CLAIM NO: 01514

UNDER The Weathertight Homes Resolution Services Act 2002

IN THE MATTER of an adjudication

BETWEEN **SAMUEL TRACY McKINNEY** and **CLAIRE RUTH McKINNEY**

Claimants

AND **GREGORY CASSIDY**

First Respondent

AND **BERNARDO ALARCON**, trading as Alarcon Contractors

Second Respondent

AND **NORTH SHORE CITY COUNCIL**

Third Respondent

AND No Fourth Respondents, Siok Koon Wee and Kelvin Donovan Wee not having been served

AND **BRIAN ALAN TURNER**

Fifth Respondent

DETERMINATION OF ADJUDICATOR
(Dated 16 August 2006)

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 20 May 2005.

1.2 I was assigned the role of adjudicator to act for this claim, and a preliminary conference was arranged and held in the Weathertight Homes Resolution Service ("WHRS") meeting rooms in Auckland on 14 June 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 ten 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 will need to be referred to in this Determination.

1.4 The hearing was held on 16 and 17 May 2006 in the WHRS meeting rooms in Auckland Central. The Claimants were represented by Mr Michael Locke barrister; Mr Cassidy represented himself; the North Shore City Council was represented by Mr Paul Robertson of Heaney & Co; no appearance for or by Mr Alarcon or Mr Turner.

1.5 I conducted a site inspection of the property on 19 May 2006 in the presence of Mr and Mrs McKinney. None of the other parties or any of their experts wished to attend.

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 Samuel McKinney, one of the claimants;
- Mrs Claire McKinney, the other claimant;
- Mr Richard Maiden, a building consultant, called by the claimants;
- Mr David Hughes, the WHRS Assessor, called by the adjudicator;
- Mr David Scott, a building inspector, called by the Council;
- Mr Sean Collins, a builder, called by witness summons by the Council;

- Mr Morris Jones, a building inspector and consultant, called by the Council;
- Mr Mark Miller, a building inspector and consultant, called by the Council;
- Mr Greg Cassidy, the first respondent.

1.7 A brief of evidence was filed by Mr Clint Smith, a building consultant called by the Council. Whilst Mr Smith did not formally give his evidence on oath (due to an oversight of mine) he participated in the experts' conferences and made useful comments on quantum with the consent of all parties present.

1.8 In the morning on the first day of the hearing I instructed the three experts present (Mr Hughes, Mr Maiden and Mr Smith) to go into an adjacent meeting room to confer on the technical issues that were a part of this adjudication. I asked Mr Hughes, the WHRS Assessor, to chair this meeting, and asked the three experts to try and reach agreement on the following:

- Where the building leaked;
- The cause of each leak;
- The damage caused by each leak;
- Necessary remedial work;
- The costs.

1.9 As a result of this experts' conference the three experts produced a summary of the issues on which they had reached agreement, notes on which issues were not agreed, and some conclusions on individual remedial costs. This summary was made available to all parties and myself at the lunch break on 16 May.

1.10 Later in the hearing I asked Mr Maiden and Mr Smith (being the two experts who gave evidence on quantum) to have a meeting to see what parts of the claimed remedial costs were not agreed. This resulted in the claimants filing a slightly revised schedule of claimed costs and the need for Mr Maiden to try and obtain more detail on some items from the remedial builder. Mr Maiden agreed to provide a written explanation regarding these items by the following Monday (22 May) and Mr Smith would have a right to file written comments on these issues by Wednesday 24 May.

1.11 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 Monday 22 May,

and written replies by 25 May. There were some slight delays caused by Mr Robertson's illness, but I had received all closing submissions by 1 June 2006.

1.12 The parties have agreed to an extension to the 35 working day period identified in s.40(1)(a) of the WHRS Act, and this was recorded in my Procedural Order No 10.

2. THE PARTIES

2.1 The Claimants in this case are Mr and Mrs McKinney. I am going to refer to them as "the Owners". They purchased the house and property at 12 Gretna Green, Browns Bay, North Shore City, in March 2001 from Kelvin and Wei Wee. The Owners are the second owners of this house.

2.2 The first respondent is Mr Cassidy, who was the principal shareholder and director of a company called New Millennium Developments Ltd. This company owned the property and arranged for the design and construction of the dwelling in 1997. It is alleged that Mr Cassidy was the builder responsible for the construction of the house.

2.3 The second respondent is Mr Alarcon, who it is alleged was the person who carried out the plastering to the outside of this house.

2.4 The third respondent is the North Shore City Council ("the Council"), which is the territorial authority responsible for the administration of the Building Act in the area. The Council reviewed the application for a building consent, issued the consent, and carried out the inspections during construction prior to issuing the Code Compliance Certificate.

2.5 The fifth respondent is Mr Turner, who is alleged to be the person who laid the shingle roof on this house.

3. CHRONOLOGY

3.1 I think that it would be helpful to provide a brief history of the events that have led up to this adjudication.

5 February 1997	Application for building consent
16 April 1997	Building consent issued
29 December 1997	Code Compliance Certificate issued
25 June 1998	Property transferred to K and W Wee
29 March 2001	Owners agree to buy property
6 October 2003	Owners make application to WHRS
26 July 2004	WHRS Assessor report published
20 May 2005	Owners file Notice of Adjudication
10 October 2005	Owners commence remedial work.

4. THE CLAIMS

4.1 The original claims made by the Owners in their Notice of Adjudication (20 May 2005) were for remedial work of at least $250,000.00, plus other costs of $15,000.00 and general damages of $20,000.00.

4.2 These claims were amended in the Amended Notice of Adjudication (29 November 2005) to remedial work of $225,921.21, consultants' costs of $16,944.99, other costs totalling $24,636.67 and general damages.

4.3 As the hearing progressed there were further adjustments made to the amounts being claimed, which is not particularly surprising as when the witness statements were filed the remedial work had not yet been fully completed. I asked Mr Locke to file an updated schedule of the repair costs on the second day of the Hearing, which showed the following amounts:

Lump Sum contract prices

Establishment, supervision	18,113.50	
Scaffolding	12,397.00	
Temporary cladding or covers	6,948.30	
Remove existing cladding	14,559.00	
Work to fascias and gutters	9,912.69	
Building wrap and wws flashings	48,979.50	
Replace Hardibacker bracing	2,755.00	
Remove wws and doors, modify and reinstall	11,580.00	
Alter balustrades	3,245.00	
Replace deck membrane	6,828.88	$ 135,318.86

Provisional Sum expenditure		
Replace decayed timber	45,405.14	
Electrical and plumbing	9,901.65	
Work to interior linings	12,990.51	
Supervision	2,895.00	
Debris	5,124.00	
Variations		
Install concrete nibs	2,336.57	
Removal of debris	0.00	
VO1 bathroom on lower floor	0.00	
VO2 additional works	9,976.04	$ 88,628.91
Profit element		
On materials	2,480.44	
On subcontractors	5,311.36	$ 7,791.80
Other costs		
Work to shower (see tiling below)	0.00	
Replacement of carpet	11,919.00	
Landscaping reinstatement	2,500.00	
Tiling to deck, steps and bathroom	8,524.25	
External plastering	3,760.00	
Gas meter	400.00	$ 27,103.25
		$258,842.82
Building Consent		3,778.60
Prendos fees to date (excluding litigation)		21,382.56
		$284,003.98
	GST 12.5%	35,500.50
		$319,504.48

4.4 It should be noted that I have made corrections to two figures in this schedule as the profit on materials had inadvertently been included twice. The above schedule includes for the consultants' costs associated with the remedial work.

4.5 The other claims for costs or miscellaneous expenses are as follows:

(i)	Insurance for building work	$ 741.00
(ii)	Moving costs to vacate home	599.75
(iii)	Estimated moving costs to return	1,000.00
(iv)	Rent for temporary premises (6 months – 21.10.05 – 21.4.06 @ $480.00 per week)	14,400.00
(v)	Valuation fee	843.75
(vi)	Estimated valuations (required by Claimants' bank during repair)	2,531.25
(vii)	Consent fees	0.00
(viii)	Mortgage interest (yet to be quantified)	0.00
		$ 20,115.75

4.6 I have shown the consent fees as zero, because this has already been claimed within the previous schedule of costs. The claim for mortgage interest has been amended to a claim for interest pursuant to clause 15 in the Schedule to the WHRS Act.

4.7 The Owners are also claiming for general damages for inconvenience, disruption, anxiety, upset and loss of enjoyment as a result of the above defects, in the amount of $20,000.00.

4.8 The claims against Mr Cassidy are in tort and based on allegations of negligence. The Owners say that Mr Cassidy owed them a non-delegable duty of care to ensure that all building work was carried out in compliance with the building regulations. They claim that he breached that duty by failing to carry out, or have carried out, the building work in a compliant manner.

4.9 The claims against Mr Alarcon and Mr Turner are similar, in that the Owners say that they were negligent in carrying out their work, or ensuring that their work was carried out, in compliance with the building regulations.

4.10 The claims against the Council are also based upon allegations of negligence. The Owners say that the Council was in breach of its duty of care owed to them by failing to ascertain that the building leaks were present; approving the works

despite the presence of these defects (leaks); and failing to cause the builder to rectify the building defects prior to issuing a code compliance certificate.

5. FACTUAL ANALYSIS OF CLAIMS

5.1 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.

5.2 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?

5.3 The experts have identified that there were seven areas, or locations, in which it was possible that moisture was getting into this dwelling. They all agreed that there were leaks in six of these areas, but did not agree about the seventh location. Therefore, I will consider the following areas or locations.

- Windows and door openings;
- Tops of quoins;
- Junction of blockwork/framing by study;
- Junction retaining wall/house by en-suite;
- Deck membrane;
- Ground levels around dwelling;
- Under-floor area;
- Other claims of leaks.

5.4 Windows and Door Openings

5.4.1 The experts all agree that most, and probably all, the windows and door openings were leaking to some extent. They also agree that the cause

of the leaking was due to inadequate flashing or sealing around the window and door frames.

5.4.2 It appears that all windows and doors had head flashings taken across the tops of the frames and extended each side of the openings by about 50mm. This is usually considered to be an acceptable method of preventing leaks along the tops of the windows and door openings.

5.4.3 There were no sill flashings or sill trays installed across the bottoms of the window openings, and no jamb flashings installed up the sides of the window openings. The aluminium window frames had been face-fixed to the timber wall framing, with the hardibacker backing boards taken behind the outer flanges of the joinery frames. A galvanised J mould was then fixed around the sill and jambs, butting up to the outer flanges of the joinery frames. The longer leg of the J mould was nailed to the timber wall framing, allowing the solid plaster cladding to be finished against this moulding. The J would have acted as a screeding board for the plasterer and provided a clean straight edge to the solid plaster around the window openings.

5.4.4 The junction between the J mould and the aluminium window flange was filled with sealant. These were two possible lines of entry for water. Firstly, moisture entered at the junction of the plaster and the galvanised moulding, because a fine crack would form at this junction as soon as the plaster dried out. Secondly, water was likely to get between the J mould and the aluminium window frame as soon as the sealant failed to protect this joint.

5.4.5 Whichever way the water found its way around this J mould, it was bound to get into the plaster itself. The junctions between the sill and jamb moulds were simply butted together, so that any chance of the sill mould acting as a sill tray was lost. The water tended to be directed to the back of the plaster and thence into the timber framing through the fastening holes.

5.4.6 The damage that had been caused by the leaks around the windows was extensive. The experts agree that the only way to rectify these leaks, and to repair the consequential damage, was to completely replace the

solid plaster exterior cladding on this house. The Owners have already had this work done.

5.5 **Top of Quoins**

5.5.1 A quoin is the name given to the dressed cornerstone in a random stone masonry wall. Quoin blocks are blocks of either brick or stone showing alternately longer and shorter faces to each course on each elevation. Quoin blocks often are laid so that they project beyond the face of the main wall plane.

5.5.2 On this house the solid plaster has been thickened out on external corners of the building to simulate projecting quoin blocks. The plasterer had tooled in concave recessed horizontal lines at about 250mm centres to create the impression of large quoin blocks laid one on top of each other up the external corners. At the top of these "quoins" the plaster had been finished up against the underside of the fascia and barge boards. A crack had former at these top junctions and allowed water to flow through the crack and into the plaster.

5.5.3 The experts agree that there had been leaks into the tops of these "quoins", and that the consequences of these leaks was that considerable damage had been caused to sections of the wall framing. They also agree that the only way to rectify the leaks, and to repair the consequential damage, was to completely replace the solid plaster exterior cladding.

5.6 **Junction of Blockwork/Framing by Study**

5.6.1 On the southern elevation, where the block retaining walls join the timber wall framing, the cladding junction had failed. The experts agree that there were leaks at this junction which appear to have been caused by the failure of the silicon-type sealant applied between the blockwork and the hardibacker.

5.6.2 The damage caused by these leaks was limited to the immediate area of the leaks, and the experts agree that the repairs would have been limited to re-cladding the lower level of the south elevation. This would represent about 9% of the area of the exterior cladding.

5.7 **Junction of Retaining Wall / House by En Suite**

5.7.1 On the northern elevation, a timber retaining wall abuts the house by the en suite. The plaster had been taken over the end of the blockwork and up to the timber retaining structure. There was no protection to prevent water from getting in behind the plaster, through the blockwork and into the timber wall framing and stopping.

5.7.2 There is no doubt that this part of the house had been badly damaged as a result of leaks in this area, but the experts do not agree about the extent of the remedial work necessitated by this leaking junction. Mr Maiden considers that this was a serious leak, and would have caused the entire north elevation to be re-clad.

5.7.3 Mr Smith thinks that most of the damage to the upper area of this wall had been caused by the windows or the quoins, so that this leak would have only damaged the lower level of this wall. On balance, I am inclined towards Mr Smith's interpretation of the situation and find that the repairs to this leak would be limited to the re-cladding of the lower level of the north elevation. This would represent about 9% of the area of the exterior cladding.

5.8 **Deck Membrane**

5.8.1 There were some leaks from around the edges of the waterproof membrane to the deck. These leaks were mostly found to be at the external angles or ends of the turn-ups at walls and where the membrane was dressed down over the fascia board.

5.8.2 The experts were in agreement about the fact that the deck membrane was leaking, and the location of the leaks. They also agreed that the remedial work included the re-cladding of the complete east elevation and the reconstruction of the deck itself. This represents about 38% of the area of the exterior cladding.

5.9 **Ground Levels around Building**

5.9.1 The Owners are claiming that the solid plaster has been taken down below the level of the surrounding ground, which allowed water to wick up through the plaster. However, the experts did agree that there were

only two locations in which this had caused leaks into the building. These two locations were:

(a) the steps on the west elevation by the double doors leading into the lobby, and

(b) the bottom plates and framing of the columns supporting the deck.

5.9.2 The experts have agreed that neither of the leaks had caused extensive damage, and that the remedial work would have been restricted to localised repairs. They also agreed that the cost of remedial work would be $5,000.00 for location (a) and $2,600.00 for location (b).

5.10 **Under-floor Area**

5.10.1 The floor to the garage is a suspended concrete floor, so that there is an open sub-floor space beneath this floor. Access to this space is via a small screwed-down panel in the wall of the cupboard under the stairs. The area has no means of ventilation and the moisture content of the timber framing in this sub-floor area was found to be high.

5.10.2 The experts all agree that this sub-floor space should have been ventilated to prevent the build-up of moisture in this space. They also agree that no permanent damage has been caused to the timber or steel shuttering, and the remedial work should be restricted to the cost of creating ventilation openings to the space. They agreed that this cost would be $3,000.00.

5.11 **Other Leaks**

5.11.1 In the Amended Notice of Adjudication the Owners cited a long list of defects, claiming that these defects have led to the need to carry out the remedial work. However, the Owners do not make it clear which defects caused what work.

5.11.2 The experts created their own list of leak locations, which has already been mentioned. I have considered each leak location in their list. The Owners have not drawn my attention to any other leaks that have not

been included in the experts' list, so I have taken the experts' list as being the complete list of leaks being claimed by the Owners.

6. REPAIR COSTS

6.1 The Owners are claiming that the cost to repair all leaks and to make good all damage caused by the leaks is $319,504.48 as shown in paragraph 4.3 above.

6.2 The work has all been completed so that there has been no reason to estimate or guess the extent of damage, or the costs to repair. The Owners employed Mr Maiden of Prendos Ltd to prepare job specifications and documentation for tendering purposes. The job was awarded to Reconstruct Ltd, a firm of builders that specialises in this type of work. Mr Maiden supervised the work and has given evidence on the costs.

6.3 During the hearing many of the questions raised by the respondents were either agreed between the experts, or further explanations were given as to the reasons for various costs. The respondents allege that the claimed costs are "excessive", but these are unspecified generalisations. However, Mr Smith's evidence was much more specific and focussed on particular areas of the costings. I will be addressing all of his criticisms as I work my way through the various figures.

6.4 I will be considering the costs under the following headings:

- Reconstruct Ltd costs;
- Prendos costs;
- Betterment;

Reconstruct Ltd's Costs

6.5 **Scaffolding and external painting** Mr Smith says that both of these costs are maintenance items that would have had to have been paid by the Owners as normal maintenance work. I am going to consider this point under the heading of "betterment" which will be addressed later in this section of my Determination.

6.6 **Replacement cladding costs** Mr Smith says that these should be reduced to compensate the years of service already given – which is another "betterment" argument to be addressed later.

6.7 **Supervision costs** Mr Smith says that a reduction in these costs should be made to reflect the removal of variation orders from the claim. The variation orders were for work done for the Owners that did not relate to repairing the leaks. However, I note that the supervision figure was calculated on the provisional sum expenditure, and was not added to the two variation order costs. I am not convinced that any adjustment needs to be made to the supervision costs.

6.8 **Carpet** This is another claim for betterment which I will address later in this section of my Determination.

6.9 **External plastering – columns** Mr Smith says that this extra cost of $3,760.00 should have been included as a part of the total re-clad price and was not an extra. Mr Maiden has explained that his tender documents only showed three columns, but this was a mistake, and they should have shown five columns. The builder has claimed for the extra two columns. I will accept this evidence, and the extra cost of $3,760.00 will remain in the remedial costings.

6.10 **Gas meter** Mr Maiden had explained that the $400.00 was the cost of temporarily removing, and later reinstating, the gas meter. However, Mr Smith has pointed out that this work was also charged by Plumbworx. I think that Mr Smith is correct, and I will deduct the sum of $400.00 from the remedial costings.

Prendos Costs

6.11 In the schedule of claimed costs presented with Mr Maiden's supplementary brief at the beginning of the hearing, the amount of the Prendos fees was shown as $27,574.56. During the hearing, Mr Maiden was asked whether this included any litigation costs. He checked through all of the invoices and provided a breakdown of the contract supervision costs, and the revised total of $21,382.56 was included in Mr Locke's updated schedule (see paragraph 4.3 above).

6.12 I am satisfied that this revised figure is correct, and related to organising and supervising the remedial work. It is an appropriate figure to be included as a part of the remedial costings.

Betterment

6.13 Mr Robertson made submissions on the need to reduce the amount of remedial costs on account of the Owners being the beneficiaries of betterment. Specific submissions were made on the need to adjust the cladding costs, which I will consider below. Mr Smith gave his opinion on the amount of the reductions.

6.14 The issue of betterment is often raised in building disputes and WHRS adjudications. The arguments from both sides are often finely balanced, and I believe have been excellently outlined in the judgment of Fisher J in *J & B Caldwell Ltd v Logan House Retirement Home Ltd* [1999] 2 NZLR 99. After covering the authorities, he concluded on page 108:

> I accept the logic of an approach which makes a deduction for betterment only after allowance for any disadvantages associated with the involuntary nature of the plaintiff's investment eg interest on the premature use of capital to replace a wasting asset which would at some stage have required replacement in any event.

6.15 I propose to adopt the logic of Fisher J and apply it, as best as I can, to the situation in this dwelling.

External Painting

6.16 Mr Smith estimates that the cost of the external painting was $6,785.00. He says that the house is now nine years old and has not been repainted since it was first built in 1997, so that all of the external painting costs should be deducted as betterment.

6.17 This matter was considered by me in the WHRS adjudications known as "Ponsonby Gardens". I found that to paint an existing previously painted surface in good condition would cost less than painting a new and previously unpainted surface. There would be no sealer coat, and probably one less top coat. I concluded that the Owners were entitled to recover the extra cost of painting on the new plasterwork over and above the cost of repainting after a normal life. I assessed these extra costs as being 55% of the total costs.

6.18 There is also the longevity of the paintwork to consider. Once again, in "Ponsonby Gardens" when I had the benefit of extensive expert opinions on the matter, I concluded that a realistic life expectancy for external paintwork on stucco in Auckland was about 10 years.

6.19 I can see no reason for coming to different conclusions in this adjudication. Therefore, I will allow the Owners to recover 55% of these painting costs. On the remaining 45% I will allow the Owners to recover 2/10 of these costs, and the remaining 8/10 will be treated as being the betterment gained by the Owners.

$6,785.00 x 45% x 8/10 = $2,442.60 deduction

Scaffolding

6.20 Mr Smith says that the cost of scaffolding the property was $12,397.00. He considers that this scaffolding would have been required to have been provided by the Owners as a normal part of the maintenance of this dwelling. Scaffold would have been needed for the external painting, and for the routine minor repair work associated with stucco.

6.21 The remedial work included a complete re-clad of the house. This could not have been done without a full scaffold, over several weeks. The fact that the scaffold was also used to paint the outside of the building meant that it was probably in place about a week longer than needed for the re-cladding work – maybe 10% longer. The main costs of the scaffolding are the erection costs, and the dismantling costs. The weekly hire rates are quite modest. Therefore, the extra cost of one week's hire would probably have amounted to a small portion of the total costs.

6.22 Mr Smith did not provide any alternative costings to help me calculate the actual amounts in this project. Under these circumstances, I do not propose to speculate further on the calculation and as I am not convinced that the deduction will amount to a significant figure, I will dismiss the claim for lack of convincing evidence.

Carpet

6.23 The total cost for replacing the carpet is $11,919.00. Mr Smith says that the carpet would have needed to have been replaced after 12 years of use and, as it is now nine years old, the cost should be reduced by three-quarters.

6.24 Mr McKinney told me that some of the carpet had been damaged by water from the leaks, but no one remembered to ask him how much had been damaged. Based on the evidence about the leaks, I would assume that the damage was

not extensive, but it may not have been possible to secure matching carpet after eight years. Therefore, assuming it was decided to replace only the damaged carpet, the Owners would have needed to either re-carpet the entire rooms that had damaged carpet, or to re-use as much of the undamaged portions as was realistically possible. I think that it is reasonable to conclude that about 25% of the floor area would need new carpet.

6.25 Once again, this matter of carpet replacement was considered by me in the Ponsonby Gardens" adjudication when I had the benefit of extensive expert opinions. I concluded that a realistic life expectancy for carpet was 12 years. Therefore, the calculation for betterment should be

$11,919.00 x 75% x 8/12 = $5,959.50 deduction.

External Claddings

6.26 Mr Robertson submits that there must also be an allowance for betterment on the external cladding because of the 15-year durability requirement imposed by B2 of the Building Code. His logic is as follows:

(a) The claim against the council substantially rests upon its decision to "pass" the windows and cladding in the course of the final inspections and the issue of the code compliance certificate in December 1997.

(b) Per B2 of the building code, the requirement is that the components of the house must, with only normal maintenance, continue to satisfy the performance requirements of the building code for [15 years] *"from the time of the issue of the applicable code compliance certificate"*.

(c) Some ten years later the cladding has been replaced with a superior product including a cavity and once again it is subject to a fresh fifteen year durability requirement under the building act 2004.

6.27 He points out that the Department of Building and Housing (and previously the Building Industry Authority), when issuing determinations under the Building Act link any direction to issue a Code Compliance Certificate to the 15-year durability requirement, and he refers me to a recent DBH determination. In that determination the DBH directed that the Council could backdate a Code Compliance Certificate to the time when the work was originally carried out.

6.28 In this particular case, the Owners have been obliged to replace the external cladding on their house. It is a new cladding. They were not allowed to re-clad without a cavity. The Council has issued a new building consent and will be

asked to issue a new Code Compliance Certificate. I do not see that the analogy with determinations issued by the BIA or DBH has any direct relevance to the situation that the Owners have found themselves to be in. I am not dealing with a manufacturer's guarantee, or the length of time which the Council may have considered was the minimum durability period for this cladding. The cladding has clearly failed well within the 15-year period.

6.29 Mr Robertson says that there is no logical distinction in the approach to be taken to betterment between paint, carpet or cladding. That is correct, but one must compare apples with apples. The life expectancy of the external paint I have concluded was ten years, and the life expectancy of carpet about 12 years. I have absolutely no evidence to show that the life expectancy of the external cladding system was only 15 years. If Mr Robertson is suggesting that house owners, as a matter of normal maintenance and upkeep, can expect to completely re-clad their houses every 15 years, I do not accept that suggestion.

6.30 With respect, Mr Robertson is confusing the 15-year minimum durability requirement under the Building Code with life expectancy. None of the experts gave an opinion on the life expectancy of solid plaster claddings, but I am personally aware of plastered houses that have been built for well over 50 years, and are not looking in need of being re-plastered in the near future. I do not accept that an extra eight years should be seen as gaining the Owners any distinct benefit or betterment.

Summary of Repair Costs

6.31 I have found that the following costs should be accepted as remedial or repair costs for the various leaks that have occurred in this house:

• Total amount claimed (see para 4.3)		$ 319,504.48
• Deductions		
- Gas meter (para 6.10)	$ 400.00	
- External paint (para 6.19)	2,442.60	
- Carpet (para 6.25)	5,959.50	
- GST on deductions	1,100.26	9,902.36
		$ 309,602.12

Allocation of Repair Costs

6.32 It is necessary to allocate the repair costs against the various leaks or leak locations. The Owners did not attempt to make any allocation, but I did ask the technical experts to see if there was any agreement as to a realistic allocation.

6.33 I say "realistic allocation" because it is not possible to make a finite allocation. At least two of the leak locations would have resulted in the need for a complete re-clad, and the damage from other areas overlapped. Therefore, it is only possible to make an assessment.

6.34 The experts did not have sufficient time to work out an agreed schedule, but Mr Smith gave his opinion in his Schedule No 2, and the other experts have assisted in some areas. I have adopted the method used by Mr Smith and made some relatively minor adjustments to the percentages. The allocation is as follows:

Windows and door openings	$ 115,937.40
Tops of quoins	92,436.58
Junction by Study	14,100.49
Junction by En suite	17,233.94
Deck membrane	57,968.70
Steps on west elevation	5,625,00
Nibs under deck columns	2,925.00
Under-floor area	3,375.00
	$ 309,602.12

7. OTHER CLAIMS FOR COSTS

7.1 The Owners are claiming for the reimbursement of other costs and expenses, together with interest and general damages. I will consider them under the following headings:

- Insurance for building work;
- Costs for alternative accommodation;
- Valuation fees;
- Interest.

7.2 **Insurance**

7.2.1 The Owners are claiming an amount of $741.00 for the costs of taking out insurance cover for the remedial work. I accept that insurance is a part of the remedial work, and as the Owners would reasonably require the work to be covered by an extension to their householder's policy, this extra cost is reasonable. I will allow the amount of $741.00, as claimed.

7.3 **Alternative Accommodation**

7.3.1 The Owners are claiming for the costs of temporarily moving out of their house and renting alternative accommodation for the time that the remedial work was underway. The claims are for $1,600.00 moving expenses and rental accommodation for 30 weeks at $480.00 per week.

7.3.2 It is reasonable for the Owners to have moved out of their house whilst this work was being undertaken. There have been no criticisms from any of the respondents regarding this claim, or the quantum of the claim. The Owners have two small children, and the rental costs have been substantiated by the tenancy agreement and invoices.

7.3.3 I am satisfied that all of these costs have been incurred by the Owners, that they are reasonable under the circumstances, and that they are as a direct result of the leaks in this house. I will allow the costs of $1,600.00 for moving and $14,400.00 for alternative accommodation.

7.4 **Valuation Fees**

7.4.1 The Owners are claiming for the costs of obtaining a valuation to enable them to raise funds from their bank for the remedial work, and are also claiming for the estimated costs of obtaining two further valuations. They have shown me the invoice for the initial valuation, but have produced no evidence to show that the subsequent valuations have been carried out.

7.4.2 I accept that it was necessary to obtain a property valuation for the purposes of raising the funds for the remedial work. I am not satisfied that the Owners have shown that further valuations were needed. Therefore, I will allow this claim for a total amount of $843.75.

7.5 Interest

7.5.1 The Owners are claiming for the interest that they were paying on their mortgage, and stated that the actual amount had yet to be calculated. At the hearing Mr Locke agreed with my suggestion that I should carry out the actual calculations as they would depend upon the amounts that I determined should be allowed.

7.5.2 An adjudicator has the power to award interest pursuant to clause 15 in the Schedule to the WHRS Act, which reads:

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

7.5.3 I can exercise my discretion as to the rate and the period in accordance with the normal accepted principles. The Owners have had to raise a Flexible Home Loan with the National Bank of New Zealand, and the interest rate has been slightly less than 2% more than the 90-day bill rate. Therefore, I will allow the Owners interest at 1.5% more than the 90-day bill rate, from the dates that they have had to pay monies towards, or associated with, the remedial costs.

7.5.4 I have calculated this interest as follows:

Year/Month	Monthly	Accum	Rate	Interest
2005				
May	2,040	2,040	8.55%	$ 14.81
June	1,266	3,306	8.53%	23.16
July	5,941	9,247	8.53%	66.99
August	1,227	10,475	8.53%	75.89
September	0	10,475	8.59%	73.95
October	3,838	14,312	8.78%	106.73
November	2,148	16,460	8.86%	119.86
December	54,616	71,076	9.20%	555.37

2006				
January	47,090	118,166	9.05%	908.26
February	62,564	180,730	9.03%	1,251.94
March	20,996	201,726	8.99%	1,540.25
April	78,413	280,139	8.97%	2,065.36
May	1,603	281,742	9.00%	2,153.59
June	0	281,742	8.98%	2,079.49
July	0	281,742	8.93%	2,136.84
August	0	281,742	8.99%	1,110.30
				$ 14,282.81

This interest has been calculated up to the date of this Determination, and will continue to accrue up to the date of payment.

7.6 **Summary of Other Claims for Costs**

7.6.1 I have found that the following costs should be recoverable by the Owners as being consequential to the remedial or repair costs:

Insurance	$ 741.00
Moving Costs	1,600.00
Alternative Accommodation	14,400.00
Valuation fees	843.75
Interest	14,282.81
	$31,867.56

7.6.2 These costs will be allocated to the various leaks or leak location remedial costs as a proportion of the whole.

8. GENERAL DAMAGES

8.1 The Owners are claiming general damages in the amount of $20,000.00 for the worry, inconvenience, stress and general disruption to their lives as a result of finding that their house had serious leaks and needed to be re-clad. It is probably better to quote Mr McKinney's own words rather than attempting to précis or paraphrase.

> 76. My wife and I have experienced considerable stress, worry and inconvenience as a result of the position we have found ourselves in. We have felt that our lives have been on hold for nearly three years since we found out the extent of the problems. We have not led the standard of life that we would normally have

done. Due to the prospective remedial costs we have not taken any holidays apart from a brief week's holiday prior to Christmas 2005 just to try and take a break from our current situation.

77. From September 2003, the date we became aware of the serious leaking problems, we have been extremely worried and stressed about the situation and the extent of the expenditure required to remedy the problems.

78. We have needed to obtain substantial additional mortgage finance to fund the cost of the work and legal and building consultants' costs. This has led to considerable financial worries and many sleepless nights.

79. My wife had to return to work when our daughter was only 10 months old and our son was 2½ to support the financing of the remedial costs. This has caused considerable stress to our family life and my wife has missed out on valuable time she could have spent at home raising our children.

80. With great reluctance I cashed in my superannuation plan with the National Bank to contribute to the remedial costs. I was only able to do this by proving to the Bank that we were in 'severe financial hardship'. This has severely impacted on our financial security as I no longer have retirement savings. We have now lost the potential for considerable interest on this investment as it was in a long term growth fund.

81. Our daughter suffered from constant ill health from early June 2005 until we moved out of Gretna Green in October 2005. She had 18 Doctor's visits during that time for viral illnesses that lasted weeks as they turned into secondary ear and chest infections requiring antibiotics and on one occasion steroid treatment.

82. My wife and I have needed to spend considerable time meeting with legal and building advisers, dealing with correspondence, liaising with valuers and the bank, and being involved in matters concerning the remedial work. I hold a senior position with my company and dealing with all these issues has been time consuming and disruptive to my working performance. It has also been stressful and detrimental to our health and personal life and marital relationship.

83. The situation has not been helped by the adversarial approach adopted by the Council and Mr Cassidy, and it was very disappointing that Mr Cassidy reneged on his earlier decision to attend mediation on 18 April 2005.

84. We have needed to move out of our home while the remedial work is being carried out, and the stress of finding a rental property and the two house moves involved are adding greatly to our stress and expense.

85. The process of preparing for and attending an adversarial hearing in order to seek recompense has also been extremely time-consuming, costly and stressful.

> 86. The personal cost to us has been greatly in excess of the actual financial costs incurred in remedying the defects and in seeking legal redress.

8.2 Adjudicators have the power to make awards of general damages, as has been confirmed by Judge F W M McElrea in the Auckland District Court in *Waitakere City Council v Smith* (CIV 2004-090-1757, dated 28 January 2005). I am aware of awards for general damages that have been made by adjudicators in previous WHRS determinations. General damages have been claimed in 19 of the 42 Determinations issued to date, and have been awarded in 14 cases. The amounts awarded have varied from a minimum of $2,000.00 (WHRS Claim 277 – *Smith*) to a maximum of $18,000.00 (WHRS Claim 27 – *Gray*), with the average amount being slightly under $6,000.00. However, each case must be decided on its particular circumstances and merits.

8.3 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.

8.4 It is submitted by Mr Robertson (on behalf of the Council) that as Mrs McKinney did not give any evidence in support of this claim, then I cannot make an award of general damages to her. He refers me to *Auckland City Council v Russell* (WHRS Claim 1240, Adjudicator Carden, 21 September 2005) where the adjudicator declined to award general damages to either claimant because their brief of evidence did not give specifics of their distress.

8.5 I am not convinced that this is a situation where I have received scant evidence about the stress and inconvenience suffered by both of these Owners. Both Mr and Mrs McKinney attended the hearing, and both gave evidence. As often happens in these sorts of situations, one partner only gave evidence of the factual background and presented the necessary documentary evidence to support their claim. Mr McKinney was chosen for that role, and he frequently used the pronoun “we” in his evidence to confirm that he was speaking for himself and his wife. Mr Robertson did not challenge Mr McKinney’s evidence as to his right to speak for his wife, nor did Mr Robertson ask me to ignore the hearsay evidence.

8.6 This is not the same situation that faced Adjudicator Carden in *Auckland City Council v Russell*. I have been given a reasonable amount of evidence about

the turmoil that the Owners have experienced as a result of these leaks and the remedial work. I have evidence to show that it has affected both Mr and Mrs McKinney, and that will enable me to make an informed decision regarding these claims.

8.7 Mr Robertson submits that I should not make any award for the stress caused by the Owners' daughter's illness. He says that there was no evidence to link the dampness in the house with the illness of the child, and that this situation would not be foreseeable at the time of the breach. I accept that this submission has technical merits, but I think that it is very difficult to differentiate between the stress caused by the building problems and their child's ill health. I will do the best that I can under these circumstances.

8.8 I have carefully considered the evidence and I am satisfied that both of the Owners are entitled to an award of general damages. They are claiming $10,000.00 each, and I do not think that this is an excessive claim under the circumstances, but it is probably slightly high. I will set the amount of general damages as being $8,000.00 for Mr McKinney, and $8,000.00 for Mrs McKinney, being a total amount of $16,000.00.

9. NO LIABILITY DEFENCES

9.1 The Council says that it has no liability in respect of the building defects, in that the Owners' losses have been caused by their failure to take proper care when purchasing the house. The Council says that the Owners relied upon the pre-inspection advice provided by a builder who should have noticed the patent defects in the building.

9.2 In the Sale and Purchase Agreement the Owners had entered a special condition which read:

> 17.0 This Agreement is conditional upon the Purchaser [the Owners] being satisfied in all respects with a builder's report on the above property on or before 12 noon Friday 30 March 2001.

9.3 The evidence is not clear as to whether that special condition was actually accepted by the Vendor. It was crossed out, but there is no clear evidence as to when it was crossed out. However, the Owners did ask a family friend, Mr Sean Collins, to have a look at the property, and he visited at some time in late March 2001.

9.4 The Owners say that the only reason why they asked Mr Collins to look at the house was some cracks in the ground floor bathroom floor. They did not ask him to carry out a full pre-purchase inspection, but did ask him to give the house a "quick look over". Mr Collins had been a builder for 15 years but did not have any moisture reading equipment or specialist tools that would normally be carried by a building surveyor. He was a family member who was a builder, and did not charge for his inspection.

9.5 Mr Collins was not particularly concerned about the cracks in the bathroom floor tiles, as he thought that the tiling had probably been done before the concrete floor had had a chance to dry out. He did not notice any other problems with the house.

9.6 Mr Robertson submits that the defects in this house were visible to the Owners, and should have been obvious to a builder such as Mr Collins at the time of purchase. I am not satisfied, on the evidence given to me, that Mr Robertson is correct. The only detail that may have been detected by Mr Collins was that the plaster was taken down below ground level, but as Mr Collins did not profess to have any knowledge of plastered houses, this was not a detail that would necessarily have meant anything to him.

9.7 I have been referred by Council to the determination of Adjudicator Green in *Smith v Waitakere City Council* (WHRS Claim 272, 12 July 2004). I will quote from paragraphs 169-172 in that Determination.

> [169] Ms Bambury and Ms Grant submit that a Council officer should not be responsible for costs associated with patent (obvious at the time), as opposed to latent (hidden and not obvious at the time, but which develop later) defects, but accept that many of the cases considered by New Zealand courts are concerned solely with the issue of latent as opposed to patent defects and a prime example of which is the list of authorities concerning houses with defective foundations. Generally that is because of the application of the principle of caveat emptor, or buyer beware, in circumstances where a building defect is obvious upon inspection. In other words if a defect is plain to be seen it will be presumed that a purchaser of a property will have taken the defect into account when agreeing to pay the purchase price.
>
> [170] Counsel advise that the Australian courts have considered the issue in *Zumpano & Anor v Montagnese & Anor* [1997] 2 VR 525 where a homeowner sued his builder in respect of losses to repair numerous defects in his home and the court gave

consideration as to whether the decision in *Bryan v Maloney* [1995] 182 CLR 609, was restricted to latent defects and in addition whether it was restricted to defects that impacted upon the value of the home (*Bryan v Maloney* was a landmark Australian case which marked the high water mark of the doctrine of reliance and its twin – assumption of liability – in establishing duty of care claims relating to economic loss in relation to negligent construction). The court held in *Zumpano* that the decision in *Bryan v Maloney* was clearly confined to latent defects.

[171] I am aware that in the more recent case of *Leonard Charles Goulding and Anor v Robert Raymond Kirby* [2002] NSWCA 393 the New South Wales Court of Appeal refused to grant leave to appeal the decision of Certoma AJ of the New South Wales District Court where the plaintiffs claimed damages of $100,000 for economic loss based on diminution in the value of the house by reason of the condition of the negligently effected paint work which had a cosmetic function. The Court found that the defect was small and correctable by re-painting albeit at a cost to the appellants, the factual circumstances of the case did not point to the appellants being unable to take reasonable steps for their own protection, and the Court should not attempt to extend *Bryan v Maloney* beyond cases of structural defects or defects that could not reasonably be discovered by inspection. It should be noted that the plaintiffs were aware that the house had a dampness problem at the time of purchase, they did not have a pest or building inspection report carried out before signing the contract, and one of the plaintiffs (the husband) was an experienced architect and principal of a home building company, and it was apparent from the evidence before the Court that he was aware of the problem with the paint at the time of purchase.

[172] It seems clear to me that the present case is clearly distinguishable from the Australian cases in a number of respects. Notably, the evidence in this case (as distinct from the factual circumstances in *Goulding v Kirby*) has been that there was no damage (mould and degradation of plasterboard) or dampness evident in the subfloor, at the time of Mr Smith's inspections of the property (at the end of the summer) prior to purchase. I am satisfied that the defective drainage was a latent defect, and not a patent defect that was obvious to a vulnerable and unsophisticated purchaser such as Mr Smith, and therefore did not evoke the degree of caution that it might have done from someone with Goulding's expertise. Moreover, in both *Zupano* and *Goulding*, the claims related to defects that did not affect the structural integrity of a dwelling and where there was no danger of physical damage or loss, or indefinite use of a dwelling.

9.8 I accept the conclusion of Adjudicator Green in that it will depend upon the evidence in each case as to whether particular defects are patent or latent. In this case I find that none of the leaks were obvious at the time of purchase, and that the defects in the construction were latent.

10. GREG CASSIDY

10.1 The Owners are claiming that Mr Cassidy either carried out the building work, or supervised and managed those persons who carried out the building work on this property in 1997. They say that he owed a non-delegable duty of care to all subsequent owners of the property, to ensure that the work complied with the requirements of the Building Code.

10.2 Mr Cassidy's response to this claim is that the building was carried out by New Millennium Developments Ltd, a small property development company that was set up in 1996 and de-registered in 2001. He employed a labour-only builder to carry out the main construction and carpentry work, and Alarcon Contractors to plaster the exterior. In Mr Cassidy's opinion, all building work was carried out in a tradesman-like way using the best materials available at that time, and making use of what little information was obtainable from reputable sources.

The Duty of Care

10.3 The existence of a duty of care between builders and subsequent purchasers, has been clearly established in New Zealand, as can be seen by reference to two reasonably recent court cases:

- Greig J in *Lester v White* [1992] 2 NZLR 483, at pages 492-493

> The law here, so far as it is applicable to the duty of builders and of a borough council to derivative owners of land, has been well and long established and has been reaffirmed. Reference needs only to be made to *Bowen v Paramount Builders (Hamilton) Ltd* [1997] 1 NZLR 394, *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234, *Brown v Heathcote County Council* [1986] 1 NZLR 84 to show that this is a reasoned maintained approach of local authorities, builders and others who have been involved in claims which have been settled and in conduct which has anticipated and perhaps prevented the damage which this kind of case examples.

- Tipping J in *Chase v de Groot* [1994] 1 NZLR 613 at pages 619-620

> I look first as [the Builder's] position. In this respect the law can be stated as follows:
>
> 1. The builder of a house owes a duty of care in tort to future owners.
>
> 2. For present purposes that duty is to take reasonable care to build the house in accordance with the building permit and the relevant building code and bylaws.

3. The position is no different when the builder is also the owner. An owner/builder owes a like duty of care in tort to future owners.

10.4 None of the parties appears to have challenged this position, so I will proceed on the basis that it has been accepted.

10.5 It is submitted that the standard of care required of a builder in performing his services is the care reasonably to be expected of skilled and informed members of his trade or profession judged at the time the work was done. I accept that this is a fair generalisation of the required standard.

New Millennium Developments Ltd

10.6 It is accepted by the Owners that the company New Millennium Developments Ltd ("NMDL") was the entity that owned the land and built the house. I would go further and find that NMDL was the "builder" in the generally accepted meaning of the word. However, the Owners are making no claims against NMDL, which is completely understandable because the company no longer exists.

10.7 Therefore, the focus must move on to Mr Cassidy, in his personal capacity.

Greg Cassidy

10.8 The determination of the liability of individuals associated with building work is a frequent problem in WHRS adjudications. Two of the parties in this adjudication have referred me to previous Determinations, some of which have been my own. I would not pretend that it is an easy subject, and yet it is of vital importance to individuals engaged in the construction industry. One thing that is certain, is that each case needs to be considered and decided on its own individual facts.

10.9 I was recently asked to consider this matter in *West v Perry* (WHRS Claim 2368, 14 July 2006) and after considering the extensive authorities quoted to me, and the submissions, I concluded.

> The legal position that is contained in the judgments to which I have been referred can, it seems to me, be summarised as follows.
>
> (i) Where a company gives negligent advice and acts solely through its director in doing so and it is made clear to the other contracting party that it is only the company that is giving the advice and there is no representation of personal

involvement of the director, it is only the company that can be held liable to that other contracting party at a substantive hearing (***Trevor Ivory Ltd v Anderson*** [1992] 2 NZLR 517).

(ii) However, the facts may show that there has been an assumption of responsibility by an individual acting on behalf of the company (***Trevor Ivory***).

(iii) In construction cases directors of a company may owe a duty of care independently of the company and may be liable in negligence if they had some involvement in matters of construction giving rise to the owner's claims (***Morton v Douglas Homes Ltd*** [1984] 2 NZLR 548***; Callaghan v Robert Ronayne Ltd*** (1979) 1 NZCPR 98).

(iv) The fact that the company may be vicariously liable for the negligence of its employees/agents does not relieve those employees/agents from personal liability if the appropriate level of duty of care is established and that person is shown to have acted negligently (***Callaghan***).

(v) The assumption of responsibility for a statement or task, in which a respondent is found to have failed to exercise reasonable care, and it is foreseeable that the owner will rely on that statement or task, creates an assumption of legal responsibility and, subject to any countervailing policy factors, a duty of care will arise; or where it is "fair, just and reasonable" to do so, the law will deem a respondent to have assumed responsibility; but this depends on a combination of factors including assumption of responsibility, vulnerability of the owners, special skill of the respondent, the need for deterrence and promotion of professional standards and lack of alternative means of protection (***Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd***, [2005] 1 NZLR 324).

10.10 In this case Mr Cassidy was the individual who was in charge and in control of the complete development. He engaged a designer to prepare plans and specifications, and used these in the application for a building consent. He selected most of the materials used in the building. He selected the suppliers and the subcontractors who did the work. He, personally, worked on the project as a carpenter for the entire construction period.

10.11 I am satisfied that Mr Cassidy was personally in control of this building project to the extent that he owed a duty to subsequent purchasers to use reasonable care to ensure that the building was properly built in accordance with the requirements of the Building Code. Was he negligent and, if so, did his negligence cause defects in the building work? To answer that question I will need to review each leak location.

10.12 **Windows and Door Openings** I have found that the cause of the leaks around the windows and door openings was inadequate flashing or sealing around the frames. Mr Cassidy told me that he had chosen this method of finishing around openings as he had seen it used on an earlier job in St Heliers Bay Road. He had been advised to use the J-mould to prevent the solid plaster causing oxidation on the aluminium windows.

10.13 I think that this was a case of a little knowledge being dangerous, because the method in which the J-moulds were used on this house was not in accordance with the published literature at the time. For example, the BRANZ *Good Stucco Practice* guide shows the J-mould fixed **underneath** the window flange, with the flange bedded against the mould with sealant. Mr Cassidy clearly did not have sufficient knowledge of the reasons for the detailing to be able to make sound decisions. He took on the job of managing and supervising this project without having sufficient knowledge, and without taking adequate steps to gain the knowledge.

10.14 I find that Mr Cassidy was negligent in the way he used the J-moulds and in the way he instructed that they be sealed around the windows and door openings. In 1997, a reasonably proficient builder should have been aware of how the detailing around openings should have been done to avoid leaking problems. Mr Cassidy's negligence had led to serious damage and extensive remedial work.

10.15 **Tops of Quoins** I have found that there were serious leaks at the tops of these quoins where they were finished up against the underside of the fascia and barge boards. These quoins were not shown on the drawings submitted for building consent. They were added by Mr Cassidy to improve the exterior appearance of the house. However, as the eaves and barges had absolutely no overhang, the top junction of this quoin was a problem junction.

10.16 This is another situation of where a lack of understanding of construction detailing has led to serious problems. If there had been adequate overhangs at the eaves and barges, it probably would have been all right – but a face-fixed fascia board leaves little room for error, and can leak if not carefully built. In this case, by introducing the projecting quoin detail, and not taking steps to protect the top junction, Mr Cassidy was negligent, and is liable to the Owners for the damage that has been caused.

10.17 **Junction by Study** I have found that these leaks were caused by the failure of the silicone-type sealant applied between the blockwork and the hardibacker. Either Mr Cassidy did this work, or he was supervising the person who did the work. In this case, Mr Cassidy used a detail that was commonly believed in 1997 to be adequate to prevent leaks, and was not negligent as judged by the standards at the time.

10.18 **Junction by En Suite** In this case I have found that the leak was caused by the plaster being finished against the timber retaining wall, with no protection or flashing to prevent water getting in behind the plaster. This was clearly an inadequate way to finish off this part of the work. Mr Cassidy should have known this, and was negligent in the way he failed to waterproof the junction, or failed to make sure another carpenter or trade had waterproofed the junction.

10.19 **Deck Membrane** I have found that there were leaks at the external angles or ends of the turn-ups at walls, and where the membrane was dressed down over the fascia board. There is no suggestion that Mr Cassidy applied the waterproof membrane, but it is claimed that he was negligent in his supervision of this work.

10.20 The deck was waterproofed with a layer of Butynol sheet membrane which, Mr Cassidy told me, had been applied by a specialist contractor. The defects were not readily apparent, and were not noticed by the WHRS Assessor, who spent the best part of two days inspecting this property for leaks. Mr Cassidy employed a specialist who appeared to have carried out the work properly. I do not think that Mr Cassidy can be said to have been negligent in not noticing the defects in the application of the Butynol.

10.21 New Millennium Developments Ltd would have been found liable for any defects in the work done by its employees or subcontractors. Mr Cassidy did not employ the Butynol contractor, although he probably arranged for the Butynol contractor to do the work. His job was to manage and supervise, which does not mean continuously looking over the shoulder of all workmen to ensure that their work is faultless. He was responsible for taking reasonable steps to make sure their work complied with the requirements of the Building Code. I find that

Mr Cassidy did take reasonable steps and is not liable for the damage caused by the deck membrane.

10.22 **Steps on West Elevation** I have found that there were leaks where the plaster had been taken down below ground levels at the point where these steps were formed outside the house. Mr Cassidy either poured these steps, or instructed them to be poured against the plaster. He should have realised that this would trap water in the plaster and cause damage. I find that he was negligent in this matter.

10.23 **Nibs under Deck Columns** I have found that the solid plaster had been taken down (around the deck columns) to floor slab level. This caused water to seep under the plaster into the timber framing and cause damage. When the remedial work was undertaken, these columns were framed off concrete nibs or plinths to keep the timber framing away from the surrounding floor level.

10.24 The building consent drawings indicate a plinth 600mm high at the base of these columns on the elevations, although this plinth is not shown on the cross-section. Therefore, the drawings are ambiguous. However, a reasonably experienced builder should realise that timber framing must be kept at least 150mm above external paved areas. Mr Cassidy should have known this, and I find that he was negligent to frame these columns off the external slab.

10.25 **Under-floor area** I have found that the sub-floor space beneath the garage should have been ventilated to prevent the build-up of moisture in this space. The WHRS Assessor did not notice this defect but I suspect that he thought that the garage floor was laid on fill. However, Mr Cassidy knew this sub-floor area was there, and should have realised that it should have been ventilated. He was negligent in his failure to install ventilation grilles to the area.

Conclusion

10.26 I find that Mr Cassidy was negligent in the manner in which he carried out or supervised the building work on this project, and therefore was in breach of his duty of care that he owed to the Owners. His negligence had led to water penetration and resultant damage to the following extent:

Windows and door openings	$ 115,937.40
Tops of quoins	92,436.58
Junction by En suite	17,233.94
Steps on west elevation	5,625.00
Nibs under deck columns	2,925.00
Under-floor area	3,375.00
Other costs (see para 7.6.1 - proportional)	24,449.42
General Damages (see para 8.8)	16,000.00
	$ 277,982.34

11. BERNARDO ALARCON

11.1 Mr Bernardo Alarcon, who was trading under the name of Alarcon Contractors in 1997, was the person who was engaged by Mr Cassidy to carry out the external plastering on the house. Mr Locke, on behalf of the claimants, told me that Mr Alarcon had been personally served with the adjudication papers after some difficulties. An affidavit from the document server was filed with WHRS.

11.2 Mr Alarcon took no active part in this adjudication. He did not respond to my directions to produce documents. He did not attend the preliminary conferences. He did not file a written Response. He did not attend the hearing. I am satisfied that Mr Alarcon was given every opportunity to participate in this adjudication, but has decided to remain silent. It is unfortunate that I have not been given his side of the story, as it could only have helped me.

11.3 A plasterer owes a duty of care to all subsequent owners of a property in the same way that a builder does. Mr Alarcon had a duty to exercise reasonable skill and care when carrying out his work on this dwelling, and if he breached that duty by failing to properly carry out his plastering work, he will be liable for any damages that flow from that breach.

11.4 **Windows and Door Openings** I have found that the cause of the leaks around the windows and door openings was inadequate flashing or sealing around the frames. Mr Alarcon would have installed the J-mouldings to provide a clear edge to his plaster. He was negligent in the way that he used this mould, which he should have realised would lead to leaks.

11.5 **Tops of Quoins** I have found that there were serious leaks at the top of these quoins where they were finished up against the underside of the fascia and

barge boards. Mr Alarcon constructed the quoins, and he was negligent in the way he installed them.

11.6 **Junction by Study** I have found that these leaks were caused by the failure of the silicone-type sealant applied between the blockwork and the hardibacker. Mr Alarcon did not do this work, and I find that he has no liability for this damage.

11.7 **Junction to En Suite** I have found that this leak was caused by the plaster being finished against the timber retaining wall with no protection or flashing to prevent water from getting in behind the plaster. Mr Alarcon should have realised that this was an inadequate way of finishing the plaster, and I find that he was negligent in the way he carried out his work.

11.8 **Deck Membrane** The leaks around the edges of the waterproof membrane were not caused by the plasterer, and I find that he has no liability for the damage caused by these leaks.

11.9 **Steps on West Elevation** I have found that there were leaks where the plasterwork had been taken down below the level of the surrounding ground. The steps were paved by the builder after the plasterer had completed his work, so that the problem was not caused by the plasterer. I do not find that Mr Alarcon was negligent.

11.10 **Nibs under Deck Columns** This was another part of the claim that plasterwork had been taken down too low to the surrounding ground levels. In this location, the plaster was taken down to the slab level as the builder had not constructed concrete plinths under the columns, so that the plasterer could do little else than take the plaster down. I do not find that this was negligent.

11.11 **Under-floor Area** This is not a matter that has anything to do with plastering, and Mr Alarcon can have no liability for the damage.

Conclusion

11.12 I find that Mr Alarcon was negligent in the manner in which he carried out his work on this property and thereby he was in breach of his duty of care that he owed to the Owners. His negligence has led to water penetration and resultant damage to the following extent.

Windows and door openings	$ 115,937.40
Tops of quoins	92,436.58
Junction by en-suite	17,233.94
Other costs (see para 7.6.1 – proportional)	23,221.98
General Damages (see para 8.8)	16,000.00
	$ 264,829.89

12. BRIAN TURNER

12.1 Mr Brian Turner was joined as a respondent in this adjudication by my Procedural Order No 7 on 8 November 2005. It was alleged that Mr Turner was the "on site" person on behalf of Shingles & Laminating Contractors Ltd, who installed the shingle roof on the house. I am advised that Shingles & Laminating Contractors Ltd was placed into liquidation at some time in 2003.

12.2 At the stage when I joined Mr Turner in the adjudication I was aware that the WHRS Assessor had identified problems with the shingle roof and in particular with the ability of driving rain to enter at the barge board details. However, now that the remedial work has been completed, it appears that the Assessor was mistaken, and the roof was not the cause of any leaks.

12.3 Mr Turner took no part in this adjudication. A letter was sent into WHRS by a Brian Pudney, which said that it was written on behalf of Mr Turner. I am satisfied that Mr Turner was aware of the timetable for this adjudication, knew when the hearing was taking place, and made a conscious decision not to attend.

12.4 I have found that the roof did not leak, so that it must follow that any claims against Mr Turner will fail.

13. NORTH SHORE CITY COUNCIL

13.1 It is claimed by the Owners that the Council owed them a duty of care when carrying out its statutory obligations under the Building Act. They claim that the Council was in breach of this duty by failing to carry out proper inspections, and thus issuing a Code Compliance Certificate when the building work was defective.

13.2 I told the parties at the hearing that it was my understanding that it was now well established in New Zealand that both those who build houses, and those who inspect the building work, have a duty of care to both the building owners and to subsequent purchasers. This has been established, not only by the cases that I have mentioned when considering the builder's liability (see paragraph 10.3 above), but also by court cases such as:

- Cooke P in *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, at p 519

> A main point is that, whatever may be the position in the United Kingdom, homeowners in New Zealand do traditionally rely on local authorities to exercise reasonable care not to allow unstable houses to be built in breach of the byelaws. Casey J illuminates this aspect in his judgment in this case. The linked concepts of reliance and control have underlain New Zealand case law in this field from *Bowen* onwards.

- Greig J in *Stieller v Porirua City Council* [1983] NZLR 628, at p 635

> The standard of care in all cases of negligence is that of the reasonable man. The defendant, and indeed any other Council, is not an insurer and is not under any absolute duty of care. It must act both in the issue of the permit and inspection as a reasonable, prudent Council will do. The standard of care can depend on the degree and magnitude of the consequences which are likely to ensue. That may well require more care in the examination of foundations, a defect which can cause very substantial damage to a building. This as I have said is not a question of foundations but rather of the exterior finishing and materials.

13.3 It is submitted by Mr Robertson, on behalf of the Council, that the Council owes no duty of care to the Owners in respect of obvious defects. I have already considered this submission in section 9 of this Determination, and have found that none of the leaks was obvious at the time of purchase. Therefore, although I would accept that Mr Robertson is correct, it is not relevant in this determination.

13.4 The next point raised by Mr Robertson is that the Council was not negligent in this particular case, and their building inspectors carried out competent inspections as judged by the standards of 1997. He submits that the three Council officers who gave evidence at the hearing about the usual practice of councils in 1997, all confirmed that this council had conformed to the inspection standards and practice of councils in general at that time. He says that as there

was no evidence called to the contrary, then I am bound to find that the Council had not been negligent.

13.5 Mr Robertson has referred me to the words of Sachs LJ in *Worboys v Acme Investments Ltd* (1969) 4 BLR 133 at p 139:

> Now Mr Harvey urges that this is a class of case in which the court can find a breach of professional duty without having before it the standard type of evidence as to what constitutes lack of care on the part of a professional man in the relevant circumstances. There may well be cases in which it would be not necessary to adduce such evidence – as, for instance, if an architect omitted to provide a front door to the premises. But it would be grossly unfair to architects if, on a point of the type now under consideration, which relates to a special type of dwelling, the courts could without the normal evidence condemn a professional man. How particularly unfair it would be is perhaps exemplified in the present case: the architect was here dealing with Mr Berry, who was a man of no less than 25 years' experience of development schemes and who of all people would be likely to know best whether houses of this type were saleable in that area without downstairs WC's.

13.6 However, Mr Robertson has also referred me to other WHRS determinations where building inspectors or certifiers have been found to have not been negligent in a number of matters, and I am aware that the adjudicators in some of these instances had little or no expert testimony as to the standards of inspections at the relevant times, but made decisions on the basis of wider information (such as BRANZ publications or BIA determinations).

13.7 Mr Locke has drawn my attention to *Kelleway v Insar & Ors* (WHRS Claim 134, Adjudicator Green, 29 September 2003):

> [289] The common conduct of Councils in respect of any particular matter, viz. stucco plaster inspections, cannot be of itself, a definitive measure of reasonableness and prudence, particularly where that conduct is, in the eyes of any independent and objective bystander, clearly not reasonable or prudent in the circumstances.
>
> [298] To suggest the practice of relying on the plastering contractor to ensure the stucco plaster work was undertaken in accordance with the building code was necessary or essential for any reason other than pure convenience, is simply fallacious, and moreover, to simply assume that concealed [stucco plaster] work complies with the building code falls well short of any objective test of being satisfied on <u>reasonable</u> grounds.
>
> [299] In my view, the adoption by the Council (or any other Council) of the practice of assuming the concealed [stucco plaster] work complied with the building code based solely on reliance on the unknown, and therefore questionable, skills and practices of the plaster applicator, was a clear abrogation of the Council's

> obligations and duties and renders the purpose of independent inspection and certification by the Council nugatory.
>
> [300] Consequently I consider the reliance placed by the Council on the plastering contractor to ensure the stucco plaster work was undertaken in accordance with the building code and the assumption that concealed stucco plaster work complied with the building code based on that reliance was both misplaced and misconceived.

13.8 Counsel for both the Owners and the Council have made lengthy and very helpful submissions on this important point, but I am not persuaded to move away from the fundamental question that I need to ask in relation to each particular leak location. The question is whether a prudent building inspector (or certifier) carrying out all the inspections and tests that should have been done by a prudent inspector in 1997 should have noticed or detected the particular defect. The words of Greig J in *Steiller* should also be borne in mind "the standard of care can depend on the degree and magnitude of the consequences which are likely to ensue."

13.9 I have found that the Council had a duty to take reasonable care with its inspections so that it could conclude that it had reasonable grounds for saying that the provisions of the Building Code had been met. It is now necessary to review each of the leak locations that have caused damage to the building to ascertain whether the Council was in breach of its duty of care.

13.10 **Windows and Door Openings** I have found that the cause of the leaks around the windows and door openings was inadequate flashing or sealing around the frames. Mr Robertson submits that the building inspector would have had considerable difficulty in ascertaining whether, or how, the windows had been flashed. He referred me to the model that had been produced in evidence as a demonstration of these difficulties.

13.11 Extensive submissions have been made on this issue by Counsel for the Owners and Counsel for the Council. Mr Robertson says that the building inspector took reasonable steps to ensure that the work complied with the Building Code. Mr Locke disagrees. He says that it should have been obvious that the windows were not being properly flashed, and that there would be leaks around the edges of the windows.

13.12 On balance I find that Mr Locke's submission prevails. Just as I concluded that a reasonably proficient builder should have been aware of how the detailing around openings should have been done to avoid leaking problems, so would I conclude that the Council's building inspectors should have possessed a similar level of knowledge. The inspector should have been able to detect the difference between a J-mould and a Z-flashing, despite the presence of building paper and/or protective plastic covers. The building inspector should have noticed that the "sill flashings" were not projecting past the bottom of the "jamb flashings" thus rendering the flashings ineffective. The inspector should have noticed that the detailing was not going to prevent water ingress around the windows.

13.13 It has been submitted by Mr Robertson that, in 1997, building inspectors were obliged to rely upon the expertise of the builders, and he has drawn my attention to an extract from *BIA News* No 137 in November 2003. This extract stated that a Council, when ascertaining whether there were reasonable grounds for issuing a Code Compliance Certificate, should take into account (amongst other matters)

- the Council's own inspections;
- inspections by the owner's engineer (producer statements);
- the skill and experience of the person who actually did the work.

13.14 I would accept this submission as far as it goes, but would also adopt the comments of Adjudicator Green in *Kelleway* (see paragraph 13.7 above). Mr Scott remembered having met Mr Cassidy on building sites in the late 1990's, and told me that he gained the impression that he was a competent builder. However, when questioned further about his recollections of Mr Cassidy, I gained the clear impression that Mr Scott could only really recall that he had not had any problems on the sites where Mr Cassidy was working. In other words, as Mr Locke put it, it was a case of "competent until proven incompetent".

13.15 In this case I have decided that Mr Cassidy was not sufficiently knowledgeable about the detailing around windows, so that, with the benefit of hindsight, it can be seen that Mr Scott's judgement on the competence of Mr Cassidy was at fault. I have found that Mr Scott (or one of his colleagues) should have noticed the problems with the detailing around these windows, and this amounts to negligence on the part of Mr Scott and the Council.

13.16 **Tops of Quoins** I have found that there were serious leaks at the tops of these quoins where they were finished up against the underside of the fascia and barge boards. The quoins were not shown on the drawings and were added as a decorative feature during construction.

13.17 Mr Scott told me that the quoins were not in place at the time of the pre-plaster inspection, but would have been completed prior to the final inspection. He says that they are only cosmetic and were of little interest to a building inspector.

13.18 I am satisfied that this was not a defect that should have been noticed by the Council's inspector. It is not uncommon to create features on plastered houses, such as projecting cornices, corbels or bands. This was not seen as a defect by the WHRS Assessor and the full extent of the damage was not detected until remedial work took place. I find that the Council was not negligent in this matter.

13.19 **Junction by Study** I have found that these leaks were caused by the failure of the silicone-type sealant applied between the blockwork and the hardibacker. I have found that this was a detail that was commonly believed in 1997 to be adequate to prevent leaks, and was not negligent as judged by the standards at that time.

13.20 **Junction by En Suite** In this case I have found that the leak was caused by the plaster being finished against the timber retaining wall, with no protection or flashing to prevent water getting in behind the plaster. As I have already concluded, this was clearly an inadequate way to finish off this part of the work. The building inspector should have noticed this unprotected junction, and it was negligent to have overlooked it.

13.21 **Deck Membrane** I have found that there were leaks at the external angles or ends of the turn-ups at walls, and where the membrane was dressed down over the fascia board. These defects were not readily apparent, were not noticed by the WHRS Assessor, and I do not consider that it was negligence on the part of the Council's building inspector to have failed to notice these problems.

13.22 **Steps on West Elevation** I have found that there were leaks where the plaster had been taken down below ground levels at the point where these steps were formed outside the house. This would not have necessarily appeared to have been a defect to a building inspector carrying out a final inspection. The surrounding ground levels were well below floor levels, and I do not find that it was negligent for the building inspector to fail to notice that these steps could cause a future problem.

13.23 **Nibs under Deck Columns** I have found that the solid plaster had been taken down (around the deck columns) to floor slab level. This caused water to seep under the plaster into the timber framing and cause damage. However, when the final inspection was carried out, it would not have been possible to notice that the builder had omitted to build a concrete plinth at the base of the columns. I find that the Council was not negligent when it failed to notice this problem.

13.24 **Under-floor Area** I have found that the sub-floor space beneath the garage should have been ventilated to prevent the build-up of moisture in this space. The WHRS Assessor did not notice this defect but I suspect that he thought that the garage floor was laid on fill. However, the Council knew this sub-floor area was there, and should have realised that it had not been ventilated. The building inspector was negligent in his failure to notice this defect.

Conclusion

13.25 I find that the Council was negligent in the carrying out of its duties to inspect, as more fully explained in the preceding paragraphs, and negligent in its issuing of the Code Compliance Certificate, and thereby in breach of the duty to take care that it owed to the Owners. This negligence has led to water penetration and damage, to the extent that it is liable to the Owners for:

Windows and door openings	$ 115,937.40
Junction by en suite	17,233.94
Under-floor area	3,375.00
Other costs (see para 7.6.1 – proportional)	14,054.81
General Damages (see para 8.8)	16,000.00
	$ 166,601.15

14. CONTRIBUTORY NEGLIGENCE

14.1 Mr Robertson has made submissions on the defence of contributory negligence, in that the Owners' own negligence has directly caused or contributed to all or part of the Owners' own losses.

14.2 I have already reviewed some of the background details in section 9 of this determination. The respondents are saying that the Owners have been negligent in the following ways:

1. Failing to have the house properly inspected prior to purchase;
2. Failing to maintain the seals in the exterior cladding;
3. Building up soil around the dwelling.

14.3 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.

14.4 "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.

Pre-Purchase Inspection

14.5 Mr Robertson has referred me to two earlier determinations of my own in WHRS adjudications where it has been found that claimants had failed to carry out adequate pre-purchase investigations, and this had contributed towards their own losses. In *Hay v Dodds & Ors* (WHRS Claim 1917, 10 November 2005) it was held that the owners should bear 75% of the damages; and in *Hartley v*

Balemi & Ors (WHRS Claim 1276, 11 April 2006) it was held that the owners should bear between 30% and 40% of the damages.

14.6 In the *Hay* case, the Owners were purchasing a house in mid 2001 when the house was about four years old. I did not find that it was essential for prospective purchasers of existing houses to obtain pre-purchase inspection reports in 2001. I did conclude that they must take the steps that a reasonably prudent purchaser would have been expected to have taken, under all the circumstances. The reason why I found the Hays should make a 75% contribution was because they were strongly advised by a professional architect to obtain a building surveyor's report before purchasing the house, and they failed to follow this clear advice. If they had consulted a building surveyor it was probable that they would have been warned about the leak problems, and could have either avoided the purchase or attempted to negotiate a suitable reduction in the price.

14.7 In the *Hartley* case, the owners were purchasing a four-year-old house in April 2003 at a time when there was a greater public awareness of the problems with leaky homes. Mr Hartley was a builder with 16 years experience and, rather than engaging a professional building surveyor to inspect the house, he did the inspection himself believing that he was quite capable of carrying out an adequate inspection. It was found on the facts of that case that the pre-purchase inspection was not adequate, and failed to notice areas that must have been damp, or would have displayed evidence of dampness.

14.8 In this case Mr Robertson says that the Owners:

- Failed to obtain a pre-purchase inspection report from a professional building surveyor;

- Were aware of the defects in the house (cracks in the floor) and should have appreciated the need for a careful and thorough inspection;

- Relied upon a cursory examination by a relative, with building experience but not experience of stucco houses, and who had no testing equipment.

14.9 As I have already mentioned, I do not find that it was essential for prospective purchasers of exiting houses in 2001 to obtain specialist pre-purchase

inspection reports. However, I do consider that they must take the steps that reasonably prudent purchasers would have been expected to have taken, under all the circumstances.

14.10 The Owners did notice cracks in the tiles of the bathroom floor. They asked Mr Collins to have a look at the cracks, and he told them that the cracks were probably signs of the initial shrinking of the concrete floor. Neither the Owners, nor Mr Collins, noticed anything untoward about the construction of the rest of the house. I have no evidence to indicate that there were any signs of leaking or failure of the cladding at that time.

14.11 Although the Owners noticed a leak soon after moving in, it was during a severe storm and they assumed that it was an isolated incident. They did not notice any further leaks for sixteen months and this second leak appeared to be a one-off situation. They say that the leaks really did not start to show until September 2003, which was over two years after moving into the house. This indicates to me that there were no signs of leaks when they decided to purchase, and nothing that should have alerted them to seek professional advice or reports.

14.12 I am not satisfied that this is a case where the Owners have failed to take all the steps that reasonably prudent purchasers would be expected to take under the circumstances. Therefore, I will not allow these claims for a reduction in the damages due to contributory negligence on the part of the Owners.

Failure to Maintain

14.13 It is submitted by Mr Robertson that the Owners have not maintained the sealant around the windows and the numerous penetrations through the walls of the dwelling, such as the meter board, kitchen extractor fan and similar.

14.14 In response to this allegation, Mr Locke says that the Owners had applied sealant around some of the windows when leaks became apparent, and took all steps to have the remedial work done as quickly as their financial situation would allow.

14.15 I do not find that the evidence supports this submission from Mr Robertson. The Owners have explained the steps they took when leaks were detected and I

am satisfied that they took reasonable steps to control the leaks and minimise all resultant damage.

Building up of Soil

14.16 It is submitted by Mr Robertson that the Owners or the previous owner had built up the ground levels around the house, and this had caused water to wick up the plaster.

14.17 Some of the photographs do show that the planting around the sides of the house indicated that the soil had been backfilled against the plaster cladding. However, I have found that any damage caused by ground levels has been restricted to the steps on the west elevation, and at the bottom of the columns. These are not the areas in which it has been alleged that the ground had been built up by the Owners or their predecessors. I do not need to determine this allegation because it will result in no financial adjustment.

14.18 However, for the sake of completeness I will decide this claim. I am not satisfied that the evidence showed that any material backfilling has taken place since construction. The photographs do not clearly show ground levels, so that I would dismiss this claim.

15. CONTRIBUTION BETWEEN RESPONDENTS

15.1 I must now turn to the complex problem of considering the liability between respondents. I say that this is a complex problem, but only from the arithmetical point of view, and not for any other reason.

15.2 Our law does allow one tortfeasor to recover a contribution from another tortfeasor, and the basis for this is found in s.17(1)(c) of the Law Reform Act 1936.

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

15.3 The approach to be taken in assessing a claim for contribution is provided in s.17(2) of the Law Reform Act 1936. It says in essence that the amount of contribution recoverable shall be such as may be found by the Court to be just and equitable having regard to the relevant responsibilities of the parties for the damage. What is a ‘just and equitable’ distribution of responsibility is a

question of fact, and although guidance can be obtained from previous decisions of the Courts, ultimately each case will depend on the particular circumstances giving rise to the claim.

15.4 It should be noted that most of the arithmetical calculations in this Determination have been carried out in electronic spreadsheets, where calculations are computed to many decimal places. This will sometimes result in apparent discrepancies when the figures are rounded off at two decimal places or at whole numbers. For example 1 + 1 = 3, because the full calculation is actually 1.45 + 1.45 = 2.9. As these apparent discrepancies are of very small value, they have no material effect on the calculations as a whole.

15.5 **Windows and Door Openings** The main burden or responsibility must fall upon those who carried out this work, that is the builder and the plasterer. Both of these respondents should have realised that this was a bad way to finish off around the windows and door openings, and I find that they should make equal contributions. As far as the Council is concerned, I would set its contribution at 20% of the total, or in the ratio of 1:4 with those who actually did the work. Therefore, the contributions should be:

Mr Cassidy	40%	$ 46,374.96
Mr Alarcon	40%	46,374.96
North Shore City Council	20%	23,187.48
		$115,937.40

15.6 **Tops of Quoins** As with the previous item, I find that the builder and the plasterer should make equal contributions towards the damages caused by these leaks, which is:

Mr Cassidy	50%	$ 46,218.29
Mr Alarcon	50%	46,218.29
		$ 92,436.58

15.7 **Junction by En Suite** I would apply the contributions set for the windows and door openings for the reasons given above, so that the contribution should be:

Mr Cassidy	40%	$ 6,893.58
Mr Alarcon	40%	6,893.58
North Shore City Council	20%	3,446.79
		$ 17,233.94

15.8 **Steps on West Elevation** I have found that only one respondent is liable for these damages, so that Mr Cassidy must bear 100% of the damages of $5,625.00.

15.9 **Nibs under Deck Columns** I have found that only one respondent is liable for these damages, so that Mr Cassidy must bear 100% of the damages of $2,925.00.

15.10 **Under-floor Area** Mr Cassidy must bear the main burden of responsibility for failing to ventilate this area. The Council should contribute 25% towards the costs, so that:

Mr Cassidy	75%	$ 2,531.25
North Shore City Council	25%	843.75
		$ 3,375.00

15.11 **Other Costs** The other costs, which I summarised in paragraph 7.6.1 of this Determination, should be contributed in the proportions of the damages that I have assessed above. This results in the following contributions:

Mr Cassidy	$ 11,380.85
Mr Alarcon	10,240.25
North Shore City Council	2,828.33
	$ 24,449.42

15.12 **General Damages** These will be contributed in the proportions of the damages that I have assessed above, which results in the following contributions:

Mr Cassidy	$ 7,447.76
Mr Alarcon	6,701.34
North Shore City Council	1,850.89
	$ 16,000.00

15.13 **Summary** In the event of all respondents meeting their obligations as ordered in this Determination, then the amounts that they will pay to the Owners will be as follows:

Mr Cassidy

Windows and door openings	$ 46.374.96
Tops of quoins	46,218.29
Junction by en suite	6,893.58
Steps on west elevation	5,625.00
Nibs under deck column	2,925.00
Under-floor area	2,531.25
Other costs	11,380.85
General Damages	7,447.76
	$ 129,396.69

Mr Alarcon

Windows and door openings	$ 46,374.96
Tops of quoins	46,218.29
Junction by en suite	6,893.58
Other costs	10,240.25
General Damages	6,701.34
	$ 116,428.41

North Shore City Council

Windows and door openings	$ 23,187.48
Junction by en suite	3,446.79
Under-floor area	843.75
Other costs	2,828.33
General Damages	1,850.89
	$ 32,157.24

16. COSTS

16.1 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.

16.2 None of the parties in this adjudication have made claims for the recovery of their costs, and I do not think that there are any particular circumstances that would justify an award of costs. Therefore, I will make no orders as to costs.

17. ORDERS

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

17.2 Mr Cassidy is ordered to pay to the Owners the amount of $277,982.34. Mr Cassidy is entitled to recover a contribution of up to $116,428.41 from Mr Alarcon, and/or a contribution of up to $32,157.24 from the North Shore City Council, for any amount that he has paid in excess of $129,396.69 to the Owners.

17.3 Mr Alarcon is ordered to pay to the Owners the amount of $264,829.89. Mr Alarcon is entitled to recover a contribution of up to $129,396.69 from Mr Cassidy, and/or a contribution of up to $32,157.24 from the North Shore City Council, for any amount that he has paid in excess of $116,428.41 to the Owners.

17.4 North Shore City Council is ordered to pay to the Owners the amount of $166,601.15. The Council is entitled to recover a contribution of up to $129,396.69 from Mr Cassidy, and/or a contribution of up to $116,428.41 from

Mr Alarcon, for any amount that it has paid in excess of $32,157.24 to the Owners.

17.5 As a clarification of the above orders, if all respondents meet their obligations contained in these orders, it will result in the following payments to the Owners:

From Mr Cassidy	$ 129,396.69
From Mr Alarcon	116,428.41
From North Shore City Council	32,157.24
	$ 277,982.34

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

Notice

Pursuant to s.41(1)(b)(iii) of the Weathertight Homes Resolution Services Act 2002 the statement is made 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 amounts for which payment has been ordered and steps taken to enforce that judgment in accordance with the law.

Dated this 16th day of August 2006.

A M R DEAN
Adjudicator