprepared for this comment, as were Respondents and Counsel. None of us had received any notice that repair work was about to commence, or had commenced.

[16] I would have thought it would have been helpful (to say the least), for WHRS to have been advised that repair work was imminent. In that way, all Respondents who wanted to, and I, could have re-inspected the dwelling before the commencement of the repair work and whilst the cladding was being removed, or once it was removed. I think it would have been particularly helpful to look carefully at the dwelling again, before repair work started, so that the issue of the cracking of the plaster could have been revisited in a practical way. Indeed, that was primarily what I was hoping to achieve. Instead, I was presented with a situation where (apparently), all the cladding had been removed and disposed of.

[17] After due consideration, I came to the conclusion that it would be inappropriate for me to re-inspect the dwelling in these circumstances and I did not do so. None of the Respondents or the Claimants objected to this. Counsel for Ali made it quite clear that he considered this decision to be the appropriate one.

[18] Counsel for the Claimants advised that the Claimants elected to proceed upon the evidence before the adjudication. That they did not intend to apply for leave to submit further evidence, perhaps available as a result of the repair work, nor to apply for an adjournment to enable the work to be completed. None of the Respondents indicated that they wished to apply for an adjournment, or for leave to file further evidence. Counsel for Ali, made it quite clear that he wished the hearing to continue.

SIGNIFICANCE OF REPAIR WORK

[19] The claim must be determined on the basis of the evidence presented at the hearing. This creates a totally unsatisfactory situation in the circumstances and it is entirely of the Claimants making. I am not able to draw any conclusions from "evidence" which has not been presented. However, it seems clear that, if the Claimants were determined to complete the repair work, then the way to present the best evidence, was to request an adjournment until after the repair work had been undertaken. In that way, all of the parties would have had an opportunity to present evidence in respect of the need for repair work or otherwise – based on their and their experts' inspections – whilst repair work was underway. The Claimants would also have had an opportunity to present evidence relating to quantum in respect of the repairs. None of this occurred. In particular, the evidence of quantum presented by the Claimants at the hearing, did not relate to the actual repair work at all – but rather, related to a repair price given to the Claimants expert by a contractor, not ultimately chosen to undertake the repair work.

[20] I was not told why the contractor who gave the repair price (see paragraph 19), was not chosen to undertake the work. Nor was any evidence led at the hearing, in respect of what was actually found when the cladding was removed, or the likely final cost of repair.

SUBSEQUENT APPLICATION TO ADJOURN FOR QUANTUM

[21] The Claimants subsequently made application –after the conclusion of the hearing – for the claim to be adjourned as to quantum, until the repair work was complete and the final actual quantum figure, known. I would almost certainly have adjourned the claim prior to the commencement of the hearing, had the Claimants requested an adjournment, on the basis of undertaking the repair work. I would almost certainly have adjourned the hearing, had any of the Respondents requested that, once it became known on day one, that repair work was underway. I would almost certainly have adjourned the hearing as to quantum (at the time when the Claimants requested this), if the request had been made by any of the Respondents or supported by any of the Respondents. However, the Claimants made a clear election to proceed to hearing. No Respondent requested an adjournment. The Claimants have chosen to present the claim in a particular way. If the extent of damage (to the dwelling) and quantum are uncertain, the Claimants are left with the consequences of that. It is up to the Claimants to establish the claim (in all its respects) to the civil standard, that is, on the balance of probability. To the extent that any Respondent chooses to defend the claim, all they need allege, is that this standard is not reached.

THE HEARING

[22] At the hearing, the following persons gave evidence:

(a) For the Claimants – Mr Alexander (an expert witness) and Mr Lewis.

(b) For Rynbeck Holdings and Rynbeck – Mr Rynbeck.

(c) For Premier Roofing and McNie – Mr McNie.

(d) For Ali – Mr Parlane and Mr O'Sullivan (both appearing under subpoena and without pre-prepared briefs of evidence), Dr Walls (an expert witness) and Ali.

(e) For Aluminium Systems – Mr Alexander and Mr Lewis (both previously referred to).

[23] All witnesses, except Mr Parlane and Mr O'Sullivan, attended for cross examination and re-examination in respect of their previously prepared and submitted evidence. Mr Parlane and Mr O'Sullivan presented verbal evidence in chief and were cross examined and re-examined. Cross examination included (brief) questioning by me.

KEY ISSUES

[24] The key issues are as follows:

(a) The Claimants purchased a design for a dwelling. The Claimants wished the dwelling to be constructed on a section at St Johns, Auckland. They had some modifications and alterations made to the purchased design, but were not responsible for making these modifications and alterations.

(b) Rynbeck Holdings entered into a contract with the Claimants to construct the dwelling. This was a full service contract on the basis that Rynbeck Holdings was to complete the construction of the entire dwelling, although it was able to subcontract out the work. The only exception to this was that the Claimants were to arrange for the windows to be supplied by Aluminium Systems.

(c) One of the Claimants (Mr W Lewis), attended the site on a regular basis. He did not thereby assume a supervisory role. His attendances were no more than could be reasonably anticipated of him, as a concerned and interested representative of the Claimants.

(d) Rynbeck (a director of Rynbeck Holdings) took a "hands on" role in respect of the actual construction of the dwelling and the management of the project.

(e) Rynbeck Holdings organised a number of subcontractors to undertake various tasks in respect of the dwelling, mainly, the plastering the painting and roofing. The plastering subcontractor in turn, subcontracted part of the plastering task to Ali.

(f) The Claimants then requested Rynbeck Holdings to engage a particular roofing contractor, but did not thereby accept responsibility for the workmanship of that contractor. It was entirely within Rynbeck Holdings ability (in terms of the contract), to engage a roofing contractor of its choice.

(g) There were leaks to the chimney and to the two decks. There was water penetration into the garage, as a result of the relative height of the driveway. There were some areas (mainly the columns under the main deck and an area of wall by the garage) where the plaster extended below ground level. It is well known that extending plaster below ground level creates a potential for "wicking", which will allow moisture to penetrate the dwelling. There was no indication that wicking was actually occurring.

(h) Condition of the paint – there were allegations that the exterior paint (work) was sub-standard and that a repaint (a maintenance issue) was overdue.

RYNBECK'S PERSONAL INVOLVEMENT

[25] Rynbeck gave evidence that he was the man who made the contract happen. He undertook the practical building work. He also conceded that Mr Lewis did not undertake a supervisory role.

[26] Rynbeck's personal involvement with the building process is a key issue, because it is that which determines whether he may owe any personal liability (in tort) to the Claimants.

[27] The start point for determining possible potential liability of directors is that something done by or on behalf of a limited liability company does not vest responsibility or liability upon directors or shareholders. This is a principle laid down in **Trevor Ivory Limited** v **Anderson** (1992) 2NZLR517. Other authorities however, for example, **Morton** v **Douglas Homes Limited** (1994) 2NZLR595, established that a director can be personally liable. The liability is not by reason of status as a director, but rather by reason of personal acts and the assumption of a duty of care. A director may be liable if he acts on behalf of a company in his personal capacity, rather than simply for the company as a director. These authorities require something special and unusual.

[28] Prior to the decision in **Dicks** (see paragraph 29), it was also clear that, where a plaintiff or a Claimant dealt with a limited liability company, rather than with the director, then the potential for personal liability of the director, was unlikely.

[29] The matter has been recently considered in **Dicks** v **Hobson Swan Construction Limited & Others**, CIV2004-404-1056, an appeal (to the High Court) from a WHRS determination and dated 22 December 2006. Here, Mrs Dicks entered into a contract with the limited liability company, "Hobson Sawn", which was the first defendant. The second defendant was Mr McDonald. Mrs Dicks ("the plaintiff") did not contract with him. He however, undertook the work. In respect of the director's personal liability, the Court applied the Morton v Douglas Homes decision (see paragraph 21). "Mr McDonald. did not merely direct, he actually performed the construction of the house and was personally responsible for the emission of seals. He is therefore personally, a tortfeasor, as well as having his conduct attributed to Hobson Swan as a tort".

[30] The Dicks decision establishes that a director who assumes personal responsibility for the work will be liable (if the work is negligently undertaken) in tort to a Claimant, whether or not there is a direct contract between the Claimant and director's limited liability company. Thus the potential for Rynbeck to be liable to the Claimant is established.

THE LIABILITY OF SUB-CONTRACTORS TO THE CLAIMANTS

[31] In closing submissions, the Claimants Counsel, Mr Lawlor submitted that sub-contractors owe a duty of care to the Claimants. Conversely, Mr Telle in closing submissions, on behalf of the sub-contractor, Ali, submitted that no common law duty of care (in the tort of negligence) is owed by Ali to the Claimants. The well known authority "**RollsRoyce New Zealand Limited v Carter Holt Harvey Ltd (2005) 1NZLR 324 (CA)"** was referred to as authority.

[32] **Rolls-Royce** establishes that the Courts will generally be unwilling to impose a duty in tort in circumstances where the parties are commercially sophisticated and elect to operate under an umbrella of complex contractual arrangements. There is nothing particularly complex about the contractual arrangements here and nothing to suggest that the parties were commercially sophisticated, to the degree of the parties in RollsRoyce

[33] A useful analysis of **RollsRoyce** and other related authorities, has been undertaken by Adjudicator Green in claim 00465 and I am indebted to him. I do not intend to repeat here, his lengthy analysis. Save to say that I agree with it and I particularly refer to paragraph 192 of that determination. There, Adjudicator Green determines that it is just and reasonable to impose on a sub-contractor and/or a person that provides any services what so ever, in conjunction, or in relation to, the design management supervision, construction or alteration, of any part of any building – a duty of care to the owner for the time being – to carry out the sub-contract work in accordance with the Building Act and regulations, including the building code. I agree with that reasoning and apply it here.

[34] On that basis, there is potential for any of the sub-contracting Respondents, namely Premier Roofing, Ali and Aluminium Systems to have liability in the tort of negligence – for breach of a duty of care to the Claimants.

GENERAL DAMAGES

[35] I deal with the matter of general damages at this stage, as it can be dealt with quite simply. The Claimants request an award of general damages for stress. There has been an established practice in the WHRS jurisdiction to award such damages in appropriate claims.

[36] The issue of general damages for stress is now dealt with in **Hartley** v **Balemi and Others**, CIV 2006-404-002589 – an appeal (to the High Court) from a WHRS determination and dated 29th March 2007. An award in respect of general damages for stress was disallowed – at paragraph 177 – "there was no legal basis on which to make that award".

[37] The Hartley decision establishes that an award of general damages (for stress) cannot be made. Whatever the future situation may be, that is presently the law.

HEARSAY EVIDENCE

[38] Hearsay evidence was presented by the following witnesses:

(a) The Assessor (Mr Stewart) – his evidence of quantum and the Petrographic Report.

(b) Mr Alexander – his evidence of quantum.

(c) Mr Lewis – his medical evidence and evidence of costs associated with the need to evacuate the dwelling while repair work was undertaken.

[39] There is no total prohibition in respect of the admissibility of documentary hearsay evidence - so long as such evidence comes with the statutory exception provided by Section 3(c) of the Evidence Amendment Act (No.2) 1980. Namely that the maker of the statement had personal knowledge and that undue delay or applause would be caused by obtaining the evidence.

[40] I take the view that undue delay and expense would certainly have been caused by requiring the author of the Petrographic Report to "present" and it therefore follows that I consider that report to be admissible.

[41] The evidence from Mr Alexander as to quantum (the Wheatcroft and Reconstruct quotations) present greater difficulty. Both these quotations are provided by Auckland companies and no reasons were provided as to why the authors did not present. However, no challenge was made to the evidence prior to the hearing, although it had been "on the record" since March 2006. The challenge (from Mr Telle) at the hearing and in his closing did not advance reasons as to why the evidence should be excluded, other than that it was hearsay.

[42] The medical evidence and evidence of associated costs provided by Mr Lewis falls into the same category as the quantum evidence (see paragraph 41) – again Mr Telle objected to this evidence.

[43] The quantum evidence provided in the Assessor's report has the same disadvantage – although it was not objected to. Nor was any evidence provided as to the domicile of its author – to satisfy the "convenience test" – although I think it can be assumed that his domicile was the U.S.A.

[44] Hearsay evidence of this type is likely to be reasonably common in WHRS jurisdiction – especially in respect of Assessor's quantum. In all the circumstances – especially the last minute objection, I adopt what is perhaps a generous attitude and admit the evidence.

DAMAGE TO THE DECKS AND CHIMNEY

[45] It is common ground that there is damage to both decks (the master deck, far more extensively than the second deck) and also to the chimney. There has been extensive deterioration of the condition of the master deck, extensive cracking to the plaster on the chimney and known leaks to the chimney.

[46] It is necessary for me to determine if this deterioration was caused by sub-standard plastering, or by other factors, or by a combination of factors, including sub-standard plastering.

[47] If the deterioration related to sub-standard plastering, either alone or in combination with some other problem, it is necessary to determine if this increases the probability of sub-standard plastering on the balance of the dwelling.

[48] When I inspected the dwelling in early July 2006, I commented, that on general observation, the plaster work did not seem to be "too bad". I do not place significant emphasis on that comment, because it was made by way of a general observation only, in direct contrast to another dwelling inspection (claim 0092, Widdowson), where at paragraph 11.1 of that determination, Adjudicator Douglas and I commented that the dwelling was in a "sorry state of disrepair".

[49] It was clear from the inspection, that cracking of the plaster was more extensive on the chimney and that (in particular), the main deck had deteriorated badly. There was certainly cracking and discoloration of paint (efflorescence staining) to other plaster work and that is why I particularly wanted to return to the dwelling to undertake a second inspection (to refresh my memory) at the time of the hearing. That was not possible. I clearly recall however, considerable discoloration (not restricted to decks and chimney) when I inspected.

[50] There are significant factors which relate to the chimney and the decks and impact on weathertight issues, which do not relate to the balance of the plaster work. These are:

(a) The evidence was that the design of the chimney was a "bold" one. It was a large structure, exposed to the elements, especially the wind and rain. Whilst it could have been built in a weathertight way, its design was always going to be a challenge and relied on careful construction. It would have been better to construct a dwelling from masonry, rather than from ply wood – especially untreated ply wood – Mr Alexander's evidence. Once water entered the chimney structure in any way, through flashings or through cracks in the plaster, or because of a poor quality paint job, it was inevitable that the untreated ply wood would deteriorate.

(b) The evidence was that the design of the decks was "flawed". The balustrade tops were flat, rather than sloping to defect water. Worse still, the guard rails were affixed to the top of the balustrades - screwed directly through the balustrade tops. There were two potential sources for leaks to the deck balustrades as a consequence. One through the balustrades themselves and secondly, through the screw holes for the guard rails. The evidence was that the balustrades could have been made weathertight, even given the design, but again this would have been a challenge.

(c) It is clear that the main deck balustrade has failed badly and the evidence was that it would only be a matter of time before the second deck failed in the same way. I accept that evidence.

(d) It is necessary to determine if sub-standard plastering has contributed to the deterioration of the decks and if so, to what degree.

THE PLASTER – THE LIABILITY OF THE TENTH RESPONDENT

[51] The liability (or otherwise) of Ali depends on the standard of the plastering and the plaster.

[52] The evidence relating to the plaster was provided by the assessor, and the expert witnesses, Mr O'Sullivan, Mr Alexander and Dr Walls. Ali and Mr May also gave evidence in respect of the plaster.

[53] The expert evidence was divided. The assessor and Mr Alexander considered that the plaster was sub-standard, while Dr Walls took the contrary view. Mr O'Sullivan did not comment directly in his brief (Prendos) report, but said in his evidence, at the hearing "I didn't get the impression that there were lots of severe cracks" (in the plaster).

[54] The assessor and Mr Alexander said that there was extensive and excessive cracking of the plaster, which in itself, was evidence that the plaster was sub-standard. Dr Walls said that the cracking to the plaster was within reasonable limits. That is to say that, some cracking was to be expected and the cracking on this dwelling was not excessive. It is indeed unfortunate that we were unable to re-inspect the dwelling at the commencement of the hearing.

[55] The petrographic report attached to the assessor's evidence is significant. Its author says that the plaster is sub-standard. However, there are difficulties with the report.

(a) Its author was not available for cross-examination.

(b) There was no evidence of corrosion of the netting imbedded in the plaster, which might be expected if the plaster had been absorbing moisture for a significant time.

(c) The report was undertaken in the United States of America and was based on United States standards which are significantly different from New Zealand standards. The Assessor said that he was not aware that it was possible to analyse plaster in New Zealand.

(d) On the one hand, I was urged on behalf of the Claimants, to take the view that "plaster was plaster" and that it did not really matter that the report was based on United States standards. On the other hand, on behalf of Ali, I was urged to disregard the report on the basis that United States standards could have no application. That in effect, the report was meaningless and of no assistance in a New Zealand context.

(e) The sample taken for analysis was taken from point 12 – the assessor's diagram, page 9 of his report. This is an area directly underneath a window. I was urged on behalf of Ali, to take the view that the sample was not representative and several samples should have been taken. Also that the sample may well have been damaged when removed from the dwelling.

[56] I regard the petrotechnical report, as at best, inconclusive. I take the view that more than one sample from a number of different locations, should have been taken and that to be of much use, the samples should have been analysed in New Zealand. I do not disregard the report completely, but at best, I regard it as relatively poor evidence, suggesting sub-standard plaster.

[57] Moisture readings were taken by the assessor (14) and by Mr Alexander (25). The evidence was that a reading over 18% would (eventually) lead to decay in framing timber. Both men tested at random sites and while not all of the readings were significantly in excess of 18%, a considerable number were. The assessor described 8 of his readings as moderate/high and 6 as medium/low. Of

Mr Alexander's readings, 21 were over 18% and (only) 5 were below 18% - although, some of the readings over 18% were only marginally so.

[58] Dr Walls gave evidence that moisture readings, while indicative (of a moisture problem), can be totally inaccurate, if for example, the metre probes do not penetrate the plaster and enter the timber. Or if they strike a metal object, such as a nail. Or if they are taken near aluminium joinery. While readings may not be totally conclusive, the number of readings (here)which were over 18% suggests (to me), a very high degree of probability that weathertight issues randomly effect this dwelling. The question to be answered is why?

[59] Mr May gave evidence that the plaster was of a good standard. So did Mr Ali. Mr Ali's experience at the time of undertaking the work was limited however (five years practical experience) and he could not give any direct evidence as to how the plaster was mixed. He said that the laborer who mixed the plaster, "knew what he was doing" and he said that the plaster felt right when he applied it. Again, I regard this evidence as inconclusive.

[60] Mr Alexander gave evidence that the timber framing of the balustrade on the master deck had the "strength of medium cheddar cheese" (paragraph 43 his evidence, 9th December 25), due to the leaks and the timber being rotten. Yet, Mr Telle and I were both able (separately), to use the balustrade wall to assist us to climb on to the roof during the inspection in July 2006. Mr Telle submitted to me that if the framing timber had the "strength of medium cheddar cheese" (Mr Alexander's words), then the only thing holding up the balustrade wall and supporting our weight when we climbed on to the roof, was the plaster. He submitted that this was in fact evidence, of good quality plaster, not sub-standard plaster. I find that argument difficult to resist. Particularly as it was obvious to me when undertaking this inspection, that the timber (of the balustrade framing) was rotten.

[61] The dilemma relating to the plaster would have been resolved, had a second inspection been possible and/or if Ali had been permitted to take plaster samples away to have separately analysed in New Zealand at his expense. I cannot understand why the Claimants undertook repair work without notice to WHRS – thus preventing a second inspection. Neither can I understand why, Ali's expert was not permitted (upon his request) to take a sample or samples of the plaster for independent analysis in New Zealand. Alternatively, why the Claimants did not get samples independently tested in New Zealand.

[62] I have some difficulty with the issue of the plaster. However, at the end of the day, the Claimants have the obligation to prove each and every element of the claim to the civil standard, that is to say, on the balance of probabilities. Put another way, the Claimants must show that on a percentage scale, there is a more than 50% chance (more likely than not), that the plaster was sub-standard. The petrotechnical report and the moisture meter readings support the claim, but these are of limited assistance to me in respect of the quality of the plaster. There is evidence from two experts that there was excessive cracking. However, the evidence from the other two experts was that cracking was not excessive. On balance, I am left to conclude that the Claimants have not established that the plaster was sub-standard. It follows from that, that there can be no liability on Ali, in respect of the claim, as that was what Ali's involvement amounted to.

THE PAINT

[63] I consider that there is a high degree of probability that the dwelling is randomly effected by weathertight issues (see paragraph 58). I have excluded plaster as a cause. While it is of some concern, that no scientific testing of the paint was undertaken, there is evidence of the condition of the paint.

[64] In his evidence dated 9th December 2005, Mr Alexander described his inspection in July 2005. He said (in respect of the paint) "The extent of efflorescence staining on the surface of the wall is a direct indicator that there has been insufficient paint film build to resist the absorption of moisture through the plaster surface. While some water load will get into the plaster through fine cracking - - - most of the water absorption will have been permitted by an inadequate paint coating. If this were not true, there would simply not be any extensive efflorescence staining".

[65] In terms of the Building Code, paint should have "a five year life". The dwelling was completed in mid 1999 (Code Compliance Certificate) and therefore, at the time of Mr Alexander's inspection in mid 2005 – almost exactly 6 years had elapsed. However, as Mr Alexander stated, paint deterioration is gradual – it doesn't simply "fail" at the end of year five.

[66] Mr Lewis gave evidence (paragraph 20 his evidence 09/12/05) that he became aware of the weathertight issues in mid 2004 – that is to say that by the end of the "five year life" of the paint, these issues were apparent.

[67] I conclude that by mid 2004, the paint had deteriorated to such a degree, that it failed to provide the weathertight seal needed to protect the plaster. As a consequence, the plaster absorbed moisture – which caused cracking (of the plaster) and the development of rot to the framing timber and chimney structure. It is significant that cracking was more extensive on the chimney than elsewhere. This is the structure most exposed to the elements (of wind and rain).

[68] I conclude that the main cause of the leaks to this dwelling is the failure of the paint coating. Secondary causes – decks and flashings – are dealt with elsewhere in this determination.

McNIE'S PERSONAL INVOLVEMENT

[69] I have already dealt with the issue of Rynbeck's personal involvement and his potential liability in consequence. The situation relating to McNie is somewhat different. There was no evidence that McNie undertook the work personally. The evidence was that, workers employed by Premier Roofing undertook the work and that McNie inspected it, at the very least, upon its completion. That is a material difference. I refer to paragraph 29 hereof, where I considered the recent authority of **Dicks** – "Mr McDonald did not merely direct, but actually performed the construction of the house and was personally responsible for the emission of seals". Here, McNie did merely direct, or perhaps more correctly put, inspected at the completion of the job. He did not actually perform any of the roofing work and accordingly, I conclude, he cannot have potential liability to the Claimants.

THE LIABILITY OF THE THIRD AND THE FOURTH RESPONDENTS – RYNBECK AND RYNBECK HOLDINGS

[70] I have already determined that there is potential for Rynbeck to have personal liability. It follows from that, that the issue of liability in respect of Rynbeck Holdings and Rynbeck, can be considered together. Rynbeck holdings is potentially liable to the Claimants for breach of contract, for breach of statutory duty and in the tort of negligence. Rynbeck's potentially liable is for breach of statutory duty and in the tort of negligence.

[71] Rynbeck Holdings did not design the dwelling, but it did undertake the construction of it, pursuant to contract and in terms of the contract, promised to provide (if only by implication), a complete and weathertight dwelling. It failed to do so. The evidence from Rynbeck on behalf of himself and Rynbeck Holdings was extensive. On this point, essentially it was that, the dwelling had

been constructed to the best standards of the day and the weathertight issues were a result of poor design in respect of which, neither Rynbeck Holdings or Rynbeck, had responsibility.

[72] To cast all responsibility for weathertight issues on design factors is simplistic. I prefer the submission from the Claimants Counsel, to the effect that a competent builder must either meet design challenges, or at the very least, suggest to his principal, that the design challenges need to be overcome by adopting some alternative method. Rynbeck Holdings did not do this. It rose to the design challenge in respect of the chimney, the decks and the level of the driveway, but it failed to meet the challenge.

[73] The tops of the balustrades needed to be sloped, or alternatively, needed to be properly waterproofed. Either system would have sufficed, but neither was adopted. That issue was of course, compounded by the affixing of the top guard rails by Aluminium Systems.

[74] The driveway levels at the base of the garage door needed to be lowered so that water could not enter the garage, or alternatively, if this were not possible, an adequate drain or nib wall needed to be constructed to prevent entry of water.

[75] When landscaping – the responsibility of Rynbeck – care needed to be taken to ensure that ground levels did not exceed plaster levels at the columns, although this does not appear to have created a weathertight issue, at least as yet.

[76] Rynbeck gave evidence that it was common practice to complete flat top balustrades at the time of this construction and that these met the standards of the day. I do not agree. I think this is a basic design fault that the builder should have recognised and corrected. This is a common issue in weathertight claims and was one of the problems encountered in claim 0092 – Widdowson – referred to in paragraph 48 of this determination.

[77] The large area of chimney exposed to the elements is something which a competent builder should have recognised. The chimney should have been constructed (probably from masonry) to take account of this challenge. If that had occurred, then almost certainly the only problems in respect of weathertightness – in relation to the chimney – would have related to inadequate paint coverage, as this effected the plaster.

[78] The height of the driveway (where it affronts the garage door), is a basic issue. Indeed, some attempt (or be it, an inadequate one) was made to address this problem by the installation of a drain at the front of the garage.

[79] Plaster extending below ground level – I accept the only way that can happen is when the landscaping is complete – is also a basic issue. The concept of wicking, or absorbing of moisture from the ground into the plaster, where plaster comes into contact with ground, is well known and basic. It is an issue which occurs time and again, in respect of weathertight claims.

[80] The Claimants contract with Rynbeck Holdings (28th November 1998) required Rynbeck holdings to paint the exterior (paragraph 25). Rynbeck managed the project (see paragraphs 20-30 hereof). It is of no significance that the painting was sub-contracted or that the sub-contractor is not a party to the claim.

[81] I conclude that Rynbeck Holdings is liable to the Claimants in contract, in breach of statutory duty and in the tort of negligence for weathertight issues. Rynbeck is liable in negligence.

THE LIABILITY OF THE TWELFTH RESPONDENT – ALUMINIUM SYSTEMS

[82] I do not find that the windows leak. Even if I had found that, I would almost certainly have attributed liability to Rynbeck Holdings and to Rynbeck, as they installed the windows, subject only to assistance and directions from Aluminium Systems in respect of installing the test windows, in the laundry.

[83] Aluminium Systems however, installed the hand rails to the top of the balustrade. The extent of liability was referred to by Mr Alexander on page 7 of his evidence on behalf of Aluminium Systems. At paragraph 21, he referred to the north deck (which I take to be the deck from the master bedroom, which has deteriorated to greatest extent). He said the contribution of the hand rail fixing (to weathertight issues) might be as high as 50%, or as low as 20%. In respect of the west deck, he said that the hand rail contribution was of no importance. With respect o Mr Alexander, I think the only logical conclusion is that the contribution of the hand rail fixings is the same on both decks. One deck has not deteriorated as badly as the other, but both need repair. It seems to me that the balustrades were bound to fail, with or without the hand rail fixings and (for that matter) with or without the flat tops. That is to say, flat tops alone, would have caused the balustrades to fail. Hand rail fixings alone, would also have caused the balustrades to fail. One factor alone (perhaps, especially the hand rail fixings), would have slowed the process of deterioration, but it would not have prevented it. I therefore conclude that the incorrect fixing of hand rails to the balustrade decks contributed to equally (or 50%) to the deterioration of the decks.

THE LIABILITY OF THE EIGHTH AND NINTH RESPONDENTS

[84] The liability of the Premier Roofing and McNie depends on the situation relating to the kick-out flashings on the roof. Although these flashings, to some extent, appear to have failed, they may have been tampered with, by someone other than Premier Roofing or McNie. More importantly however and vital to the issue of liability, is whether they were constructed to the standards of the day.

[85] Mr Alexander comments on the flashings in his evidence dated 9th December 2005. When itemizing a summary of defects, he says at paragraph 76, "there are seven stop ends to apron flashings that are poorly formed". However, when discussing apron flashings, in particular, at paragraph 65, he says "any stoppings to the apron flashings in 1988, was probably above average. This was not a well known problem in the roofing industry, but has contributed very significantly to the overall leaking building problems. It appears that the roofer had an awareness of the need for stoppings to apron flashings, but did not execute them adequately".

[86] Mr Alexander said that, regardless of whether the apron flashings were executed adequately, any such flashings at all (at the time of the construction of this dwelling), were an above average feature. The need for them not being well known at the time. Thus, it seems to me that the roofer met the standards of the day and in consequence, neither Premier Roofing or McNie can have liability, as negligence is measured against the standards of the day – this is evidence from the Claimants own expert.

EXTENT OF REPAIRS

[87] I do not accept that the dwelling can be made weathertight by "targeted" repairs. It is clear that the chimney and the two decks must be rebuilt. A total of 29 moisture readings were high/moderate (the assessor) or over 18% (Mr Alexander). These readings were taken from random sites. This indicates a significant weathertight problem and a high degree of probability that "targeted" repairs would miss many targets. The only solution is a total re-clad.

QUANTUM OF DAMAGES FOR REPAIRS

[88] The question of quantum was dealt with by the assessor, Mr Stewart, by Mr Alexander (the expert for the Claimants) and by Rynbeck.

[89] The problem with the evidence as to quantum, which was presented by the assessor and by Mr Alexander, was that it was "hearsay" – see paragraphs 38 to 44 inclusive, hereof. As such, the authors of the evidence as to quantum, could not be cross examined. Indeed, Mr Alexander gave evidence (when cross examined at the hearing), that the company which provided the preferred (of two) estimate, as to quantum, presented on behalf of the Claimant, was not the company actually engaged in the repair work.

[90] Rynbeck gave detailed evidence as to quantum. Counsel for the Claimants submitted that his evidence could not be considered un-biased, as he is of course, a party to the claim. Rynbeck's evidence however, was the only direct evidence of quantum given and he was subject to careful cross examination, especially by Counsel for the Claimants. Rynbeck gave evidence that (effectively), he had the same qualifications in quantity surveying as Mr Alexander and Dr Walls. He said if he completed "quantity surveying three", then that would "make him a registered quantity surveyor". He said that was all

commercial and high rise – which did not interest him – and which I take to be irrelevant so far as this claim is concerned. He gave evidence that he had extensive experience (over twenty years and two hundred quotations) in providing quotations for construction work, mainly (as I understand it) new work, but also some renovation work, including repair work. He provided a detailed and careful analyses of his calculations. His evidence (on quantum) was far more extensive than anything provided by the assessor, or by Mr Alexander. He maintained his position in the face of careful and lengthy cross examination.

[91] I prefer the evidence (as to quantum) presented by Rynbeck. I accept it, rather than the "hearsay" evidence presented by the assessor and Mr Alexander. Quantum of damages against Rynbeck Holdings and Aluminium Systems will be based upon Rynbeck's calculations.

CONSEQUENTIAL DAMAGES

[92] (a) Medical expenses - Attached to Mr Lewis's affidavit dated 31st March 2006 - were copies of medical accounts to support a claim for medical expenses of $1,905.00. However, these were firstly documentary hearsay and secondly, were not linked in any particular way to problems associated with the dwelling. Mr Lewis said (in answer to a question from Rynbeck) that there was a high likelihood that his asthma was connected to potential toxic mould in the house. I do not consider that the evidence links Mr Lewis's medical condition sufficiently to the weathertight issues in respect of the house – I do not allow this claim (see paragraph 93).

(b) Additional Costs – The Claimants claimed a total sum (as required in closing submissions) of $27,469.05 (deducting the medical expenses)

for additional costs related to the repair work – cleaning, painting, storage of contents, alternative accommodation and the like. This was based upon vacating the dwelling for 16 weeks while it is repaired. The need to vacate (if such repairs were needed) was not challenged. I have found that extensive repairs are needed and (in general) I allow the claim based on that time calculation.

[93] Dr Walls, in his evidence (at the hearing), challenged the validity of the medical evidence presented by Mr Lewis. I thought this challenge would easily be overcome, on the basis that Dr Walls was not a medical practitioner, but rather the holder of a PHD Degree. However, his evidence was that his doctorate (the PHD degree) was in building health and related issues with one chapter of his thesis, being specifically on potential contaminants in buildings and their health effects. He said that it was very difficult to link health problems with a potential contaminant and to "just make a direct link …. is based on pure speculation". I prefer the evidence of Dr Walls in respect of the link between respiratory complaints and leaky buildings to that presented by Mr Lewis. Accordingly, the claim for medical expenses (which is distinct from general damages for stress) is disallowed.

[94] Of the costs claimed, I will allow the following:

(i)	Removal of contents, storage and return (the Claimants calculation $6,973.00 is not correct)	$6,223.00
(ii)	Alternative accommodation – 16 weeks	$7,600.00
(iii)	Provision of utilities (it is not necessary for the dwelling to be cleaned while being repaired)	$1,100.00
(iv)	Cleaning of interior after repair (average of two figures provided by "Home Clean Team"	$ 393.00
(v)	Carpet and Floor Clean	$ 337.55

(vi)	Re-landscaping etc		$1,000.00
		Total	**$16,653.55**

BETTERMENT

[95] The repairs, apart from repainting will simply place the Claimants in the same position that they would have been in had the dwelling been weathertight – that is not betterment. I accept that a building consent (today) would require a cavity system. Therefore, I do not regard a cavity system as betterment. The dwelling is now overdue for a repaint and accordingly, that is betterment – there will be no allowance for painting.

CONTRIBUTION BY CLAIMANTS

[96] Rynbeck Holdings, Rynbeck and Ali all alleged that any orders (in favour of the Claimants) should be reduced to reflect the Claimants contribution to the loss by failure to maintain – in particular by a failure to attend to (minor) repair of cracks in plaster and to repaint.

[97] Although repainting is now over-due, this was not the situation when the damage was first discovered. At worst, at that stage, the paint should have been approaching the end of its (protective) life. The damage was done. Failure to repair minor cracks or to repaint, latter did not contribute to the damage in any meaningful way.

TOTAL QUANTUM

[98] The total quantum is therefore:

(i)	nib wall		$ 7,290.00
(ii)	chimney		$16,590.00
(iii)	master deck		$ 8,082.00
(iv)	guest deck		$ 4,512.00
(v)	balance house		$33,962.00
(vi)	consequential		$16,653.55
		Total	$87,089.55

COSTS

[99] I have been invited by both Counsel for the Claimants (and Aluminium Systems) and by Counsel for Ali, to award costs – against Ali and Rynbeck Holdings and Rynbeck and the Claimants – respectively, on the basis that the parties pursued the claim and the responses (as the case may be) with bad faith and with allegations / objections that were without substantial merit. – Section 43(1) WHRS Act 2002.

[100] Counsel for the Claimants (and Aluminium Systems) submitted that:

(a) Allegations by Ali that Mr Lewis was the designer and project manager (Mr Parlane's evidence did not support this) and that the windows were faulty, had no substantial merit.

(b) Allegations by Rynbeck Holdings and Rynbeck that Mr Lewis was the designer and project manager and that the standards of the Building Code in respect of the chimney and decks had been met, had no substantial merit.

[101] Costs may only be awarded in a WHRS claim, if the party against whom they are awarded, has been held to have acted in bad faith, or has made allegations that are without substantial merit. – Section 43 (1) WHRS Act 2002.

[102] Although I have not upheld the allegations (complained of) by Ali, Rynbeck Holdings and Rynbeck, I do not consider that they were made in bad faith or that they were without substantial merit. They are the type of allegations commonly raised in WHRS claims – especially allegations relating to the windows and compliance (or otherwise) with the Building Code. It was not unreasonable to raise the issues of project management and design. Nor was it unreasonable to call the evidence of Mr Parlane (although an earlier indication of this would have assisted). Although Mr Parlane's evidence did not support Ali's allegation and although he (Mr Parlane) was less than candid, he was an unwilling witness appearing by subpoena – his evidence could not be predicted.

[103] I will not order costs against any of Rynbeck Holdings, Rynbeck or Ali.

[104] I think the decision (of the Claimants) to refuse Respondents permission to independently test the plaster and the decision to undertake radical repair work without notice, were both ill-advised.

[105] However, these decisions (paragraph 104) were tactical ones which the Claimants decided upon as a strategy for conducting the claim. Although they may have been better to have adopted a different strategy, the strategy itself, is not evidence of bad faith and I will not order any costs against them.

ORDERS

[106] Rynbeck Holdings is ordered to pay the Claimants the sum of $87,089.55

[107] Rynbeck Holdings is entitled to recover a contribution of up to $43,544.78 from Rynbeck for any amount paid in excess of $43,544.77 to the Claimant.

[108] Rynbeck Holdings is entitled to a contribution of up to $6,297.00 from Aluminium Systems for any amount in excess of $80,792.55 paid to the Claimants.

[109] Rynbeck is ordered to pay the Claimants the sum of $87,089.55.

[110] Rynbeck is entitled to a contribution of $43,544.78 from Rynbeck Holdings for any amount paid in excess of $43,544.77 to the Claimant.

[111] Rynbeck is entitled to a contribution of up to $6,297.00 from Aluminium Systems for any amount in excess of $80,792.55 paid to the Claimants.

[112] Aluminium Systems is ordered to pay the Claimants the sum of $87,089.55.

[113] Aluminium Systems is entitled to a contribution of up to $80,792.55 from Rynbeck Holdings for any amount paid in excess of $6,297.00 to the Claimants

[114] Aluminium Systems is entitled to a contribution of up to $80,792.55 from Rynbeck for any amount paid in excess of $6,297.00 to the Claimants.

[115] No other orders are made and no orders for costs are made.

STATEMENT OF CONSEQUENCES

Section 41 (1)(b) & (iii) WHRS Act 2002, statement for consequences for a Respondent if the Respondent takes no steps in relation to an application to enforce the Adjudicator's determination.

[116] If the Adjudicator's determination states that a party to the adjudication is to make payment and that party takes no step to pay the amount determined by the Adjudicator, the determination may be forced 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 interests and costs entitled arising from the enforcement.

Dated this day of 2007

Timothy Scott
Adjudicator