CLAIM NO: 00792
UNDER The Weathertight Homes Resolution Services Act 2002

IN THE MATTER OF an adjudication

BETWEEN: **STUART EMERSON MIDDLEMASS SALLY DIANA MIDDLEMASS and BAILEY INGHAM TRUSTEES LIMITED as Trustees of the SE & SD MIDDLEMASS FAMILY TRUST.**

Claimants

AND **NZ LOG CHALETS LIMITED**

First Respondent

(Intituling continued next page)

Hearing: **31 October, 1, 2 & 3 November, 2005**

Appearances: Ms Whitfield and Ms McDonald, counsel for the Claimants
Mr Dowthwaite, counsel for the First Respondent and Second Respondent
Mr Heaney, counsel for the Third Respondent

Determination 6th April 2006

DETERMINATION

AND **PETER DORFLIGER**

Second Respondent

OTOROHANGA DISTRICT COUNCIL

Third Respondent

BSK CONSULTING ENGINEERS LIMITED
(Now struck out)

Fourth Respondent

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SUMMARY OF DETERMINATION

Dwelling construction: log chalet, unique design, exposed site, leaks to log walls - Respondents: building company, director/shareholder, territorial authority - Liability of Respondents: in contract, tort, breach of Consumer Guarantees Act, breach of Fair Trading Act and breach of Statutory duty – contributory negligence - Claimants, cost of remedial work, general damages, stress on family trust Claimants, costs.

[a] The claim is by a family trust against a building company, its director and the territorial authority.

[b] The claim relates to a log chalet of unique design.

[c] The claim is for the costs of demolition and replacement with a conventionally designed dwelling, or alternatively for the repair (by over cladding) of the chalet. There are significant cost differences in respect of the alternatives. There is also a claim for stress suffered by the occupiers of the dwelling who are two of the trustees of the family trust.

[d] Liability is determined with regard to:

(i) Breach of contract, the tort of negligence, breach of the Consumer Guarantees Act 1993 and the Fair Trading Act 1986 – the company;

(ii) The tort of negligence, breach of the Consumer Guarantees Act 1993 and the Fair Trading Act 1986 – the director;

(iii) Breach of statutory duty – the territorial authority.

[e] There is liability upon the company in contract, in negligence and in respect of a breach of the Consumer Guarantees Act 1993. There is no liability upon either the director (of the company) or the territorial authority.

[f] The appropriate remedy is to provide for the costs of repair by way of re-cladding – the cheapest re-cladding option claimed – less piles and roof. That amounts to the sum of $141,800.00 (including GST if any), and includes an allowance of $5,300.00 for "one off" painting.

[g] General damages for stress are awarded - the sum of $10,000.00 each to the two trustees who reside in the dwelling.

[h] There is no award for costs. The unsuccessful party did not act with bad faith or pursue allegations or objections that were without substantial merit. – Section 43(1) WHRS Act.

INTRODUCTION

[1] This is a claim concerning a "leaky building" as defined by Section 5 of the Weathertight Homes Resolution Services Act 2002 ("the Act")

[2] The Claimants, Stuart Emerson Middlemass, Sally Diana Middlemass and Bailey Ingham Trustees Limited are trustees of the SE & SD Middlemass Family Trust and the owners of a dwelling house ("the owners") located at 1158 Harbour Road, Oparau near Kawhia ("the dwelling") and it is the owners' dwelling which is the subject of this claim.

[3] The First Respondent, NZ Log Chalets Limited, (NZLC) is a Limited Liability Company and a Building Contractor, specialising in the construction of solid timber log chalets built to a traditional Swiss design.

[4] The Second Respondent, Peter Dorfliger (Dorfliger) is a Director and Shareholder and working manager of NZLC. He took a "hands on" part in the contract negotiations, the design and the construction of the dwelling.

[5] The Third Respondent, (ODC) is the local Territorial Authority within whose district the dwelling was constructed. It issued the Building Consent and undertook inspections of the dwelling while under construction and subsequently.

[6] The Fourth Respondent, (now struck out) BSK Consulting Engineers Limited is a limited liability company which issued the producer statement in respect of the dwelling particularly relating to the roof and the roof tie downs. It was struck out as a party to these proceedings (no other party opposed the strike out) as there was no evidence to link its work or the producer statement to weathertightness issues. There was no foreseeable likelihood of any liability in respect of the work performed by the Fourth Respondent.

MATERIAL FACTS

[7] The owners own a rural property near Kawhia. In September 1999 two of the owners ("SE Middlemass and SA Middlemass") met with Dorfliger and another representative of NZLC and in due course as a result of negotiations entered into a building contract ("the contract") to construct a solid timber log chalet on their property. In this determination, until the liability of NZLC and Dorfliger is determined, references to NZLC and Dorfliger are used interchangeably (for ease of grammar). They refer to the "builder" without implying liability (at that point).

[8] On the 22nd day of May, 2000 Dorfliger acting for NZLC applied for a building consent permitting the construction of the chalet on behalf of the owners. On

the 1st day of June, 2000 ODC issued a building consent in respect of the construction of the dwelling.

[9] On the 22nd day of May, 2000 after lodging the application for the building consent Dorfliger briefly visited the building site with SD Middlemass. Nothing was said at this stage about the nature of the site.

[10] The construction of the dwelling commenced on the 10th day of July 2000 with the placing of the piles. The next day the 11th day of July 2000 Dorfliger expressed some reservations about the exposed nature of the site. He said he did this because his truck driver (now deceased) who had delivered items to the site in bad weather conditions had told him of the extreme weather conditions experienced. He said that he suggested to the owners that the dwelling be constructed in a sheltered gully near a small lake. He said that SE Middlemass, with whom he spoke, refused to consider this and that his response was "what Sally wants, Sally gets". He was very specific about that.

[11] SE Middlemass was equally specific that no such conversation had occurred. He recalled Dorfliger suggesting the lake location, but said that he thought Dorfliger was merely expressing a personal preference. Both SE & SD Middlemass said that had Dorfliger told them that the site was unsuitable for the log chalet they would have considered an alternative design. They were set on the site. They were keen on the log chalet, but would not have gone ahead with that design had Dorfliger told them it was unsuitable for the site.

[12] Dorfliger recognised that there would be a problem constructing the chalet on this particular site, but he did not press the issue with the owners. He looked to an alternative solution. He constructed a small test sample in NZLC'S Rotorua yard. He experimented with the cutting of an additional lip (for want of a better term) at the log extensions. He experimented with the use of a substance called space invader. This is a type of flexible filler and has particular relevance later

in the determination. He hose tested his modified design and he satisfied himself that the modified design was up to the task. Namely that it would perform and be weathertight (and water tight) on the particular site.

[13] He did not say anything about this experimentation to SE & SD Middlemass, but it was only after successfully completing the experimentation (or so he thought) that he proceeded to have the logs for the chalet machined and precut.

[14] The sub floor had been completed as part of the work undertaken on the 10th and 11th days of July 2000. It was inspected by the building inspector for ODC. The first inspection was on the 11th day of July 2000. There was a second inspection on the 19th day of September 2000, but this seems to have occurred while the building inspector was actually inspecting a shed being constructed by the owners as a separate job. There were some issues with the piles, but these issues have no relevance to weathertightness issues.

[15] Construction of the log walls of the chalet commenced on the 6th day of October 2000.

[16] By mid December 2000 construction work was basically complete and the owners paid all but $6,957.00 of the contract price to NZLC. By that time there were weathertightness problems with the chalet which NZLC was endeavoring to rectify.

[17] SE & SD Middlemass did not move into the chalet until around October 2001. At that time they had identified significant weathertightness problems, but considered they had no option but to move in as they were unable to continue renting accommodation.

[18] During the construction ODC undertook the two inspections already referred to. There was a further inspection on the 10th of January 2001. By that time

construction was basically complete. The inspection notes record that "the trip was shared" perhaps suggesting that another building was inspected also that day. These notes finish with the words **"there have been leaks inside. No weather grooves"**.

[19] Subsequently ODC took part in several meetings with SE & SD Middlemass and with NZLC and Dorfliger in an attempt to resolve weathertightness issues in respect of the dwelling. There were several subsequent inspections. An interim code compliance certificate was issued and then withdrawn and two notices to rectify were issued. These notices are significant. There is still no Code Compliance Certificate.

[20] The first notice to rectify dated the 3rd day of July 2001 contained a list of thirteen specific requirements. Three of these were:

(i) caulking of window sills and frame;
(ii) caulking of exterior corners of log construction to prevent moisture ingress;
(iii) brackets and bolts to the supporting pole in the main entrance to be stainless steel.

[21] the second notice to rectify was dated the 6th day of November 2002. It contained two specific requirements, one of which was that "the pole be provided with appropriate adjustment and the roof and wall logs be repaired". This requirement appears to relate to the third item contained in the first notice to rectify – the supporting pole.

[22] The notices to rectify were addressed to SE and SD Middlemass. NZLC attempted to comply with the notices in respect of some items, but not others. The requirements (in the notices) appear to be mandatory and have significance later.

[23] The dwelling began to leak from the outset. In early November 2000 on a Friday with the roof nearly completed it began to rain. The builders left for the weekend. Dorfliger said that the roof was left unfinished (the ridge capping) because it was too dangerous to continue in the wet. According to the owners, water entered the dwelling that weekend. That was the first evidence of weathertightness issues although that problem was of a temporary nature.

[24] The weathertightness issues began again when the windows were installed. They were installed without flashings or sealer. When the French doors to the upstairs were installed these leaked also. There are leaks around the windows and French doors continue to leak, not withstanding remedial work.

[25] During the Christmas holidays 2000-2001 Dorfliger contacted SE & SA Middlemass while he was holidaying on the Coromandel Peninsula. He said he did this because there was bad weather and he had concerns. The dwelling was leaking badly and Dorfliger traveled from his holiday location to the dwelling to undertake repairs. A return trip which he said took about five hours or more just for the travelling.

[26] Attempts were made throughout 2001 to remedy weathertightness issues relating to the dwelling. These were meetings between SE & SD Middlemass, Dorfliger and representatives of ODC. Dorfliger attended the site on several occasions. At one point the owners wrote to NZLC banning NZLC's representatives or Dorfliger from returning to the site, but that letter was soon revoked.

[27] Dorfliger placed a stainless steel bracket at the bottom of the supporting pole – a pole which supports the roof in the main entrance to the dwelling – this was to comply with that requirement in the first notice to rectify. The bracket

prevented and still prevents the supporting pole being adjusted downwards - this has significance later.

[28] SE Middlemass undertook caulking in particular to the exterior log extensions in an attempt to close and seal the gaps between the logs. He said he was told to do this by the building inspector Mr Apeldoorn to "protect their investment". Regardless it is clear that this is a specific requirement contained in the first notice to rectify. It has significance later.

[29] In or about January 2002 Dorfliger agreed to box in the log extensions, this was arranged between him and Mr Apeldoorn (the ODC Building Inspector) and was agreed to by the owners with some reluctance. The idea was that the log extensions would be covered with solid timber to prevent water from penetrating the gaps between the logs at that point. Owing to a degree of friction between Dorfliger and the owners by this time, SE & SD Middlemass agreed not to be present when this work was undertaken. When Dorfliger and Mr Apeldoorn attended the site however Dorfliger realised for the first time that the owners had caulked the logs, particularly around the extensions. He told Mr Apeldoorn that this was exactly the wrong thing to do as the chalking would prevent the logs from settling as they shrank. He felt that by doing this SE & SD Middlemass had "sabotaged" the plan to box the log extensions and he refused to complete the work. That was the last occasion when there was any attempt by Dorfliger to remedy the weathertightness problems.

[30] The external walls of the dwelling are constructed of solid, untreated, western red cedar logs. These are left rounded on the outside, but are machined to a flat surface on the inside. Although there are similar designs, this particular design is unique to NZLC. Each log is interlocked at the log extensions and is fitted to the next log with a tongue and grooving system and wooden dowels. The structure relies on the interlocking system and the weight of the logs one on top of the other for support and strength. The logs shrink and the height of the

structure decreases as the logs dry out. All this is significant later. The dwelling is presently leaking at the windows and at the upstairs French doors. Also throughout the log walls, particularly at the corners or log extensions, but by no means exclusively there. There are leaks between the top log and the roof. The roof has been unable to settle with the rest of the dwelling as the support pole is now not adjustable. There do not appear to be any leaks to the roof itself. This is relevant later.

[31] SE & SA Middlemass have not subsequently made any further attempts themselves to remedy the problems. SE & SA Middlemass say that they have not been prepared to do any further "repair work" because of the trouble they got themselves into when SE Middlemass undertook the caulking work referred to earlier.

INSPECTION

[32] I arranged to inspect the dwelling on Wednesday the 26th of October 2005. I did so in the company of SE & SD Middlemass and their Counsel Ms Whitfield and Ms McDonald. Mr Apeldoorn was also in attendance as was another building inspector from ODC. Other parties were notified of my intention to inspect at that time, but neither they nor their representatives attended.

[33] The dwelling is situated on a hill top and over looks the Kawhia harbour. The dwelling is approached from the main road via a long metal driveway. That driveway passes through the gully where a small lake is situated which was the sheltered site suggested by Dorfliger.

[34] On the day when I inspected the dwelling the weather was fine and there was little wind, but the site was exposed and I can certainly appreciate that it would be subject to high winds and driving rain at times.

[35] I was able to undertake a close and careful inspection of the dwelling both inside and out and, as a result, I gained a clear appreciation of the type of construction which is unique. I was able to see for myself what was meant by the term log extensions which are a very significant aspect of this claim. I saw numerous splits in the logs. I understand the correct term for these is shakes and that shakes usually do not penetrate the entire diameter of the log. I also saw the evidence of the caulking and of the considerable gaps between the logs (remedied to a degree by the caulking) especially, but not exclusively at the log extensions.

[36] When inspecting the interior of the dwelling there was clear and obvious evidence of water staining. This was prolific. However, it was to the walls only. I saw no evidence of leaks via the roof through the ceiling.

HEARING

[37] At the hearing Ms Whitfield and Ms McDonald represented the owners. Mr Dowthwaite represented the First Respondent and the Second Respondent. Although the position and possible liability of these Respondents at law is separate as a matter of good practice and common sense, no such distinction was maintained at the hearing. Mr Heaney represented the Third Respondent.

[38] The first witness was the assessor Mr D Lewis. His evidence was evidence to assist me. He was not a witness for any party.

[39] The owners called the following witnesses.

(a) S D Middlemass.

(b) SE Middlemass.

Both SD & SE Middlemass gave evidence on behalf of the Trust. as the trustees owners. They gave evidence of the contract process, the construction process and the post construction negotiations as they saw them. They are the occupiers, and two of the three trustees.

(c) Mr Gibbs.

Mr Gibbs is a building consultant and was the Claimants principal expert witness. He gave technical evidence directed to the various specialist reports, other evidence and the building work as he saw it.

(d) Mr Gray.

Mr Gray is an engineer and was called as an expert about structural construction and weathertightness issues as he saw them.

(e) Mr Duffield.

Mr Duffield is a quantity surveyor and gave expert evidence of quantum costs in respect of a number of alternative options for rebuilding or repair.

[40] The First and Second Respondents called the following witnesses.

(a) Mr Dorfliger.

Mr Dorfliger is a share holder and director and the working manager of the First Respondent and he is the Second Respondent. In a practical sense (without for the moment looking at the legal position) he was the designer, the contractor and the builder. Mr Dorfliger gave evidence about all these aspects and in particular gave comprehensive and detailed evidence about the type of design and the method of construction.

(b) Mr Drew.

Mr Drew is a self employed builder and is contracted to the First Respondent. He worked on the dwelling and gave brief evidence in support of the First and Second Respondent.

(c) Mr Mullooly.

Mr Mullooly operates a rival building company in Rotorua, building a similar, but not identical type of log chalet. I use rival in its most general sense as obviously the relationship between Mr Mullooly and Mr Dorfliger is a good one. He gave evidence in support of the First and Second Respondents, especially relating to the caulking. He suggested an alternative solution (chinking) and after the conclusion of the substantial hearing inspected the dwelling and submitted quotations (by agreement between Counsel) and a further affidavit basically relating to his alternative solution.

[41] The Third Respondent called the following witnesses.

(a) Mr Roxburgh – Mr Roxburgh is a chartered building surveyor who gave evidence as to quantum.

(b) Mr Lawrence is the building control manager for the Rotorua District Council and gave expert evidence on behalf of the Third Respondent as to proper Council practice at the relevant time relating to building consents and inspections.

[42] There were other witnesses on the parties witness lists, but these witnesses were not called to present affidavits filed prior. These witnesses together with a witness supporting the (removed) Fourth Respondent have been ignored by me. They do not form part of this decision.

CLAIM

[43] The claim is set out in three formal documents filed subsequent to the notice of adjudication headed **amended points of claim**, **second amended statement of claim** and **third statement of claim**.

[44] The Claimants stated a **preferred option** of demolition, recycling and replacement of the log chalet with a conventionally constructed dwelling. In respect of this option they claimed a total (with certain allowances) of $269,149.66 (including GST).

[45] As a **second alternative** the Claimants claimed damages of $219,600.00 (including GST) relating to the over cladding of the dwelling with ply wood over timber framing – includes $53,000.00 for ongoing maintenance $1,700.00 for missing piles and $14,600.00 for roofing (all GST inclusive).

[46] As a **third alternative** the Claimants claimed damages of $205,800.00 (including GST) relating to the over cladding with ply wood, but over timber battens – includes $53,000.00 for ongoing maintenance, $1,700.00 for missing piles and $14,600.00 for roofing (all GST inclusive).

[47] In addition the Claimants claimed:

(a) a total of $30,000.00 - $15,000.00 each (for Mr S Middlemass and Mrs S Middlemass) by way of general damages for stress and anxiety;

(b) an unspecified amount for costs and indicated that costs including legal and expert fees and disbursements were in the region of $77,000.00 to $82,000.00. Later this was quantified to a total of $78,998.90 (including GST) – for legal fees, disbursements and expert fees.

[48] The Claimants maintained that the first option of demolition and rebuilding a conventional house was not only the preferred option, but the only appropriate option.

[49] The Claimants allege against the First Respondent:

(a) breach of the building contract;
(b) negligence;
(c) breach of a guarantee of reasonable skill of care pursuant to the Consumer Guarantees Act 1993;
(d) breach of a guarantee that the product was fit for a particular purpose pursuant to the Consumer Guarantees Act 1993;
(e) misleading and deceptive conduct pursuant to Section 9 of the Fair Trading Act 1986.

[50] The Claimants allege against the Second Respondent:

(a) negligence in respect of a personal duty of care;
(b) misleading and deceptive conduct pursuant to Section 9 of the Fair Trading Act 1986.

[51] The Claimants allege against the Third Respondent:

(a) the breach of a duty of care in respect of a failure to inspect to ensure compliance with the Building Code;
(b) breach of a duty of care to issue a building consent only if satisfied that the Building Code could be met.

RESPONSES

[52] The First and Second Respondents (NZLC and Dorfliger) adopted a "combined position" in respect of their defence. There was no formal response, but the position they adopt is clear from the affidavit evidence filed.

(i) It is the Claimants (and/or SE & SD Middlemass) – not NZLC or Dorfliger – who were the "builders" and/or

(ii) It is NZLC rather than Dorfliger who might potentially be liable. NZLC being the building company and Dorfliger being the share holder, director and working manager and/or

(iii) There is no liability because there was no breach of contract or negligence or breach of Consumer Guarantees Act or Fair Trading Act and/or

(iv) The Claimants (and/or SE & SD Middlemass) – caused the problems by their unskilled and unacceptable intervention – caulking.

[53] The Third Respondent (ODC) made a formal response to the claim.

(i) There was no statutory duty owed to the Claimants,

(ii) Even if there was this could not have been breached because (ODC) met the appropriate standard at the time of construction in respect of the issuing of the consent and inspection.

(iii) When it became apparent that there were defects affecting weathertightness, ODC did all that was required to draw these to the attention of the Claimants.

(iv) The obligation was not upon ODC to remedy the defects, but rather to draw these to the attention of the Claimants and if necessary to issue notices to rectify. This was done.

(v) NZLC and Dorfliger are solely liable to the Claimants and the Claimants have been contributory negligent by interfering with the building process, caulking the logs and coating the exterior of the dwelling with a preservative.

DAMAGE

[54] From an early stage the dwelling leaked and continues to do so.

[55] The main cause of water ingress is via the gaps between the logs, particularly, but not exclusively at the log extensions. Water is tracking down the groove at the top of each log (the tongue and groove system for interlocking the logs) and is finding its way into the dwelling via shakes (splits in the logs), knot holes, service channels (for the electric wiring) and the dowel holes (for the dowels holding the logs together). Water is also penetrating down the tie-rod holes (for the roof tie downs).

[56] Failure to adjust the pole supporting the roof at the entrance to the dwelling has caused the top logs and the roof to part as the log house settles. As a consequence leaks have developed between the top logs and the roof. This is another cause of water penetration down the tie-rod holes.

[57] Evidence on behalf of all the Respondents is:

(i) the caulking of the logs undertaken by SE Middlemass was inappropriate and has had the effect of holding the logs apart.

(ii) The caulking compound has been forced between the logs and is preventing the logs from settling together as a solid continuous structure.

[58] The Claimant's evidence is that it is that the space invader compound used by the Second Respondent and log distortion is causing this problem. The caulking work undertaken by SE Middlemass is not causing the problem, rather it is reducing the problem by preventing at least some leaks.

[59] There is leaking around the French doors at the upstairs balcony and the windows. These are caused by inadequate flashing and sealing, and by an inadequate "step" at the French doors.

[60] The NZLC and Dorfliger say that there has been a lack of understanding of the whole construction process by the Claimant and its experts. They say that an essential part of the process is the drying out and the settling of the logs as they dry. This is the reason (they say) for needing an adjustable support for the roof because the whole house settles and in effect the roof needs to be lowered as it does. They say that the caulking compound was forced between the logs and has prevented the settlement process and thus caused the leaks.

[61] There is a fundamental difficulty with this explanation. The caulking was not completed until approximately a year after the dwelling was constructed. By that time the logs had had up to three years drying (Dorfliger's evidence), one year in the dwelling itself and two years prior to construction. His evidence was that the logs would take about five years in total to dry and therefore it follows that most of the settling would have occurred before the caulking compound was used by SE Middlemass.

[62] This dwelling was leaking very extensively from a very early stage. SE & SD Middlemass were aware of this and were concerned and so was Dorfliger. He was so concerned that he made a special trip over during his holidays in 2000-2001.

[63] While I accept that the log "settlement process" is a unique part of this construction, I do not accept that the dwelling should "leak like a sieve" while that process is happening. Dorfliger has never suggested that the leaks were normal. His course of conduct suggests the exact opposite.

[64] During the hearing Dorfliger produced letters of reference from previous satisfied clients. These are accepted for what they are. Certainly he would not have been able to produce any of these letters, nor would NZLC still be in business, if a leaking process was all part of the general building process of this design - until the logs settle - no home owner would tolerate that.

[65] It is clear that log chalets constructed by NZLC (and Dorfliger) do not normally leak in the way that this dwelling does.

[66] The dwelling is built in an exposed location, but it is difficult to imagine that this location is any more exposed than many of the locations where similar dwellings have been constructed, both in New Zealand and overseas. Part of the publicity material consisted of pictures of dwellings (obviously in an alpine environment), literally covered in snow. The material suggested that such chalets provided a warm and cosy environment for many generations. In their wildest dreams no one would suggest that this is the way the Middlemass dwelling is performing.

[67] Weathertightness issues have undoubtedly been made worse by the exposed location and the fact that there are no (large) eaves on the dwelling to protect the

log walls. However, I do not to accept that these factors alone are responsible for the leaks.

[68] Nor do I accept that the caulking of the dwelling (by SE Middlemass) is causing the leaks. The dwelling was leaking extensively and had been leaking extensively for one year or more prior to the caulking. Indeed that was the reason why the caulking compound was used.

[69] I am satisfied that the caulking is a potential remedy for the weathertightness problem, not a cause of it. However, even if it were a cause of the problem, it is not something for which the Middlemass's have responsibility. They were told to do it. Indeed they were required to do it. It features prominently as a required solution in one of the notices to rectify and also according to the evidence of SE Middlemass was something which the building inspector Mr Apeldoorn (who did not give evidence) verbally recommended as well. Mr Lawrence, the one person who did give evidence relating to the best practise of ODC cautioned against coaching (or making suggestions to remedy problems) in notices to rectify. He said that notices to rectify should be simply that. They should not contain possible solutions, least these solutions be wrong and cause potential liability issues for local authorities. I do not think the caulking solution was wrong, but it was suggested, indeed required by ODC. All that the Middlemass's were doing when SE Middlemass chalked the dwelling was complying with that aspect of the notice to rectify.

CHOICE OF LOCATION

[70] Dorfliger says that SE Middlemass insisted upon the site. The words "what Sally wants, is what Sally gets" featured prominently in his evidence. SE Middlemass on the other hand says that no such comments were ever made. SD Middlemass had a simplistic response to the alleged comment – "I wish". I

prefer the evidence of SE and SD Middlemass and conclude that Dorfliger has forgotten the exact nature of the conversation over a period of time. However, even if the comments had been made, they would not in themselves have relieved Dorfliger and NZLC from potential responsibility and liability. Whatever the exact nature of the comment, Dorfliger had the opportunity at that point to protest, even to state, that the kind of dwelling NZLC constructed was unsuitable for the site and that he would not build it there. Had he done that the Middlemass's evidence was that they would have looked elsewhere for a design and I accept that. By that stage NZLC was not totally committed to the project, the logs were not milled to specifications.

[71] What Dorfliger chose to do was to – "rise to the challenge" - he created a model and modified it in an attempt to overcome the harsh environmental conditions – refer paragraph 12. He did not succeed. It is probable that he made matters worse by the introduction of the compound space invader as a sealer. This compound probably kept the logs apart. I do not think the caulking did.

[72] Dorfliger and NZLC had notice of the challenging nature of the site and the opportunity to withdraw from the building contract at that point of time. That opportunity might not have been an easy one to exercise. Dorfliger and NZLC might even have incurred some liability or responsibility had they taken that course. However it was available to them. Instead they chose to proceed believing that the chalet could be constructed on the site, and be, and remain weathertight there. That is not what has occurred.

LIABILITY OF THE FIRST RESPONDENT

[73] There is a legal maxim known as Res Ispa Locquitur. It is a Latin term. It means "the facts speak for themselves". It is an entirely appropriate maxim to use in this determination. There is no challenge to the fact that, from a very

early stage, the log chalet leaked extensively and still does. It could not possibly be suggested that this is normal, and to their credit, neither NZLC or Dorfliger have attempted to do so. Whatever the reason, the leaks (or the facts) speak for themselves. A properly constructed log chalet (or any dwelling) does not leak like this. Neither NZLC nor Dorfliger suggested to the Claimants that the chalet would leak quite badly for a year or two until the logs settled, but that was simply part of the process and something that home owners were quite prepared to put up with. Clearly that would not be acceptable.

[74] Given the extensive weathertightness issues relating to the dwelling, the facts speak for themselves. Unless these were caused or contributed to by the Claimants, the First Respondent must be responsible. In the absence of another explanation (for example, substandard timber supplied by the timber merchant) there can be no other reasonable conclusion.

[75] Although it may not be absolutely certain what has caused the weathertightness issues, the First Respondent has offered no reasonable or persuasive explanations for them. The most likely explanations (the balance of probabilities) however in my view, are as follows:

(a) The extreme conditions experienced at this exposed site were not adequately addressed by the First Respondent. The additional "lip" (paragraph 12) simply did not work.

(b) The use of the compound space invader (paragraph 12) by the First Respondent in an attempt to address the extreme weather conditions made the problem worse not better. This compound to a degree found its way between the logs and at least contributed to the logs not settling together. This could be observed from a close inspection of the test sample (paragraph 12) which Dorfliger produced at the hearing.

(c) The twisting of the logs as they dried and the effect of this on the tongue and groove system intended to lock them together created a situation where, inevitably (to a degree) they did not settle.

(d) The combined effect was to create spaces between the logs (especially at the extensions) which permitted water penetration.

[76] NZLC had never experienced similar conditions or a similar outcome in respect of any other chalet built for clients. It is clear that NZLC (and for that matter Dorfliger) have a passion for the design and the workmanship required to construct the design.

[77] The end result is very simple. There is, and must be liability, on the First Respondent. The facts are overwhelming.

[78] The claims against the First Respondent

(a) are in contract – breach of the building contract,

(b) negligence, substandard workmanship,

(c) breach of the Consumer Guarantees Act 1993 Section 28 – a guarantee that service will be carried out with reasonable skill and care, and lastly

(d) breach of the Fair Trading Act 1986 Section 9.

I find against the First Respondent under all these heads, except (d).

[79] Contract – I quote from the documents (there are two) – "**the builder undertakes to ensure good quality workmanship by all trades and services in his control. Construction of the house will be completed to lock up stage. This means that when we have completed the construction of your home, it is ready for you to move your furnishings in immediately. We congratulate you for your decision to build a log home from NZ Log Chalets, and look forward to building you a fine home that we know you will be proud of".**

The First Respondent undertook (in the contract) to ensure good quality workmanship, but that is not what occurred. When I inspected the dwelling, I did not gain an overall impression of good quality workmanship. That quite aside from issues of weathertightness. The First Respondent undertook to complete to lock up stage, where upon the home would be ready to move into with furnishings. In the broadest possible sense, perhaps it can be said that, that did occur. However, it could not possibly be suggested that the Claimants were required to accept the contract as being fulfilled, simply because there was some sort of structure into which they could move their furniture, even though that structure leaked extensively.

[80] Although possibly not a term of the contract, I think there is no doubt that the Claimants were induced to enter into the contract by the representation made by the First Respondent, as to how well they might expect the chalet to perform. In fact the complete opposite occurred.

[81] Negligence – the test of negligence is simple. To be negligent (in respect of this claim) the First Respondent needed to owe a duty of care to the Claimants and to perform its task less well than could reasonably be expected from a reasonable builder in all the circumstances. It is well established that builders owe a duty of care (to home owners and subsequent purchasers) in respect of the construction process. The test is not an absolute one. It is one of reasonableness. The First Respondent may have tried its best. It modified the design in an attempt to overcome harsh conditions, but it failed miserably. The test is "reasonable endeavours", not "best, but inadequate endeavours".

[82] The First Respondent held out that the chalet would be up to the task, and the publicity material suggested that many similar structures had stood for hundreds of years on the European continent, withstanding the most harsh conditions. Pictures of chalets surrounded by heavy snow were prominent. Although the conditions here were harsh, no evidence was lead to suggest that they were exceptional or that a weathertight dwelling could not be constructed on the site.

Although no evidence was lead on this point, I speculate that hundreds of dwellings would be built in New Zealand, on similar exposed sites. It did not seem to me at my inspection that, the site was particularly unique, although I certainly accept that it was always going to be a challenge to the First Respondent.

[83] A dwelling properly constructed on the site should not leak. The First Respondent ought to have been able to construct such a dwelling. It seems that other similar dwellings had been constructed world wide on sites no less challenging. The First Respondent did not even come close to constructing a weathertight dwelling. It leaked from the very commencement and continues to leak. The logs did not settle properly, there were gaps between them, particularly at the log extensions. I do not accept that these gaps were created by the caulking attempted by the Claimants. They were probably contributed to by the space invader used by the First Respondent. The end result was that weathertightness issues were inevitable.

[84] The Consumer Guarantees Act 1993 – Section 28 and 29. These sections deal with the supply of services (in the definition section including a contract for the performance of work). The services are to be carried out with reasonable skill and care, and there is a guarantee that "any product resulting from the service will be reasonably fit for any particular purpose", and "can reasonably be expected to achieve any particular result". I find that the First Respondent breached the Act. I have already found that the First Respondent did not use reasonable skill and care in respect of the building work. It is clear that the product resulting from the service – the dwelling – was not, and is not reasonably fit for any particular purpose – made known to the supplier (Section 29). The First Respondent was aware that the dwelling was going to be used as a dwelling, and it is not fit for that purpose, and never has been.

[85] The Fair Trading Act 1986 – Section 9 and 11. – misleading and deceptive conduct. Essentially these sections provide that no person shall engage in

conduct that is misleading or deceptive, or likely to mislead or deceive (Section 9) or conduct that is liable to mislead the public as the nature characteristics, suitability for a purpose, or quality of service.

[86] I do not find that there has been any breach of the Fair Trading Act 1986. The Fair Trading Act can only apply to conduct likely to mislead or deceive. That is to say to mislead or deceive the Claimants into believing that a weathertight chalet could be constructed on the site when in fact it could not be. Although the end result is that there has been a failure to construct a weathertight chalet, I think that is because of the First Respondent's breach of contract and negligence. I think it was entirely possible, with good workmanship skill and care, for a weathertight chalet to have been constructed. All the material would suggest that many such chalets have been constructed world wide – but not here.

[87] Accordingly, I find NZLC liable to the Claimants in breach of contract, in negligence and by virtue of a breach of the Consumer Guarantees Act.

LIABILITY OF THE SECOND RESPONDENT

[88] Dorfliger is the person – he is the human face behind his company NZLC. Limited liability companies are incorporated for many reasons. One of these reasons is to protect their shareholders (and/or directors) from personal liability on the basis that anything done by, or on behalf of the company, will be the responsibility of the company, not the individual.

[89] The start point must always be that anything done by, or on behalf of, a limited liability company does not vest responsibility or liability upon directors or shareholders. This is the principle laid down in the Trevor Ivory decision – **Trevor Ivory Ltd v Anderson in [1992] 2 NZLR 517** - However, from that

start point, there stems an exception. This relates to the assumption of personal liability.

[90] Counsel for the Claimants, says that Dorfliger must be personally liable, because he accepted overall responsibility for the construction. Counsel says that "his involvement is as extensive as they get in cases of builders negligence. He was the designer, the builder and the foreman, Mr Dorfliger ought not to be able to say, "I built this defective building, but it was in the name of my company, so I am not liable".

[91] Counsel for the Second Respondent, says that "Dorfliger operated under the protection of the limited liability company, his letterhead and all communications made it clear, he was signing on behalf of the company. At no time could Mr and Mrs Middlemass been under any impression they were dealing with the company that they first contracted with". I think Counsel intended the words "not have been under the" rather than those underlined. Counsel continues "there is nothing to indicate that Mr Dorfliger did anything to indicate something special or unusual that would put him in the category of having personal liability. He employs a significant number of staff and worked with those staff again emphasizing that it was not Mr Dorfliger, but the company and its staff, including Mr Dorfliger".

[92] In paragraph 79, I referred to the contract documents. The document dated 17th September 1999 is not on letterhead and there is no direct description of the name of the builder. However, it is signed by two people, firstly Martin Werndle, referred to as "administrator" and secondly, Peter Dorfliger, referred to as "director". The second document dated the 27th day of October, is signed by the same people, under the same designations, but is on letterhead, entitled NZ Log Chalets (no limited). A letter dated the 17th day of November 2000 and an invoice No. 58631 from the company were produced, as was a cheque dated the 13th day of October 2002 issued to the company by SE & SD Middlemass.

[93] I am satisfied that the Claimants were and at all times knew they were dealing with the limited liability company. There was no correspondence from Dorfliger personally and no correspondence of any kind suggesting that the contractual arrangements were with him. Their evidence was that they went to Rotoiti to discuss the idea of the chalet after having seen the design advertised in the "yellow pages". They met Dorfliger and were introduced to Martin Werndle. Thus they responded to an advertisement (by NZLC) and met Dorfliger and another employee - they did not respond to any direct personal representation from Dorfliger.

[94] The Claimants Counsel referred to authorities with which I am familiar - **Carter (and others)** v **Auckland City Council (and others)** –CIV–2004-404-2192. **Morton** v **Douglas Homes Limited** [1984] 2 NZR 595, **Callaghan** v **Robert Ronayne Limited** (1979) 1 NZCPR 98 and **Bowen** v **Paramount Buildings Limited** [1997] 1 NZLR 394. These authorities establish that a director can be personally liable. This liability is not by reason of status as a director, rather by reason of personal acts and the assumption (whether imputed or actual) of a duty of care. A director may be liable in such situations, if he acts on behalf of the company in his personal capacity, rather than simply for the company as its director. These authorities depend upon the doing of "something special" and unusual – e.g. in **Morton** – the ignoring of expressed advice from the engineer – "the owner of a one man company may assume personal responsibility" – "something special is required" – **Trevor Ivory** P 524.

[95] Dorfliger negotiated the contract, applied for the building consent and was the foreman of the work gang which undertook the construction. He had hands on personal involvement. He instigated and undertook a visit – during his holiday – to the site – in an attempt to fix weathertightness issues during bad weather. However, he was by no means a "one man band". He was in charge of a gang of workers. There was at least four including Dorfliger. There is photographic

evidence of this. It appears (based on the number of workers) that the majority of the work was undertaken by others. Mr Werndle assisted with the negotiations and also signed the contract. The holiday trip was an example of diligent company management and client service. There were no personal guarantees or commitments from Dorfliger. "Hands on" involvement is by no means uncommon in respect of what may be described as "one man companies". If this in itself were to create a situation where directors of such companies became personally liable, (especially where the companies had a contractual obligation), then the concept of limited liability would have little meaning. The Trevor Ivory decision was just such a situation. Here, a one man company contracted to provide agricultural advice to an orchardist. Mr Ivory gave the advice, but did so for the company as its director. He did not assume any personal duty and the orchardist contracted with the company Trevor Ivory Limited. Mr Ivory was not personally liable, either in breach of contract, or for the negligent advice. There was no evidence that Mr Ivory was not simply acting as the company performing its contractual obligations.

[96] The Claimants were aware, that they were dealing with a limited liability company, not with an individual. The initial approach was made by them on that basis (paragraph 93) Mr Werndle assisted with this negotiation and signed the contract together with Dorfliger. Se & SD Middlemass did not seek personal guarantees or assurances from Dorfliger and he did not give any.

[97] The Claimants entered in to the contract with NZLC. Dorfliger did not do or say anything so unusual or so special so as to step outside the protection firstly afforded him by that contract or secondly afforded him by limited liability. Accordingly, I reject the claim against Dorfliger personally and dismiss it.

LIABILITY OF THE THIRD RESPONDENT

[98] The question of whether ODC was also responsible, and if so to what degree, depends upon what duties ODC owed to the Claimants (if any) and whether or not these were complied with.

[99] Counsel for ODC conceded that ODC had a duty to check the plans and specifications prior to issuing the consent. Counsel suggested that there was no statutory duty to inspect the dwelling while it was in the course of construction. Although there was a duty to issue notices to rectify, (if issues became apparent) there was no duty to go beyond that and ensure that the notices were complied with.

[100] ODC complied with its duty to consider the plans, specifications, engineer's calculations etc and to issue a consent only if satisfied that these were adequate. The Claimants expert, Mr Gibbs, alleged that this information was inadequate, but I am satisfied that he did not have full information available when he came to that conclusion. I consider that the information available to ODC was adequate and therefore the issuing of the consent met the statutory requirements. In particular, Mr Lawrence who gave evidence for ODC – he was the building control manager for Rotorua District Council – considered the information available to ODC to be completely adequate.

[101] Mr Lawrence's evidence was interesting and unusual. He said that his Council had experienced no problems with the workmanship of NZLC (which is a Rotorua based company). He also said that so far as inspections were concerned, his inspectors would let "operators" like NZLC "get on with the job and do their own thing" as there was in fact little that the inspectors could look to and analyse in respect of such a unique construction design. What he was saying was, that provided the operator was recognised as a good one, the local authority would simply let the operator get on with the job. He said that

because of the unique construction design it would not be possible for an inspector to reasonably discover anything amiss while (for example) the logs were being assembled.

[102] Counsel for ODC submitted that a territorial authority has no statutory obligation to inspect while a dwelling is under construction. It is well established that the inspectors for a territorial authority are not clerks of works. They are not expected to closely monitor or supervise the job to protect the home owner from every eventuality. However, they do have a statutory duty to issue (or refuse to issue a Code Compliance Certificate) and usually the only way that they will be able to make that decision is by inspecting. If they inspect they owe a duty in respect of the inspection process. I note with some interest that Mr Lawrence said that his local authority had a system for checking upon and reviewing building consents where no inspections were called for. Clearly that authority anticipates an inspection process.

[103] There are numerous authorities, for example: **Invercargill City Council** v **Hamlin** [1994] 3 NZLR 513, **Stieller** v **Porirua City Council** [1986] 1 NZLR 84,– **Sloper** v **WH Murray Ltd** & **Maniapoto County Council** (DC Dunedin) A31-85. While not being a clerk of works - there is nevertheless a statutory duty to carry out inspections in accordance with the reasonable standards of the day.. The purpose of the inspection process is to ensure reasonable conformity with the requirements of the by-laws and good building practice – **Peters** v **Muir [1996] D.C.R. 205 AT 218.**

[104] In respect of this dwelling there were limited inspections. Dorfliger indicated that he did not call for them as he was not within cellphone communication (of ODC). There were many inspections and meetings - once the dwelling was basically completed in an attempt to rectify weathertightness issues.

[105] The inspections undertaken by ODC were sufficient to ensure that the building consent was complied with. I take particular note of Mr Lawrence's evidence, and I am persuaded by that evidence. This construction was unique and it was better to let the operator get on with the job, there was nothing that was likely to be detected by inspecting the construction while the log walls were being placed.

[106] Once the dwelling was basically constructed and weathertightness issues were apparent, ODC did as much as reasonably possible, indeed far more than it would have been required to do by law, (if indeed anything was required by law) to assist the Claimants, NZLC and Dorfliger to reach a resolution. In particular ODC (in compliance with its statutory duty) refused to issue a Code Compliance Certificate.

[107] There is a another issue so far as a possible liability of ODC is concerned. That is the use of western red cedar logs in the construction of the dwelling. Do these logs meet the fifty year standard required by the Building Act for a building consent? There was conflicting evidence. Evidence called by the Claimants simply stated as a fact, that they did not. Evidence called by ODC was that western red cedar is a far more durable timber than some other timbers used in construction and that a distinction should be drawn between fully formed logs and weatherboards. Evidence on behalf of ODC was that western red cedar was a timber commonly used in construction of this type of dwelling and there was no problem with it or the fifty year standard. I accept that evidence.

[108] It is my view that ODC has fulfilled its statutory obligation and therefore it is not and cannot be liable to any of the parties for the loss following from weathertightness issues. ODC complied with its statutory duty. When weathertight issues were detected it did its best to "broker" a solution between the Claimants and NZLC and Dorfliger. It issued notices to rectify. Although it was unwise to "coach" a solution, the "coaching" did not contribute to

weathertightness issues. It therefore follows that there can be no liability to the Claimants by ODC.

CONTRIBUTORY NEGLIGENCE OF THE CLAIMANTS

[109] There are three allegations levied by Respondents against the Claimants. These are:

(a) The Claimants or alternatively SE & SD Middlemass were in fact the contractors, with the First Respondent merely being employed to undertake some of the building work on their behalf.

(b) The Claimants caused or contributed to the leaks by undertaking the caulking.

(c) The Claimants caused or contributed to the leaks by not adjusting the pole which supported the roof.

I deal with each of these issues in turn.

[110] I do not find that either the Claimants or SE & SD Middlemass were the building contractors. It appears that in the initial stages SE & SD Middlemass did consider completing the chalet themselves, but that idea was soon abandoned. Even if it had not been, that in my view, would not have made them the contractors. Their evidence (which was entirely believable) was that they knew nothing about building and contracted with the First Respondent to have the chalet built. The names S & S Middlemass appear on the building consent as the applicant and as the owner. That, in my view, is no more than "administrative convenience". Clearly they were not the owner. The owner was the family trust which included the third party "Bailey Ingham Trustees Ltd". The evidence was that Dorfliger submitted the application for the

building consent and he may not have been aware that the property was owned by the family trust. In my view, the issuing of the building consent in that way means nothing. I do not accept the submission on behalf of NZLC and Dorfliger that it is "a natural deduction that they are the principal builders who in turn engaged NZLC to carry out a substantial part of the building".

[111] I find that SE & SD Middlemass entered into the building contract with NZLC as agents for the trust. The building contract itself is significant. There are two documents. One dated the 17th day of September 1999 and the other dated the 27th day of October 1999. The documents are similar, but not identical. There is a price reduction in the second document, but the work to be undertaken by the builder appears to be the same or if not very similar. The first document is headed "**Costing Complete House**". The second document is headed "**Contract Complete House**". The second document contains the phrase "**includes – construction, labour, supervision and co-ordination of sub-trade".** The first document does not contain that phrase. Both documents contain the phrases:- "**Construction of the house will be complete to lock up stage. This means that when we have completed the construction of your home it is ready for you to move your furnishings in immediately. If the owner has a specific wish to cover the compiled house with oils, varnish or other preservatives then this would be an extra to the contract, since this is a personal preference and therefore not essential**". The first document contains the phrase "**we congratulate you for your decision to build a log home from New Zealand Log Chalets Ltd and look forward to building you a fine house**". The second document contains the phrase "**the builder undertakes to ensure good quality workmanship by all trades and services**". This is not a contract wherein a builder agrees to provide limited services to owners who are themselves to co-ordinate the project as head contractors. This is a contract to build a house for clients whose only real involvement in the process is to pay the price. Indeed the various payments (there were four required) are carefully detailed in the contract.

[112] The First and Second Respondents say that the actions of SE & SD Middlemass in caulking the dwelling, especially the log extensions was entirely contrary to good building practice in respect of the design. It prevented the logs from settling, thus guaranteeing that there was a major weathertightness problem. I have given this very careful consideration, and I reject it. I do not believe that the caulking compound prevented the logs from settling. "By and large" I think that the caulking compound (accepting the evidence of the Claimants expert – Mr Gibbs – and my own observations) did not penetrate between the logs. In the main it was a surface application only and if some of it did penetrate between the logs that was insufficient to prevent the logs from settling. Incidentally had I not reached this conclusion, I would have concluded that any liability created by the caulking vested in ODC because it was ODC that required (in the notice to rectify) that the caulking be completed. This requirement was further emphasised in the verbal recommendation of Mr Apeldoorn – the building inspector - that the dwelling should be caulked to "protect the investment". Not only was the caulking solution recommended to the Claimants, they were directed and required to do it pursuant to the notice to rectify. If therefore, the caulking itself had created the mischief (and I expressly find that it did not) the liability flowing from that would have vested in ODC.

[113] The failure to adjust the pole supporting the roof. The original problem with the pole being non adjustable came about as a result of the first notice to rectify - requiring a bracket and bolts of stainless steel to be fitted. When that was fitted it was non adjustable. The second notice to rectify required the pole to be provided with an "appropriate adjustment". It is clear from the evidence that this could have been achieved even (with the non adjustable bracket) relatively easily. The first notice to rectify which required the stainless steel bracket is dated the 3rd day of July 2001 and the second notice which required adjustment is dated the 6th day of November 2002. I surmise that by the time the second

notice was issued, there was already a major problem (although not a major weathertightness problem) with the lack of adjustment.

[114] The notice to rectify relating to the adjustment of the pole supporting the roof is issued to SE & SD Middlemass. The failure to adjust the pole has contributed to weathertightness issues. It has created a gap between the top logs and the roof and made the problem worse. However, the prime cause of the problem is water penetration between the logs, particularly at the extensions. But for one series of events, I would have taken the view that the failure to adjust the pole and the subsequent (secondary) effect on weathertightness caused thereby (after the issue of the notice), was the responsibility of the Claimants. However, when considering all factors, I do not consider it would be neither fair or appropriate to take that view.

[115] The Claimants (here I use this term loosely to apply to SE & SD Middlemass) have no particular expertise either in law or in building. They had already done their best to comply with the notice to rectify requiring the caulking - which was reinforced by the verbal advice of Mr Apeldoorn. From their point of view their reasonable attempts to comply meet with a disastrous and an entirely negative response – that is the abandoning of any attempts to assist by NZLC and Dorfliger. Assessing their evidence, I conclude that they did not want to intervene again, least they be "blamed" for further intervention – it was better to do nothing further, least they get themselves in to more strife. Dorfliger's action in abandoning the "rescue" process and Mr Apeldoorn's actions in either supporting him or at least not objecting to this were, in my view, entirely inappropriate. I think the response (do nothing further) of SE & SD Middlemass at that point was, in contrast, entirely reasonable. Their response (until then) had been to do what was suggested, in fact what was required, in terms of a notice to rectify. This was met with an entirely negative response from the builder - and no support from the building inspector.

[116] The Claimants did what was required of them pursuant to the notice to rectify and pursuant to the recommendation of the building inspector. SE & SD Middlemass acted entirely reasonably and appropriately. The result for them was that the builder reacted in an extreme way and the local authority did not support them. In my view it is entirely reasonable that they did not choose to repeat the exercise in respect of the support pole.

[117] I do not consider that the Claimants have any liability by way of contributory negligence and I do not consider that either the Claimants or SE & SD Middlemass (personally) were the head contractor.

REMEDY

[118] I am required to determine is whether the dwelling is weathertight and if it is not, what is required to make it so. That is to say what is the most appropriate remedy?

[119] The nature of the solution to my mind, depends upon whether the logs have rotted and are rotting, compromising the structural integrity or whether the structural integrity is intact. Here there was conflicting evidence. The Claimants witness – Mr Gibbs was of the view that rot had inevitably commenced within the logs and it would continue. This evidence is the basis of the Claimants claim for a complete rebuild. Evidence from witnesses, on behalf of all Respondents however, was that the logs were now relatively dry and there would be little, if any, internal rot. The structural integrity was not, and would not be, compromised and the dwelling could easily perform for its fifty year intended life.

[120] There are two basic solutions suggested by the parties. The Claimants preferred solution is to demolish the chalet and rebuild a conventionally designed

dwelling of brick. They say that they contracted with NZLC for the construction of a no maintenance dwelling and that was particularly important as SE & SD Middlemass are nearing retirement. They say that the whole structural integrity of the chalet has been compromised by rot. They say that the chalet design cannot be constructed to a weathertight standard on this particular site and therefore it follows that the solution must be the cost of demolition and replacement with a conventional brick home. Their Counsel used the words already referred to in this determination "a sedan car should not be replaced with a mini". The alternative solution is to repair the log chalet. There were two options which involved over cladding. Later (Mr Mullooly) one option which involved a filler and weather proofing compound known as chinking or alternatively an over cladding with weatherboard. Although denying liability all Respondents say that the repair option is suitable and acceptable and that, in particular, the structural integrity of the chalet has not been compromised by rot.

[121] The nature of this design is radically different from other dwellings. Most dwellings which have weathertightness issues can be repaired or rebuilt (using the same or similar materials) to a weathertight standard. Claimants can expect to get a dwelling that looks and performs like the dwelling prior to the repair, but without the leaks. That, of course, is what they are entitled to. If a rebuild is disregarded, then none of the options proposed by any of the parties (leaving aside Mr Mullooly's chinking for the moment) will give the Claimants a dwelling that looks like the original chalet. Although the assessor included a rebuild as one solution, none of the parties favoured this solution. I believe it would be possible with careful workmanship to rebuild to weathertight standard. However, to provide a remedy which gives the Claimants a conventional brick house is a totally different remedy. The only similarity is that externally the house will be almost maintenance free (but probably not internally). That is where the similarity would end. The Claimants say they should not be given a "mini to replace a sedan". Neither should they however be given a "sedan to replace a mini". I have come to the view that the Claimants are simply now

disenchanted with the whole idea of the chalet design and that is primarily why they want to be compensated (in money terms) for the value of a conventional home. I do not think they are entitled to such compensation **unless the whole structure of the chalet is compromised with rot**. That is not my finding. I note also, that the Claimants accepted (with some reluctance), the idea of "boxing" the extensions – which would have been a partial re-clad. The Claimants are entitled to be compensated to enable repair of the chalet so that it resembles, as far as possible, the present structure. Obviously any repair will leave the interior intact. It is the exterior that would be altered.

[122] I was attracted to Mr Mullooly's chinking proposal when he gave his evidence at the hearing. He was confident about this and offered to guarantee it. This proposal put simply, involves the filling of all the cracks in and between the logs with a chinking compound imported from the USA. This compound can be left white or it can be stained. It seems to me that this is the only solution that will maintain the complete visual integrity of the original chalet structure for the Claimants. For that reason I was attracted to it. However when Mr Mullooly filed his affidavit (post hearing- in December 2005 - by consent), he offered an alternative solution of covering the external structure with weather boards. He said this would be a "preferred solution". That is why I reject the chinking as a solution. Mr Mullooly's original evidence was unequivocal. That is that the chinking would work. It would stop the leaks and he would guarantee it. He was asked merely to provide a quotation for doing this. He chose to swear an affidavit and provide a further alternative solution. He refers to that as a preferable solution. To my mind there can only be one reason why he would do so and that is that he does not have complete confidence that the chinking remedy would work.

[123] Had I concluded that the structural integrity of the logs was compromised by rot then it follows that the solution would be to compensate according to a

"rebuild" or an alternative design. However, on the basis that the structure is not compromised, then it follows that an over cladding remedy is appropriate.

[124] Mr Gibbs said that the ply wood would need to be coated (painted) every five years. That is how the $53,000.00 allowance (claimed for painting) is calculated. Mr Duffield also referred to painting every five years at a cost of $5,300.00 inclusive of GST per time. Mr Roxburgh however, indicated that the ply wood would not be required to meet the fifty year durability test (it not being a structural element). He said that recoating every five years was not strictly needed to comply with code performance, but was an elective maintenance cost. He said that regular maintenance would enhance durability. The $53,000.00 allowance claimed for painting is at best a reasonably unreliable estimate. Assuming that it costs $5,300.00 to apply a coating to the ply wood in 2006, I do not see how a recoating forty five years later in 2051 could possibly be undertaken at the same price. The evidence as to whether ongoing maintenance will be necessary was conflicting. It is fair to allow a "one off" allowance of $5,300.00 to preserve the ply wood at the outset. Otherwise, I adopt the Claimants calculations (their witness Mr Duffield) as to quantum.

[125] I have concluded that neither the missing piles, nor the roof, are the cause of weathertightness issues, and accordingly the amounts claimed in respect of these items are disallowed. I saw no evidence of leaks to the roof when I inspected, and the evidence did not direct me to any – only the question of Mr Gibbs (paragraph 104 his statement) "Have the open gaps….compromised the structural integrity of this roof at this point?" There are leaks between the top of the log walls and the roof, but the remedy is to lower the adjustment on the support pole.

QUANTUM

[126] The issue of quantum is dealt with by the assessor – Mr Lewis, by the Claimant's witness, Mr Duffield and by the Third Respondent's witness Mr Roxburgh. All these witnesses dealt with quantum on a quantity survey basis, and I deal with each in turn.

(a) Mr Lewis – Mr Lewis had three alternative solutions. Firstly, a rebuild costed at $164,671.50. Secondly, an over clad with ply costed at $79,258.50. Thirdly, an over clad of the top floor only, with a veranda to protect the ground floor costed at $79,206.75. He did not consider that the roof needed to be replaced.

The difficulty with Mr Lewis's costings is that they were undertaken for the purposes with his report, which he completed at the end of April 2004, effectively one and a half years before the hearing. This is no reflection upon Mr Lewis, but it does of course mean that apart from anything else, his costings are time dated and to that extent, less reliable than other costings. For that reason, I have placed the least reliance upon them.

(b) Mr Duffield – Mr Duffield produced the three estimates, one for rebuilding and the two alternative re-cladding estimates, which form the basis of the Claimant's pleading. I do not repeat the figures, but I note that his estimates include the $1,700.00 for missing piles, $14,600.00 for replacement of roof and $53,000.00 for maintenance initial and ongoing (all GST inclusive). I do not regard the missing piles or ongoing maintenance to be weathertight issues. Nor do I consider that the roof needs to be replaced.

(c) Mr Roxburgh – Mr Roxburgh estimated that the costs of a re-clad was $62,677.00 GST inclusive. Mr Roxburgh however, conceded that when

compared with Mr Duffield's estimate, his estimate omitted several significant aspects, e.g. professional fees, alternative accommodation, local authorities, roof replacement, stainless steel tie-downs. Mr Duffield conceded that when "apples were compared with apples", there was little difference (a few hundred dollars only) between his estimate for a re-clad and estimate number two (the first re-clad option suggested by the Claimant).

[127] I consider the Claimants are entitled to a remedy based on Mr Duffield's costings for a re-clad. That is their claim for $205,800.00 (including GST if any) less $1,700.00 for missing piles less $14,600.00 for replacement of roof and less $47,700.00 for ongoing maintenance (allowing $5,300.00 for initial preservation). That is to say $141,800.00 (inclusive of GST if any). There was no compelling evidence advanced as to why the more expensive re-clad alternative should be preferred. The issues of damages for stress and costs are dealt with later in this determination.

ALLOWANCE FOR UNPAID CONTRACT PRICE

[128] It was accepted that there had been short payment by the Claimants to NZLC of $6,957.28 of the original contract price. Counsel for NZLC and Dorfliger claimed a credit for this in the event that NZLC or Dorfliger were held liable. I have difficulty with that claim. In view of my finding what Counsel is suggesting is that although the contract was never completed – the house was never weathertight – the Claimants have an obligation to pay the full contract price and any short fall needs to be deducted from any amount required to put matters right now. That is not correct logic. NZLC was entitled to payment for the work it did to the point of time when effectively it abandoned the project (or be it the nearly complete project). While all parties accepted that there was a short fall in payment of the overall contract price there was not evidence lead by

any party, as to whether or not, by the time the contract was abandoned the Claimants had paid fair value to NZLC for what they recieved. It might well be that the Claimants would say that they paid more than fair value. It might well be that NZLC would say that they did not pay fair value, that is speculation. No evidence was lead. The only thing that is clear to me is that the contract was not completed – a "complete and weathertight" dwelling was not constructed. I cannot see in those circumstances, that NZLC as the builder, has any right to entitlement to claim the full price and I am not going to award it.

DAMAGES FOR STRESS

[129] The Claimants claim a total of $30,000.00 for stress suffered by SE & SD Middlemass. All Respondents say that there can be no claim for stress, firstly because there is no evidence of stress and secondly because the Claimants (or perhaps more correctly the Claimant) is a Family Trust and cannot suffer stress. There is case law (provided by the Claimant) to confirm that damages for stress can lie in respect of the beneficiaries of a Trust. The particular decision is **La Grouw** v **Cairns** (2004) 5 NZCPR 434 – a judgment of O'Regan J the High Court of Auckland, No. CIV 2002-404-156 – here the High Court confirmed the District Court finding that Ms La Grouw (who was after the occupier of the dwelling owned by the Trust) could be awarded general damages for distress caused by leaks thereto. Even though she was acting in her capacity as a Trustee of the Trust. Mr Dowthwaite (for the first and Second Respondents) referred me to Adjudicator Dean's determination, claim 00210 – Baldock, where he determined that Trustee Claimants could not claim for stress. This determination was issued "hard on the heels" of the decision in La Grouw. It would seem that La Grouw was not (at that time) available to Adjudicator Dean. He in any event expressed a contrary view in determination 027 – Ponsonby Gardens, as has Adjudicator Green in determination claim 00540 - Tucker. La Grouw seems to me to settle the matter quite easily. As a matter of law there is

no reason why damages for stress cannot be awarded – so long as stress relates to the cause of action, rather than to the litigation itself. The question therefore is whether there is any evidence of stress and if so should an award be made and how much?

[130] I refer to some aspects of the evidence.

(a) **"Sally and I were shocked. The house leaked like a sieve".**

(b) **"Over Christmas however, the house leaked dreadfully. An unbelievable amount of water was pouring in through the corners of the walls, through the windows and between the logs. It was obvious we had a serious problem".**

(c) **"It is hard to describe how stressful it has been with the problems with our house".**

[131] This property leaked and leaked badly from "day one". It continues to leak. SE & SD Middlemass were "shocked" and "stressed". This was a result of the cause of action, not the litigation. They said so in their evidence.

[132] In the typical leaky homes scenario the dwelling at first appears to be well constructed and there are no problems. Later, sometimes years later, problems slowly develop and the owners, whether or not they have any remedy in this jurisdiction, (or any other jurisdiction) are faced with a nightmare. That is bad enough, but at least they or the previous owner experienced some initial degree of normality. Here the dwelling leaked "like a sieve" (to adopt SE Middlemass's words) before it was completed and nothing has changed. SE & SD Middlemass are entitled to a damages remedy for stress. The only question is how much this should be. Remedies have been restricted and in this jurisdiction are often between $5,000.00 and $10,000.00 per applicant. Here the remedy sought is $15,000.00 per applicant. However, there is a precedent for damages in the region of $15,000.00, namely Putman (claim 00026) where

$15,000.00 was ordered in respect of Mrs Putman and $5,000.00 in respect of Mr Putman.

[133] SE & SD Middlemass are only entitled to damages relating to the stress directly relating to the leaky dwelling. They are not entitled to any damages for stress in respect of pursuing the claim at law. It is therefore a question of what should be awarded if anything. In respect of this claim, there are two unusual factors:

(a) The dwelling leaked from day one (paragraph 132).
(b) The dwelling does not leak, only in some places – it leaks everywhere.

These facts justify an award higher than average - $10,000.00 to each Claimant is appropriate.

COSTS

[134] The next issue that I need to deal with is the question of costs against the unsuccessful party (NZLC). Here the Claimants have made much of their actual legal costs and submit that a substantial claim for costs is justified.

[135] How the Claimants choose to pursue their remedy at law is a matter for them. Here they were very well represented, and no doubt the cost of representation was a reflection of this. Costs cannot (however) be awarded on that basis.

[136] In terms of Section 43(1) WHRS Act I can award costs against an unsuccessful party if there has been bad faith on behalf of that party or if allegations or objections by that party have substantial merit. That is not the case here. I dismiss the claim for costs.

ORDERS

[137] (i) The First Respondent – New Zealand Log Chalets Limited (NZLC) is to pay the Claimants - Stuart Emerson Middlemass and Sally Diana Middlemass and Bailey Ingham Trustees Limited as Trustees of the SE & SD Middlemass Family Trust the total sum of $161,800.00. (inclusive of GST if any) – made up as follows:

(a)	Repair by way of re-clad (ply over battens – less allowance for roof and piles)		$136,500.00
(b)	One time painting		$5,300.00
(c)	General damages – (stress and anxiety)		
	SE Middlemass		$10,000.00
	SD Middlemass		$10,000.00
	- Section 42 (1) WHRS Act	Total	$161,800.00

(ii) The claim against the Second Respondent is dismissed. – Section 42 (1) WHRS Act.

(iii) The claim against the Third Respondent is dismissed. – Section 42 (1) WHRS Act.

(iv) The claim for costs is dismissed. – Section 42(1) and Section 43(1) WHRS Act.

STATEMENT OF CONSEQUENCES

Section 41 (1)(b) (iii) WHRS Act

[138] 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 payment, and that party takes no step to pay the amount determined by the adjudicator, the determination may be enforced as an order of the District Court including, the recovery from the party ordered to make the payment of the unpaid portion of the amount, and any applicable interest and costs entitled arising from enforcement.

Dated this 6th day of April 2006

Timothy Scott

Adjudicator