CLAIM FILE NO: 00119

UNDER The Weathertight Homes Resolution Services Act 2002

IN THE MATTER OF an adjudication

BETWEEN	**DENNIS & JANE McQUADE**
	Claimants
AND	**MAUREEN YOUNG, RICHARD MARTIN & B D BYERS (Trustees for the Maureen Young Family Trust)**
	First Respondent
AND	**SAM YOUNG**
	Second Respondent
AND	**PORIRUA CITY COUNCIL**
	Fourth Respondent
AND	**BULLEYMENT-FORTUNE ARCHITECTS LIMITED**
	Fifth Respondent

(intituling continued next page)

DETERMINATION OF ADJUDICATOR
(Dated 26th April 2004)

AND **BOYD ALUMINIUM LTD**

Sixth Respondent

AND **FERNHILL PROPERTIES LTD**

Seventh Respondent

AND **BUILDERS PLASTICS LTD**

Ninth Respondent

AND **ALCHEMIS COATINGS LIMITED**

Tenth Respondent

AND **NICHOLAS NEBEN**

Twelfth Respondent

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1.0 BACKGROUND

1.1 On 22 December 2002 the claimants made application to the Weathertight Homes Resolution Service (WHRS) under the Weathertight Homes Resolution Services Act 2002 (the Act) in respect of their property at 67 Paremata Road, Porirua City.

1.2 An assessor's report dated 22 April 2003 was provided by Dianne Johnson pursuant to s10 of the WHRS Act.

1.3 The claim was accepted pursuant to s7 of the WHRS Act.

1.4 The claimants made application pursuant to s26 of the WHRS Act for the matter to be referred to adjudication.

1.5 I was assigned the role of adjudicator pursuant to s27 of the WHRS Act.

1.6 A preliminary conference was held on 22 July 2003 by teleconference. At that time there were only the claimants and the first to fourth respondents. The preliminary conference set down the procedures for the conference and the adjudication process and timetabling.

1.7 Between the time of the preliminary teleconference and the hearing further teleconferences were held and I was required to issue twenty-two Procedural Orders to give directions under s 36 of the WHRS Act and to rule on applications and requests by the parties and to assist in preparations for the hearing

1.8 During the course of the process respondents joined to the adjudication pursuant to s33 of the WHRS Act were Bulleyment-Fortune Architects Limited, Boyd Aluminium Ltd, Fernhill Properties Ltd, Metropolitan Glass (Wellington) Ltd, Builders Plastics Ltd, Alchemis Coatings Ltd, the Building Industry Authority and Nicholas Neben.

1.9 During the course of the process respondents struck out pursuant to s34 of the WHRS Act were Clendon Burns & Park Ltd, Metropolitan Glass (Wellington) Ltd and the Building Industry Authority.

1.10 A hearing was conducted before me which commenced at 10.00am on Tuesday 23 March 2004 and concluded at 5.45pm on Thursday 25 March 2004. The hearing was held at the Conference Centre Trentham Racecourse.

1.11 The parties that were present or represented from the outset of the hearing were:

- The Claimants Denis & Jane McQuade with counsel Scott Galloway
- The first respondent Mrs Young (except for Thursday pm) with counsel Andrew Davie
- Counsel for the second named first respondent Costas Mastis and only present to give his brief of evidence Richard Martin.
- The second respondent Sam Young (except for Thursday pm).
- Leoni Gibb and David Rolfe (part time) for the fourth respondent with counsel David Heaney
- Denis Fortune (part time) for fifth respondent with counsel Darroch Young.
- John Boyd for the sixth respondent
- The seventh respondent Darren Young (Tuesday only)
- Mr & Mrs Milne for the ninth respondent
- Johnathon Burton for the tenth respondent
- The twelfth respondent Nicholas Neben (Tuesday and Wednesday) with counsel James Moore.

1.12 Brian Byers the third named first respondent was not present or represented at the hearing. On my return to my office from the hearing there was a letter from the WHRS containing a ‘Witness Statement Of Brian David Byers’. This was not in my

Post Box on the morning of 22 March 2004. The existence of the Witness Statement was not mentioned at the hearing by any other party or their counsel.

1.13 Parties that appeared as witnesses and gave evidence under oath or affirmation were:

- Denis McQuade - claimant
- Jane McQuade - claimant
- Maureen Young – first respondent
- Richard Martin – second named first respondent
- Sam Young – second respondent
- Leonie Gibb –for fourth respondent
- Denis Fortune –for fifth respondent
- John Boyd – for sixth respondent
- James Milne – for ninth respondent
- Nichloas Neben – twelfth respondent

1.14 Parties that appeared as expert witnesses or were called by me to assist the tribunal were:

- Erne Joyce – expert called by the claimant
- Dr Ian Cox-Smith – expert called by the claimant
- Eddie Bruce – expert called by the claimant
- Grant Meek – expert called by the claimant
- Diane Johnson – WHRS assessor
- Vic Criscillo – Quantity Surveyor - report appended to assessors report
- Paul de Lisle – expert called by first respondent
- Stewart Alexander by telephone – expert called by fourth respondent

1.15 Mr John Boyd on behalf of the sixth respondent sought leave at the commencement of the hearing to file a written brief of evidence which he wished to be given at the appropriate time during the hearing. The written brief was accepted and a copy given to all parties. Mr Johnathon Burton was in attendance during the entire hearing but he had not filed a brief of evidence and he advised that he did not wish to give evidence. His status at the hearing was explained to him and he was advised that he would be given the opportunity to respond to any matter directly affecting him that arose during the hearing.

1.16 The question of an inspection of the property was discussed at the commencement of the hearing and was reserved until the Wednesday. In the event there were no requests for an inspection or for me to view any aspect of the property. The photographs appended to the assessor's report and to various briefs as well as the drawings and detailed information given in evidence resulted in it being unnecessary for me to make an inspection of the property.

1.17 Counsel for the claimant tabled written 'Opening Submissions By Counsel For Claimants' and spoke to the submissions. Counsel for the first respondent gave oral opening submissions. All parties who attended the hearing were given the opportunity to present their submissions and evidence and to cross examine all of the witnesses

2.0 THE PROPERTY AND THE PARTIES

2.1 The dwellinghouse is known as Unit 5 Seacrest Apartments and is situated at 67 Paremata Road, Porirua City and is owned and occupied by the claimants (the McQuades).

2.2 The site comprises 5 units at 65-67 Paremata Road. According to the evidence of Mrs Young Unit 1 commenced construction in late 1991 and was constructed over a period of about 18 months, Unit 2 was constructed during 1992/1993, Unit 3 was

constructed during 1993/1994 and Unit 4 was constructed in 1994/1995 and the foundations for Unit 5 were commenced early 1997.

2.3 A building permit was applied for in June 1991 and was issued dated 15 October 1991. The permit was issued for the 5 units.

2.4 At the time of commencement of construction of Unit 5 the land upon which Unit 5 was to be constructed was owned by Mrs Young. Mrs Young sold Unit 5 to the Maureen Young Family Trust before it was fully completed. The McQuades purchased Unit 5 from the Maureen Young Family Trust and the agreement for sale and purchase was executed in the name of the Vendor as M J Young, B D Byers and R N Martin as Trustees of the Maureen Young Family Trust.

2.5 Before completing the agreement for sale and purchase on 3 December 1999 Mr McQuade had observed the property during construction and had inspected it. The agreement for sale and purchase included a list of work to be completed and defects which was prepared by Mr McQuade. There was considerable dialogue between Mr McQuade and Mrs Young between the signing of the sale and purchase agreement and settlement date of 10 March 2000. The dialogue related to work that Mr McQuade required to be completed in accordance with the sale and purchase agreement.

2.6 The dialogue continued until May 2001 with the extent of defects expanding as leaks occurred and further alleged defective work became identified. The dwelling is still leaking today and there is alleged defective work that has not been rectified and that is the basis of the claim.

2.7 The status of the parties is set out under the chapter on Liability.

3.0 CLAIMS

3.1 The claims being made by the claimants are set out in the 'Amended Statement of Claim' at paragraphs 18 to 21 as:

"18. The dwelling contains numerous defects and is not weathertight, including but not limited to:

(a) There is wind driven rain entry at window and door penetrations;

(b) There is moisture entry at parapets and wingwalls;

(c) There is moisture entry at junction of decking and wall cladding;

(d) There is moisture entry at fixed and opening skylights;

(e) There is moisture entry at localized ruptures in acrylic membrane;

(f) The dwelling is not appropriately insulated.

19. The cause of the water entry is:

(a) Insufficently flashed window and door penetrations;

(b) Insufficiently flashed junctions of dissimilar materials;

(c) Poor weatherproof detailing and construction of parapets and wing walls;

(d) Trapping of moisture at the junction of decking and wall cladding;

(e) Insufficiently flashed skylights;

(f) Localised ruptures in the acrylic membrane.

20. In order to remedy the defects, it is necessary to, amongst other things:

(a) Reclad the dwelling;

(b) Repair and redecorate damage to internal linings and roof repairs;

(c) Install appropriate flashings for doors, windows, junctions and skylights;

(d) Replace areas of damaged framing as required;

(e) Repair damaged acrylic roofing;

(f) Insulate the dwelling.

21. It is estimated as at April 2003 that the total cost of the necessary remedial works is $120,924.80 plus GST. The claimants reserve the right to produce a revised estimate in view of the protracted nature of these proceedings."

3.2 Causes of action which were listed in the Claimant's Statement Of Claim' are:

CAUSE OF ACTION AGAINST FIRST RESPONDENTS – BREACH OF CONTRACT

CAUSE OF ACTION AGAINST THE FIRST NAMED FIRST RESPONDENT (MAUREEN YOUNG) – NEGLIGENCE

CAUSE OF ACTION AGAINST SECOND RESPONDENT – NEGLIGENCE

CLAIM AGAINST FOURTH RESPONDENT – NEGLIGENCE

3.3 The claims for negligence by the claimants as well as the amount of the claim for remedial works include a claim for general damages for an amount of $30,000.00.

3.4 The closing 'Submissions of Maureen Joan Young' submitted that the fourth and twelfth respondents should share in any liability. The submission also raises the issues of contributory negligence and betterment and mitigation.

3.5 The 'Synopsis Of Fourth Respondent's Argument' submits that Mrs Young must attract at least 80% of the liability if any exists and that the fifth, sixth, tenth and twelfth respondents must share in any eventual liability. The submission also raises the issue of contributory negligence.

4.0 STATE OF THE DWELLINGHOUSE

4.1 The evidence clearly established that the dwellinghouse was a leaky building and that damage has resulted from the dwellinghouse being a leaky building. This position was not contested. The extent of the damage, the causation and the extent of remedial work was the subject of much debate. I will deal first with the issue of the standard to which remedial work should be carried out.

4.2 Statutory Requirements

4.2.1 The dwellinghouse at Unit 5 was the last stage of the construction of 5 units which were constructed under the authority of a building permit applied for in June 1991.The Building Act 1991 had not come into effect at that point.

4.2.2 Extensive evidence was given concerning whether a building consent should have been applied for, whether the local authority should have insisted on an application for a building consent and whether the construction should have

been in accordance with the Building Code or to the standards applying at the time the building permit was issued. This issue was of concern as it could have influence on the position of the Porirua City Council in regard to the claim against them and also the claim by the Council that the claim is time-barred.

4.2.3 The transitional provisions of the Building Act were cited by counsel for the claimants and it was submitted that s93(3) of the Building Act required that for Unit 5 a building consent was required under the Building Act. And they claimed at paragraph 22 of the opening submissions *"Rather than requiring a building consent to be issued before building work started, the Porirua City Council treated the matter as being an extension of the original building permit. For the reasons stated, this was illegal."*

4.2.4 Revised drawings for Unit5 were commissioned in September 1997 by Mrs Young from Bulleyment Fortune Architects. The revised drawings numbered W9 and W10 were prepared and they altered the layout from the original drawings and they showed harditex cladding to the exterior and the Architect added a note: CONSTRUCT IN ACCORDANCE WITH THE NEW ZEALAND BUILDING ACT AND CODE INCLUSIVE OF NZS 3604. AS 3500.2 FOR PLUMBING SERVICES. It was apparent from the evidence that these drawings were never given to the Porirua City Council and no amended drawings were requested by them.

4.2.5 Leonie Gibb when giving evidence and under cross examination outlined the Council view and gave an explanation as to why the Council had decided that a building consent was not required. Leonie Gibb also at paragraphs 13 and 14 of her brief of evidence stated that the issue of a building consent would have had little or no effect on the outcome.

4.2.6 Having considered the evidence I determine that the Council were wrong in their interpretation of the Building Act and that a building consent should have been required. I also consider that had a building consent been required and applied for the outcome could well have been different as a different set of drawings would have been lodged for the building consent.

4.2.7 The work should have been carried out to a standard in accordance with the Building Act and the code.

4.3 As previously stated it is accepted by all that the dwellinghouse is a leaky building. The defects are listed many times in the documentation and were traversed many times in the evidence presented and are repeated in the 'Closing Submissions By Claimant's Counsel' at paragraphs 46 to 49. The defects as listed are acknowledged by all except the issue of insulation is challenged on a jurisdictional basis and no evidence was presented regarding "ruptures in the acrylic membrane" other than it is mentioned in the assessor's report but there was no evidence presented concerning this aspect and no examination of the assessor on this aspect.

4.3.1 The claimant outlines in the 'Closing Submissions By Claimant's Counsel' at paragraphs 87 and 88 the remedial work that they consider is necessary and why it is necessary. They claim that :

(a) strip all of the exterior cladding;

(b) install the necessary wall insulation;

(c) remedy any defective timber framing and flashings, including any other associated works;

(d) reinstate wall cladding and plaster coating system.

4.3.2 There was considerable evidence given as to the extent of remedial work that was required including what work was required to comply with the Building Act and Code. The extent of the remedial work in question varies from the complete re-cladding of the exterior of the building to the partial remedial work of fixing the leaks around the windows and the atrium skylight. There is also the work required at the interior to make good damage.

4.3.3 The WHRS Act requires the adjudicator to determine at s 29 *"(a) the liability (if any) of any of the parties to the claimant; and (b) remedies in relation to any liability determined under paragraph (a)."* To comply with s 29(1)(b) I have to consider the aspects of the assessor's report concerning s.10(1)(b)(i)(ii) and (iii) and determine what work is properly encompassed by those sections having taken into account all of the evidence presented to me.

4.3.4 Mr Heaney in his submissions and emphasized during cross examination of nearly every witness by suggesting to them that the only remedial work required was at the five areas of leaking that had been identified and that only targeted repairs are justified. In the alternative it was submitted that the targeted repairs be carried out and a resurfacing of the entire cladding was an option.

4.3.5 I accept that the aspect of insulation in the walls is not an item that is within my jurisdiction. The aspect of insulation of the external walls is relevant in so far as the question of whether the EIFS system as used on the building meets the insulation requirements of the Building Code has to be taken into account when considering the remedial work required to fix the leaky building. I also accept the submission from the fourth respondent that I do not have jurisdiction concerning "*poor construction*' where that poor construction is not related to the leaks in the dwellinghouse. I do not agree with the fourth respondent that I do not have jurisdiction concerning *"potential areas of water ingress.*

4.3.6 I have given careful consideration to the extent of remedial work that is required. It was submitted that a building consent would be required for the remedial work to be carried out. I agree that would be the position. The remedial work would have to be carried out to the requirements of the Building Code. This would require that any EFIS system would need to comply and that would include insulation to the standard required by the Building Code. I consider the submissions of the claimant from paragraphs 90 to 122 to be very persuasive . I am further convinced by the evidence given by the WHRS Assessor both under questioning by Mr Galloway and under cross examination by other counsel concerning the difficulty with targeted repair and cladding over existing cladding. There are risks with incompatibility, the inadequate thickness of the existing polystyrene, the inadequate cover of the coating, the inadequate fixings and support, the conflicting evidence on the design for the wind zoning and in particular the difficulty of making junctions between new and existing over existing framing. I am convinced that the option for this dwellinghouse is not a targeted repair or patch up but that taking everything into consideration the only sensible option is to reclad the dwellinghouse after ensuring that all penetrations are properly sealed and all flashings are in place.

5.0 CAUSATION

5.1 Paragraph 19 of the 'Amended Statement of Claim' outlines the claimant's opinion on the cause of the water entry and this is based on paragraph 4.7 of the Assessor's report.

5.2 Insufficently flashed window and door penetrations; insufficiently flashed skylights

5.2.1 There was no real contest by the respondents that there was leaking due to inadequate flashings and/or sealing and often the complete lack of flashings around the windows and doors and the atrium (main entry) skylight.

5.2.2 The Assessor's report at paragraph 4.6.1 deals with the lack of flashings and there are some photographs included with the report that show the lack of flashings and damage that has occurred

5.2.3 Mr McQuade gave extensive evidence as to the leaks from the windows doors and skylights and Mr Heaney acknowledged that of the five leaks that he acknowledged four were due to this cause.

5.2.4 Mr Joyce also gave extensive evidence as to the inadequacy of the flashings and his report includes many photographs relevant to the flashings issue.

5.2.5 Mr de Lisle in his evidence also acknowledges that the problem is flashing related.

5.3 Insufficiently flashed junctions of dissimilar materials; poor weatherproof detailing in construction of parapets and wing-walls; trapping of moisture at the junction of decking and wall cladding

5.3.1 This part of the claim relates to the wall and parapet cladding system. Much of the evidence of the Assessor and the experts concerned the cladding system and whether the cladding system should be repaired or replaced. The status of the EIFS system was hotly debated.

5.3.2 The history of the cladding makes sad reading. The amended drawings as prepared for Unit 5 by Bullyment Fortune Architects showed Harditex

cladding. Mrs Young gave evidence that she consulted with Mr Fortune before changing to polystyrene. Mr Fortune stated that it was only a casual comment when they were conversing on another project. It is not clear as to who specified the EIFS system that was used but from the evidence I conclude that it was Mrs Young that arranged the subcontractor. The evidence shows that the subcontractor originally employed was placed in receivership after the polystyrene was applied but before the plaster coating was applied. The polystyrene was left without the plaster coating for months and the tenth respondent, Alchemis Coatings Ltd, at the request of Sam Young arranged for the plastering to be carried out by another subcontractor. Mr McQuade observed during an inspection of the dwelling that the inside of some parapets had not been completed. By this time it appears that there was acrimony between Mrs Young and Alchemis Coatings Ltd and money was withheld and Alchemis Coatings were not prepared to assist further. Mrs Young arranged for the ninth respondent, Builders Plastics Ltd, to complete the work.

5.3.3 The evidence given by various witnesses and also by the photographs produced clearly establishes that the cladding system was not carried out in a workmanship like manner and clearly is defective. I also accept the evidence that the finished thickness is such that it does not meet the insulation requirements. Evidence was given regarding the EIFS system as a whole and whether the flashings should be installed by the subcontractor for the EIFS system rather than by the window subcontractor or the main contractor. I conclude that it is common practice for the EIFS system subcontractor to be responsible for the installation of all flashings to preserve the integrity of the system and to avoid demarcation problems and that is what should have happened on Unit 5.

5.3.4 The Assessor's report at paragraphs 4.6.1 and 4.7.1 deals with the extent of the water penetration and potential water penetration to the cladding system.

The Assessor concludes that *"Without remedial works it will only be a matter of time before framing timbers exceed the 20% maximum in service moisture percentage allowed in NZS 3602 for untreated timber. It is therefore recommended that the home be reclad."*

5.3.5 Mr Joyce in his report deals in detail at paragraphs 25 to 41 with what he considered was the system that had been applied and the thickness of the plaster coating and produced at the hearing three sections of cladding which had been cut out from the walls. Mr Joyce states his opinion at paragraph 42 that the existing cladding should be removed and replaced and at paragraphs 44 to 47 gives the reasons for his conclusion.

5.3.6 Dr Cox-Smith gave evidence that the R value of the cladding system was below that required to meet the requirements of the Building Code Mr Bruce also gave evidence regarding the insulation values which I believe confirmed and reinforced the evidence of Dr Cox-Smith.

5.3.7 Mr de Lisle was of the opinion that the flashings could be installed and the cladding could be repaired and a letter from DL Jones Solid Plasterer was tabled which provided a price for patch and recoat. The conclusion of Mr de Lisle I believe is predicated on the insulation value of the system as installed being up to standard. I prefer the evidence of Dr Cox-Smith and combined with that of Mr Joyce and Mr Bruce and I consider it is not up to standard.

5.3.8 Mr Heaney submitted that only targeted repairs are necessary and he continually took the approach during cross examination that only the five areas of leaking were relevant. Mr Heaney also submitted that the WHRS Act only covered "*current water ingress".*He submits at paragraph 38 and 39 of 'Synopsis.of Fourth Respondents's Argument' that:

38. The quantum claimed is slightly in excess of $120,000 but that is on the basis that there is a total reclad. Both Mr Jpyce and Miss Johnston have given evidence that they have only been able to identify five areas of leaking. Both have agreed that targeted repairs could deal with these five areas, ie three bay windows, atrium skylight and parapet flashing, so as to prevent from leaking.

39 They both started out recommending a total reclad based upon the concern that the framing was of untreated timber and the need tp replace insulation.

40 The evidence relating to insulation now favours the view that from an insulation point of view, the building is compliant but even if it that is not so, issues relating to insulation are outside the jurisdiction of the WHRS system and cannot be taken into account.

5.3.9 Mr Heaney has been careful with his wording in paragraph 38. Mr Heaney was persistent in his cross examination on this issue and Mr Joyce did agree that the five leaks were the only ones that were evident. He would not agree however that did mean there were no other leaks. Miss Johnson's report mentions at section 4.6.1 moisture contents that would indicate there is moisture penetration at the balustrades and that damage is occurring where there is moisture being trapped at the junction of the wall and the deck where decking has been laid in close contact with the cladding.

5.3.10 It is correct that Mr Joyce's report recommended a total reclad and that under cross examination he stated that "*he was not a proponent for recald or repair*", that is a decision for others to make. Revised costings were given by Mr Criscello for his opinion on the cost of repair rather than a complete re-clad.

5.4 Localised ruptures in the acrylic membrane.

5.4.1 The Assessor's report was admitted as evidence and section 4.6.2 of that report deals with this issue and there are photographs in the report that show the ruptures. The Assessor's report at section 5.0.2 states that *"The flat roof/wall junctions will be addressed as part of the reclad project."* The estimated cost of the repairs is included in the Assessors report and this was admitted as evidence when Mr Criscello gave evidence.

5.4.2 No further evidence was given relative to this issue during the hearing.

6.0 LIABILITY

6.1 The claimants Statement of Claim lists actions against the first respondents, the first named first respondent, the second respondent and the fourth respondent. The first named first respondent claims against the fourth, fifth and twelfth respondents and the fourth respondent claims that should any liability be found then the first respondents, the first named first respondent, the fifth, sixth, ninth, tenth and twelfth respondents must share in that liability.

6.2 Liability First Respondents as trustees in contract

6.2.1 The Claimant's claim is for breach of contract and in particular the breach of clauses 6.2(5)(a),(b),(c) and (d) and special condition 14 of the Agreement for Sale and Purchase for the dwellinghouse.

6.2.2 The justification for the claim is listed at paragraphs 15 -30 of "Closing Submissions by Claimant's Counsel'.

6.2.3 Counsel for Maureen Young and Mr Martin, one of the trustees, submitted that the construction was substantially complete when the Trust purchased

the property and therefore clause 6.2(5) does not apply I am satisfied that the majority of the work that is the cause of the dwellinghouse being classified as a leaky building was done before the Trustees were the Owner of the building. The Trustees are therefore not in breach of the vendor's warranties under section 6.2(5) of the Agreement for Sale & Purchase.

6.2.4 I accept the submission from Counsel for the second named first respondent concerning special condition 14 that the completion or otherwise of the maintenance items in the contract is irrelevant to this hearing.

6.3 Liability of First Named First Respondent (Maureen Young)

6.3.1 The 'Claimant's Statement of Claim' sates "*Maureen Young owed a duty of care to the claimants to exercise reasonable care and skill to ensure that the dwelling was constructed in a proper and workmanlike manner using appropriate materials and that the dwelling was built in accordance with the Building Act and Building Code.* The claim is in tort based on negligence and is against Maureen Young individually.*"*

6.3.2 The position of Maureen Young has to be established before the issue of a duty of care can be addressed. The 'Closing Submissions By Claimants' Counsel' deals mainly with the submissions that Mrs Young and/or Mr Young were the developers. I will deal with Mr Young separately. For Mrs Young to have owed a duty of care I consider that her role has to be established as more than just an owner/developer.

6.3.3 It was not contested that Mrs Young was the owner when the majority of the construction work was carried out. The evidence established that Mrs Young was also in control of the building after the transfer of the property to the Trust and until it was sold to the claimant. Mrs Young was also in control of the

process to complete any outstanding work and to carry out remedial work after the sale took place, albeit she was assisted at times by Darren Young.

6.3.4 Mrs Young gave evidence that she is employed as a motelier and her previous background is as a hairdresser. She maintained that she had no direct involvement with the technical construction of any of the five units and her involvement was limited to selection and organization of the furnishing and fittings. A accept that Mrs Young did not physically get involved with the construction but the evidence overwhelmingly showed that not only was Mrs Young in control but it was Mrs Young that organized everything to do with the development from having revised drawings prepared, contacting the local authority and organizing all parts of the contract and the subcontractors. In effect Mrs Young was the main contractor. The Closing Submissions By Claimants' Counsel' at paragraph 35 is a very convincing list substantiating that Mrs Young was deeply involved with the process.

6.3.5 It is well established in New Zealand that those that own/develop/build have a duty of care to future owners. Many authorities were cited including

Chase v de Groot[1994] 1 NZLR 613

Morton v Douglas Homes Ltd [1984] 2 NZLR 548

Mt Albert Borough Council v Johnson (CA) [1979] 2 NZLR 234

Ridell v Porteous [1999] 1 NZLR 1

Mowlem v Young (1994) Tauranga High Court

Frost v McLean (2001) Wellington High Court

Bowen v Paramount Builders (Hamilton) Ltd [1977] 1 NZLR 394

Gardiner and Gardiner v Howley and Howley (1994) High Court Auckland

WHRS Kellaway determination

6.3.6 I have given consideration to the authorities cited and I am of the opinion the facts in this case are such that *Ridell v Porteous and Mowlem v Young* can be distinguished and that in all the circumstances Mrs Young more comfortably fits into the *Mt Albert Borough Council* situation. I conclude that Mrs Young was in effect the head contractor.

6.3.7 As to liability the principle in *Bowen v Paramount Builders* still applies and as the head contractor the duty was non delegable as *Mt Albert Borough Council.*

6.3.8 The Statement of Claim goes on to set out how the duty of care was breached and lists five actions in particular. I do not find that the actions as listed are accurate but I do find from the evidence that Maureen Young caused the dwellinghouse to be constructed from drawings which were different from those which were lodged for the original building permit; that she failed to lodge the amended drawings with the local authority; that she instructed a different exterior cladding system be used from that shown on the drawings; that she failed to take steps to ensure that the building work was properly supervised or checked; that she failed to request inspections by the local authority at appropriate intervals, times or stages; and she failed within a reasonable time to ensure defective works were properly remedied once she became aware of them.

6.4 Liability of Second Respondent (Sam Young)

6.4.1 The ‘Claimant’s Statement of Claim’ lists a separate cause of action in tort for negligence against the second respondent Mr Sam Young and lists the same allegations as against Mrs Young. The ‘Closing Submissions by Claimants’ Counsel’ brackets Mr and Mrs Young together. The facts pertaining to their participation in the development and construction of Unit 5 are very different.

6.4.2 Having heard and considered the evidence I conclude that the participation of Mr Young was intermittent and only in the way of assistance to Mrs Young and was of such a nature that Mr Young could not be considered as owner/developer or head contractor or project manager. Any involvement by Mr Young with the project was not such that could give rise to any liability for a duty of care to the claimants or any other respondent.

6.5 Liability of Fourth Respondent (Porirua City Council)

6.5.1 The ‘Amended Statement of Claim’ states *“The fourth respondent owed a duty of care to the claimants to take exercise* (sic) *reasonable care and skill in performing the functions set out in sections 24 and 76(1) of the Building Act.”*

6.5.2 The ‘Closing Submissions by Claimants’ Counsel’ poses the question ***(a) Did the building require a building consent?*** And submits that it did then poses the question ***(b) if so , was the PCC negligent in failing to require that a building consent be issued before workstarted?”*** and concludes that it should have. Later in the submissions the questions are posed as items ***“(h) to (l)*** which relate to the responsibilty of the PCC to carry out inspections and the effect of the failure or otherwise to do so.

6.5.3 It is well established in New Zealand law that territorial authorities have a duty of care to building owners in relation to permit, consent and inspection processes. Many authorities for this were cited including:

Invercargill City Council v Hamlin [1996] 1 NZLR 513

Steiller v Porirua City Council 91983) NZLR 628

Lacey v Davidson & Manakau City Council (1986) Auckland High Court

Mt Albert Borough Council v Johnson [1979] 2 NZLR 234

6.5.4 The facts surrounding this case are somewhat unusual in that the work was commenced on Unit 5 in late 1996 or early 1997 but the work was carried out under the authority of a building permit issued in 1991 before the Building Act came into force. The requirements for construction compliance under the permit were different from the requirements under a building consent had one been issued in 1997/98. Also the procedures that the territorial authority followed under a building permit situation are different from those under a building consent situation.

6.5.5 The claimants claim that the fourth respondent breached its duty of care to the claimants by *"failing to require a building consent be obtained prior to the building of the dwelling"* Leonie Gibb in her evidence gives an explanation as to why a building consent was not required but under cross examination she agreed that if s93(3) of the Building Act had been considered then a building consent would have been required. Leonie Gibb was obviously in a difficult position giving evidence which mainly had to be supposition about the possible actions of others. It was very evident however that there was a serious lack of records at the PCC concerning this project and that there

appeared to have been lack of action by Leonie Gibb's superiors or colleagues.

6.5.6 Both Leonie Gibb and Counsel for the fourth respondent submitted that had a building consent been issued then it would have made no difference to the manner in which the unit was ultimately constructed and that the PCC dealt with the construction of the unit as it would have had a building consent been issued. This is conjecture and any difference in approach can only be conjecture. It is relevant however that as a result of a building consent not being required the amended drawings were never lodged with the PCC and the drawings that the PCC were working from were different from those that were being used for construction and were also different from what was constructed.

6.5.7 The claimants also claim that the fourth respondent breached its duty of care to the claimants by *"failing to carry out a sufficient number of building inspections, or to carry out building inspections at appropriate times, stages or intervals so that the building inspector could ensure compliance with the building code;"*

6.5.8 Counsel for the fourth respondent submitted that there was no causation and no reliance by the claimants on the PCC. The arguments advanced I consider are too narrow and there is a connection between the actions, or lack of actions, by the PCC and the leaks and that the claimants could have expected the inspections by the PCC to have prevented the situation that eventuated with this dwellinghouse.

6.5.9 From the evidence I would consider a reasonably prudent building inspector would have picked up the potential for problems when inspecting the unit, especially at the pre-line inspection. The external cladding was obviously not complete at the time and it must have been evident that flashings were not all

in place. The external cladding was not in accordance with the drawings for which the permit was issued and there were major differences to the floor plan from the permit drawings. The circumstances of the construction of this dwelling and especially the EIFS cladding system should have alerted PCC to potential problems which have proved to be the major reason for this action.

6.5.10 Accordingly I conclude that the PCC breached its duty of care and has a liability to the claimants.

6.5.11 Counsel for the fourth respondent submitted that the claim against the PCC is time-barred under the Building Act and cited as authorities *Hamilton City Council v Rodgers* and *Frith v Auckland City Council*. I consider that this claim must fail as the act or omission was both the failure to require an application for a building consent in 1997/98 and the failure to carry out proper inspections during construction. The proceedings do not arise out of the issue of the permit in 1991.

6.6 Liability of fifth respondent (Bulleyment Fortune Architects Limited)

6.6.1 The claimants do not make a claim against the fifth respondent. The first named first and the fourth respondent claim that should they be found liable then the fifth respondent should contribute to that liability.

6.6.2 The only reason put forward as the basis that Bulleyment Fortune Ltd should contribute to the liability was:

" It seems now, pursuant to the evidence, that the architects were well aware of the difficulties at the site and in particular the plastering difficulties, early in 2000. It would have been reasonable for the architects to inform Council."

"The architect Mr Denis Fortune, was aware of the defects in the cladding but failed to draw these to the attention of Council or anyone else other than Mrs Young. His failure to warn the council has contributed to the loss …"

6.6.3 Mr Fortune was informed of the change from Harditex to an EFIS cladding system but I accept the evidence that it was as an aside comment made by Mrs Young at another building site. Mr Fortune became aware of the problems only when he was asked to give advice in a professional capacity and he fulfilled his professional obligations. As counsel for Mr Fortune states "The duty alleged is novel. There is no case an architect has been held liable in similar circumstances.." and goes on to give reasons why such a concept is unreasonable.

6.6.4 I agree that Mr Fortune either as an individual or as a representative of Bulleyment Fortune Architects Ltd did not have a duty to advise others of the problems with the cladding system. The evidence does not substantiate any breach of duty of care by the fifth respondent to any party and therefore no liability can attach.

6.7 Liability of sixth respondent (Boyd Aluminium Ltd)

6.7.1 The claimants do not make a claim against the sixth respondent. The submissions by the first named first respondent makes reference at paragraphs 4.2, 4.3 and 8.1 to Boyd Aluminium responsibilities and implies that they were possibly responsible for not installing flashings. The fourth respondent claim that should they be found liable then the sixth respondent should contribute to that liability and at paragraph 53 of their submissions state:

“ Boyd Aluminium had supplied windows which have not had with them appropriate flashings, the absence of which has given rise to the water leaks and accordingly Boyd Aluminium should share significantly in the liability.”

6.7.2 My conclusion from the evidence is that Boyd Aluminium were a supplier only of the aluminium joinery and that they did supply flashings with the windows. It was the responsibility of the cladding subcontractor to provide a completely weathertight system which included the fitting of and ensuring the supply of necessary flashings to achieve that.

6.7.3 The evidence does not show that there was any fault with the aluminium joinery other than the defect with a window that was fixed by Boyd Aluminium at the appropriate time. The evidence does not substantiate any breach of contract or duty of care by the sixth respondent to any party and therefore no liability can attach.

6.8 Liability of the seventh respondent (Fernhill Properties Ltd)

6.8.1 The only reference to a claim against Fernhill Properties is a reference to Darren Young, a director of Fernhill Properties, in the ‘Submissions Of Maureeen Joan Young’. At paragraph 9.1 under the heading of **LIABILITY OF SAM YOUNG AND DARREN YOUNG.** It states: *“These were two of the subcontractors used by Mrs Young to assist. As such it is a matter for the adjudicator to ascertain whether they are liable on a percentage basis if at all.”*

6.8.3 I do not consider “subcontractors” as an appropriate description as they were just giving assistance to Mrs Young however the definition is of little relevance. The evidence showed and the facts are that Darren Young became involved to assist his mother in resolving issues between

MrMcQuade and Mrs Young after completion of Unit 5. He was not involved in the construction of Unit 5.

6.8.4 Accordingly no liability can attach to the involvement of Darren Young.

6.9 Liability of ninth respondent (Builders Plastics Ltd)

6.9.1 The claimants do not make a claim against the ninth respondent. The fourth respondent claim that should they be found liable then the ninth respondent should contribute to that liability and at paragraph 54 of their submissions state:

"Alchemis Coatings Limited and Builders Plastics Limited were both actively involved in the plastering system and should have dealt with matters concerning flashings if others did not and they too must share in the eventual liability."

6.9.2 In the 'Closing Submissions for Maureen Young it states at paragraph 4.6 *"Counsel submits that it is reasonable to assume the bedroom leak as coming from the ineffective plastering on the parape. As such, Builders Plastics and/or Alchemis are responsible."* The evidence was such that I can not accept that statement as correct. It was not established that was the cause of the leak.

6.9.3 The facts are that the ninth respondent was employed by Mrs Young to complete work that two previous subcontractors had failed to complete. The work was specific to the parapets and was a small part of the total cladding. Mr Milne on behalf of Builders Plastics Ltd in his evidence stated: *"We completed the work we were requested to do to the highest standards of workmanship as were possible under the circumstances.."* The evidence

presented did not establish that Builders Plastics Ltd did not carry out the work that they were requested to do in a workmanlike manner.

6.9.4 Accordingly no liability can attach to Builders Plastics Ltd.

6.10 Liability of the tenth respondent (Alchemis Holdings Ltd)

6.10.1 The claimants do not make a claim against the tenth respondent. The fourth respondent claim that should they be found liable then the tenth respondent should contribute to that liability and at paragraph 54 of their submissions state:

"Alchemis Coatings Limited and Builders Plastics Limited were both actively involved in the plastering system and should have dealt with matters concerning flashings if others did not and they too must share in the eventual liability.

6.10.2 In the 'Closing Submissions for Maureen Young it states at paragraph 4.6 *"Counsel submits that it is reasonable to assume the bedroom leak as coming from the ineffective plastering on the parapet> As such, Builders Plastics and/or Alchemis are responsible."* The evidence was such that I can not accept that statement as correct. It was not established that was the cause of the leak.

6.10.3 Mr Burton did not give evidence but was in attendance throughout the hearing. Mr Burton confirmed at the hearing that his letter dated 3 December 2003 was his brief of evidence. The letter states *"Alchemis Holdings Limited denies liability to the above claim as the supplier only of the texture coating materials. Alchemis Holdings Limited has never undertaken contracting and was only ever a sales and marketing company from its inception up until it ceased trading on the 1 September 2002."*t

6.10.4 The evidence presented established that Alchemis Holdings Limited did provide product and also assisted Maureen Young, through Sam Young, in obtaining a replacement cladding subcontractor but Alchemis Holdings ltd were never a subcontractor on the dwellinghouse. The evidence did not establish that the product supplied was defective.

6.10.5 Accordingly no liability can attach to Alchemis Holdings Limited.

6.11 Liability of twelfth respondent (Nicholas Neben)

6.11.1 The claimants do not make a claim against the twelfth respondent. The submissions by the first named first respondent makes reference at paragraphs 8.1 to 8.4 the liability of Mr Neben. The fourth respondent claim that Mr Neben should *"either attract the liability of a builder or at least the same liability as Mr Fortune."* And make a claim against Mr Neben at paragraph 30 of it's 'Amended Response and Claim'.

6.11.2 'The 'Closing Submissions of Counsel for Twelfth Respondent' at paragraph 7 states: *"The fundamental question is whether or not Mr Neben had a supervisory role as a project manager to oversee the quality and performance of other contractors. It is submitted that the evidence overwhelmingly establishes beyond any doubt that Mr Neben did not exercise that function."* I completely agree with this statement. The allegations in the Submissions of Maureen Joan Young' at paragraphs 8.1 to 8.4 were not proved by the evidence. The evidence did not establish that the work undertaken by Mr Neben was deficient. I conclude that the evidence established that Mr Neben was no more than a labour only contractor and that he had no responsibility for arranging or co-ordinating any sub contractor and he had no responsibility

for arranging inspections with the Council. The legal authorities cited support that Mrs Young had those responsibilities.

6.11.3 Accordingly no liability can attach to Mr Neben.

7.0 QUANTUM

7.1 The claim is for:

(a) the amount of $120,924.00 plus GST being the estimated cost of remedying the damage
(b) the amount of $30,000 in general damages for stress and inconvenience

7.2 Quantum and Cost of Remedial Work

7.2.1 The 'Closing Submissions by Claimants' Counsel' at paragraphs 87 to 140 deal with this aspect at length. The main issues are: what is the extent of remedial work required which includes the issue of full or partial recladding.; what remedial work is within the jurisdiction of the adjudicator under the WHRS Act; and what is a fair estimate of cost of the remedial work.

7.2.2 I do not intend to traverse every issue in detail in this determination and I will summarise my conclusion. The cladding system is of such poor quality of workmanship that it is deficient and is, in conjunction with the lack of flashings, allowing water to penetrate and the water penetration has already caused damage around the windows and doors and there is evidence that moisture is penetrating and will cause damage in the future if the deficiencies in the cladding system are not remedied.. To carry out remedial work effectively the cladding system should be replaced. This is not to increase the insulation value or to comply with the building code but to provide a weathertight cladding system. It is logical that the replacement cladding

should comply with the building code and as it will be necessary to obtain building consent for the remedial work the re-cladding will have to comply with the building code which may well be as an alternative solution.

7.2.3 In the 'Closing Submissions by Claimants' Counsel' at paragraph 139 it states: *"In the absence of a properly prepared estimate or quote, the figures provided by Project Economics and Grant Meek provide the best evidence of the cost of repairs and should be accepted."* I agree that they provide the best evidence but there are aspects that I can not accept. The actual calculations of Project Economics were not contested. I do not consider that the insulation to the walls is an item that comes within the jurisdiction of the WHRS Act and I do not consider that a Contingency Sum should be included as there is already an allowance for sundry work. I consider the value of the remedial work based on the Project Economics calculations to be $121,149.00 including GST This is very close to the Grant Meek figure of $116,791.56 excluding the contingency sum. However the Grant Meek figure makes no allowance for sundry work and if the same allowance was included as in the Project Economics calculations the amount of the Grant Meek calculations would exceed the amount of the Project Economics calculations. I adopt the amount of $121,149.00 as being the cost of the remedial work.

7.3 General Damages

7.3.1 The claimant cites as authorities for the award of general damages Todd '*The Law of Torts in New Zealand'* 3rd edition, page 1183. *Chase v de Groot* [1994] 1 NZLR 613and *Stevenson Precast Systems Ltd v Kelland (High Court Auckland, CP 303-SD/01).* The WHRS *Putman determination No 0026* is also cited as authority.

7.3.2 It was submitted that this case is very similar to the Stevenson case and justifies a total award of general damages to the claimants of $30,000 but in any event not less than the $20,000 awarded in the Stevenson case and the Putman Adjudication.

7.3.3 It is for me to assess first whether Mr & Mrs McQuade have suffered in a way which entitles them to damages of this kind and secondly the amount of such damage. I have studied the Stevenson judgement and the Putman adjudication determination and listened to the evidence and conclude that there has been suffering by Mrs McQuade of this kind. As stated in the Stevenson case "*Just as time spent on preparation for litigation is not compensatable, nor is the stress and worry inevitably involved in a claim of this kind.*"

7.3.4 Taking into account the circumstances of this case which I consider are at the lower end of the scale I assess the general damages for Mrs McQuade at $5,000.00

8.0 EXTENT OF LIABILITY AND APPORTIONMENT

Maureen Young

8.1 I have found that Mrs Maureen Young is liable for her negligence in the management of the construction of the dwellinghouse in the work that was carried out by contractors under her direct control. That substantially was the defects in the cladding system but there were other minor defects.

8.2 The claimants are entitled to recover from Maureen Young the sum of $121,149.00 being costs of remedial work and $5,000.00 for general damages, a total of $126,149.00.

8.3 That is a direct liability of Maureen Young as a tortfeasor.

Porirua City Council

8.4 I have found Porirua City Council is liaible for their negligence in failing to require an application for a building consent and in inspection of the work.

8.5 The claimants are entitled to recover from Porirua City Council the sum of $121,149.00 being costs of remedial work and $5,000.00 for general damages, a total of $126,149.00.

8.6 That is a direct liability of Porirua City Council as a tortfeasor.

Contribution

8.7 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 a joint tortfeasor or otherwise…*

8.8 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.

8.9 The Head Contractor/Construction Manager must shoulder the main responsibility for the defective construction The Territorial Authority role is essentially supervisory and I think that the responsibility should be treated as being significantly less than that of the principal author of the damage.

8.10 In the case of *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 the Court of Appeal considered a similar situation, where the owner of a defective building succeeded against the builder and the local authority.The Court apportioned responsibility between these two defendants as 80% to the Builder and 20% to the Council.

8.11 I see no good reason to come to a different conclusion in this claim. Therefore, I find that the Porirua City Council is entitled to an order that the Maureen Young shall bear 80% of the total amount which the claimants would otherwise be entitled to obtain from the Porirua City Council in damages pursuant to this Determination (refer to Orders in section 8 of this Determination).

Mitigation

8.12 Counsel for Maureen Young and the Poirirua City Council submitted that that it is trite law that the claimants had a duty to mitigate. That is correct. Counsel for Maureen Young submitted that the failure to mitigate in particular impacts on any claim to general damages.

8.13 It was submitted that the failure on the part of the claimants to take any remedial action had caused matters to become worse. I conclude from the evidence that the failure to carry out any remedial work may have caused a little more deterioration to the dwellinghouse but it is not such that the remedial work now required would be any different. Had temporary work been carried out then the amount of the claim for remedial work would have been greater than it now is. I find that the claimants did not fail to mitigate the loss and damage.

Contributory Negligence

8.14 Counsel for Maureen Young at paragraphs 3.1 to 3.7 and the Porirua City Council at paragraphs 30 to 36 made submissions that Mr McQuade was not a lay person and his experience in the construction industry was such that he was well aware of the state of the dwellinghouse and that he failed to take action that a prudent person would have done. I conclude that Mr McQuade did have expertise such that he should have been alerted to the possible problems with the dwellinghouse.

8.15 It is submitted "*The Contributory Negligence Act provides that where a claimant has caused or contributed to the loss claimed then any award in favour of a claimant ought to be reduced by the extent of that contribution."* I have first to assess whether the claimant has caused or contributed to the loss claimed and if so assess the amount of that contribution. I find the submissions on contributory negligence very persuasive and having considered the authorities cited *Gilbert v Shannahan & Partners Cout of Appeal; Peters v Muir* and *Cinderella Holdings Ltd v Housing Corporation of New Zealand;* I have concluded that the claimants contributed to some degree to their own loss as Mr McQuade with his experience should have been alerted to the possible problems and he failed to take any action.

8.16 Having decided that the claimants did contribute to the loss then I have to decide on the significance of the contribution. Counsel for the Porirua City Council suggested that the claim should be reduced by at least 90% and counsel for Maureen Young suggested 100%. I do not consider that Maureen Young or the Porirua City Council can disclaim the consequences of their negligence to a significant degree by saying that the claimant ought to have made further enquiries and/or sought expert reports. I have to be fair and equitable in making an assessment and I find that the damages awarded in the claimants favour should be reduced by 33%.

9.0 COSTS

9.1 It is normal in adjudication proceedings under the 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 Act, the adjudicator may determine that one party will be responsible for more than its own costs if these costs are unnecessarily caused by bad faith or allegations or objections that are without substantial merit.

9.2 No applications were made that I should exercise my discretion to make a determination pursuant to s.43(1) of the Act. I could add that if costs had been sought, then I would not have allowed them. Therefore, I find that the parties to this adjudication will meet their own costs and expenses.

10.0. ORDERS

10.1 For the reasons set out in this Determination, I determine and order that:

10.2 (a) Maureen Young and Porirua City Council are jointly and severally liable to pay Denis and Jane McQuade the amount of $84,520.00.

(b) Maureen Young is entitled to a contribution of $16,904.00 from Porirua City Council (being 20% of the amount of $84,250.00) in the event that Maureen Young should have paid that sum to Denis and Jane McQuade

(c) Alternatively, Porirua City Council is entitled to a contribution of $67,616.00 from Maureen Young (being 80% of the amount of $84,520.00) in the event that Porirua City Council should have paid that sum to Denis and Jane McQuade

This Determination is dated 26th April 2004

____

George D Douglas

Adjudicator

STATEMENT OF CONSEQUENCES

IMPORTANT

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

If the adjudicator's Determination states that a party to the adjudication is to make a payment and that party fails to pay the full amount determined by the adjudicator, the Determination may be enforced as an order of the District Court, including any applicable interest and costs entitlement arising from enforcement.