CLAIM FILE NO: 00765

UNDER The Weathertight Homes Resolution Services Act 2002

IN THE MATTER of an adjudication

BETWEEN **NICOLE ODETTE MILLER-HARD**

Claimant

AND **MELANIE GAIL STEWART**

First Respondent

AND **ROBIN LAWRENCE FORD**

Second Respondent

AND **BAY BUILDING CERTIFIERS LIMITED**

Third Respondent

AND No Fourth Respondent, the **TAURANGA DISTRICT COUNCIL** having been struck out.

AND No Fifth Respondent, **GEOFFREY MORRISON** having been struck out

AND **RAY MARKLEW** trading as **MODERN TEXTURES**

Sixth Respondent

AND **HOWARD REID** trading as **LA BAIE BUILDERS**

Seventh Respondent

(intitulation continued next page)

DETERMINATION OF ADJUDICATOR
(Dated 26th April 2004)

AND	**DURASEAL TEXTURE SYSTEMS LIMITED**
	Eighth Respondent
AND	**ROSS MALCOLM** trading as **ARCHITECTURAL DIRECTIONS**
	Ninth Respondent
AND	**PLASTER SYSTEMS LIMITED**
	Tenth Respondent

1. BACKGROUND

1.1 The Claimant in this adjudication, Ms Miller-Hard, purchased a property at 6 Alexander Place, Papamoa in the Bay of Plenty in May 2000. The purchase was made on behalf of herself and her husband from a Ms Stewart (the First Respondent). I will refer to Mr and Mrs Miller-Hard as "the Owners". There was a house on the property, which had been built in 1997 by Ms Stewart's husband, Mr Ford (the Second Respondent). Ms Stewart and Mr Ford had lived in the house from the time that it was built until it was sold to the Owners.

1.2 Prior to moving into the house, the Owners decided to have some alterations made to the ground floor bathroom and to carry out some improvements to the external paths and driveway. When their builder started work on the property, he expressed concerns about some aspects of the construction of the house, and in particular about the condition of the exterior cladding on the house. He recommended that the Owners obtained the opinion of a Building Consultant. A Mr Spraggs, who is a BRANZ accredited adviser, was engaged to inspect the house.

1.3 Mr Spraggs prepared a report, which was critical of several elements of the construction. He concluded with recommendations that included extensive remedial work to the external wall cladding, and replacing the roof cladding. Based on these recommendations, the Owners asked their builder to obtain quotations for the remedial work, and decided to get the work done as soon as possible. Their builder was Mr Reid (the Seventh Respondent) who traded under the name of La Baie Builders. The subcontractor who quoted to repair the external wall cladding was a Mr Tito (the Eighth Respondent).

1.4 The remedial work had been substantially completed by the beginning of March 2001 when the Owners finally moved back into their house. They then commenced proceedings in the Tauranga District Court against Ms Stewart, Mr Ford, Bay Building Certifiers (the Third Respondent) and the Tauranga District Council (the Fourth Respondent).

1.5 After an unsuccessful Judicial settlement conference in December 2002, the Owners successfully applied to the Court to have the proceedings transferred to adjudication under the Weathertight Homes Resolution Services Act 2002 ("WHRS Act"). This was confirmed in the reserve judgment of Judge P S Rollo on 14 March 2003.

1.6 The Owners made an application to the Weathertight Homes Resolution Service ("WHRS"), and their claim was deemed to be an eligible claim under the WHRS Act. The Owners then filed a Notice of Adjudication under s.26 of the WHRS Act on 27 November 2003.

1.7 Prior to accepting the claim, the WHRS sent an Assessor to inspect the house and prepare a report. The WHRS Assessor's report was not complimentary about the remedial work that had been done by Mr Reid and Mr Tito in early 2001. The Assessor expressed the opinion that the entire external wall cladding needed to be replaced, and the metal roofing also needed to be replaced.

1.8 I was assigned the role of the adjudicator to act in relation to this claim and a preliminary conference was arranged for 18 December 2003 in Tauranga for the purpose of setting down the procedure and a timetable to be followed in this adjudication.

1.9 I have been required to issue six Procedural Orders prior to the hearing to assist in the preparations, and to rule on applications and requests made by the parties. Although these Procedural Orders are not a part of this Determination, they are mentioned because some of the matters covered by these Orders will need to be referred to in this Determination.

1.10 The Hearing took place on 15-17 March 2004 in the Cosmopolitan Club in Mt Maunganui. Representation was as follows:

- The Owners (Claimant) were represented by Mr Tomaszyk of Swarbrick Dixon;
- Ms Stewart and Mr Ford (First and Second Respondents) were represented by Mr Briscoe of Davys Burton;
- Bay Building Certifiers Ltd (Third Respondent) was represented by Mr Hern of McElroys;
- Mr Marklew (Sixth Respondent) represented himself, but was only present on 15 March;
- Mr Reid (Seventh Respondent) was not represented and did not appear at the hearing;
- Mr Tito (Eighth Respondent) represented himself;
- Mr Malcolm (Ninth Respondent) was represented by Mr Dafydd Malcolm of R Vigor-Brown;
- Plaster Systems Ltd (Tenth Respondent) was represented by Mr Robertson, its manager.

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

- Greg Miller-Hard, called by the Claimant;
- Kerry Murphy, a building consultant, called by the Claimant;
- Grant Honeyfield (affidavit admitted by consent), for the Claimant;
- Nicole Miller-Hard;
- Geoffrey Morrison, a carpenter involved on the original building, called by myself;

- Mark Hazelhurst, the WHRS Assessor, called by myself;
- Ron Spraggs, a building consultant, called by the Claimant, and evidence given by a telephone conference call;
- Joseph Tito;
- Robin Ford;
- Wayne Wellington, managing director of the Third Respondent;
- John Turner, a building inspector for the Third Respondent;
- Melanie Stewart;
- Ross Malcolm;
- Rodney Faulkner – called by the Tenth Respondent.

1.12 I visited the house on 18 March 2004 and, by prior agreement, only Mr Faulkner, Mr Ford and the current tenants were present. All parties were invited to file written closing submissions by 26 March, and written replies by 2 April 2004. This timetable was confirmed in my Procedural Order No 7 so that any parties not present at the hearing would be aware of my invitation.

1.13 I was due to complete my Determination by 19 April 2004. However, I asked the Case Manager at WHRS to notify all parties that, due to the unusual complexity of this adjudication I was struggling to complete on time, and would prefer to have some more time to check over the analysis and reasoning before releasing my Determination. I asked him to ascertain whether any party would object to my extending the date for completion by seven days. No objections were received.

1.14 The situation has been further complicated by claims for costs from two parties who had earlier been removed (struck out) as parties to this adjudication. I must rule on these claims, but because the other parties have not been given an opportunity to consider and comment on these claims, I cannot issue my determination on these claims at the moment. Therefore, I will issue this Determination which decides all other matters in this adjudication except for these two non-party claims for costs.

1.15 Mr Morrison, who was cited as the Fifth Respondent in this adjudication, made an informal application at the Hearing for recovery of his costs incurred when he was a party in the adjudication. He was struck out as a party in my Procedural Order No 6 on 11 March 2004. A formal claim for costs was made

by Mr Morrison's lawyer in a letter dated 19 March 2004, which will now be circulated to all parties.

1.16 The Tauranga District Council has also made an application for an order for the recovery of its costs relating to this adjudication prior to being struck out as a party (by Procedural Order No 4 on 16 February 2004). This application was received by WHRS on 22 April 2004, and will now be circulated to all parties.

1.17 All parties will be given an opportunity to consider these claims, and file a response if they wish. It is not my intention to include my decisions on these applications in this Determination (as indicated earlier), as I do not wish to delay the publication of this Determination any longer than is necessary.

1.18 Therefore, I would like the parties to respond to these two non-party claims for costs as quickly as possible, and all responses must be in writing and received by WHRS by 4 May 2004. All parties will then have a right of reply on any of the responses, but the replies must be made in writing to WHRS by 11 May 2004. I would anticipate being able to issue my Determination on these two claims immediately on receipt of these replies.

2. CHRONOLOGY

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

- June 1997 – Building Consent issued by Council for construction of new dwelling to Ms Stewart as owner and Ford Developers as builder;
- September 1997 – Code Compliance Certificate issued by Bay Building Certifiers Ltd (BBC);
- March 2000 – Sale & Purchase Agreement to sell property to Owners;
- May 2000 – Settlement of Agreement and Ms Miller-Hard became owner of property;
- October 2000 – Owners return to live in NZ;

- November 2000 – Owners have ground floor bathroom modifications done by Mr Reid, who recommends inspection by a Building Consultant (Mr Spraggs);

- December 2000 – Mr Spraggs inspects and provides Report – Owners move into house;

- January 2001 – Mr Reid provides quotation for carrying out remedial work identified in the Spraggs Report, and also for modifications to upstairs bathroom;

- February 2001 – Mr Reid carries out remedial work and upstairs bathroom modifications, whilst Owners move out temporarily;

- 22 February – Council issues Notice to Rectify for changed window in bathroom;

- March 2001 – Owners apply for Building Consent for changed window, and Council issues Consent;

- May 2001 – Owners issue proceedings in District Court against Ms Stewart, Mr Ford, BBC and the Council;

- October 2002 – Settlement reached between Owners and the Council, and between the Council and BBC;

- December 2002 – unsuccessful Judicial Settlement Conference;

- March 2003 – District Court accepts Owners' application to have the dispute transferred to WHRS adjudication;

- July 2003 – WHRS Assessor completes Report;

- November 2003 – Owners apply for adjudication.

3. THE CLAIMS

3.1 The claims that I am asked to consider in this adjudication fall into two different packages. The first series of claims are the proceedings that were transferred from the District Court and relate to the alleged defects in the house that existed at the time of purchase in May 2000. The second series of claims relate to the alleged defects in the remedial work that was carried out in early 2001.

3.2 The first series of claims revolve around the allegations that the roofing and exterior wall cladding systems specified in the approved building consent documents were not used in the construction. The Owners say that inferior materials and systems were used, and these did not comply with the minimum standards set out in the New Zealand Building Code.

3.3 The second series of claims relate to the remedial work, which was undertaken to correct the defects that were identified in the roofing and exterior wall cladding. The Owners say that the remedial work did not properly rectify the original defects, did not comply with the quoted specifications, and the work was substandard.

3.4 The amounts being claimed can be summarised as follows:

For the matters transferred from the Court:

• Costs of remedial work in February 2001	$ 35,085.00
• Alternative accommodation	3,375.00
• Loan facility and interest	3,683.00
• Consultants fees	1,905.00
• Legal fees	9,755.74
• General damages for stress and anxiety	20,000.00
	$ 73,804.62

I am anticipating that it will be necessary, at a later stage in this Determination, to have to break down some of these costs when considering individual claims or alleged defects. Therefore, I have broken down the costs of the remedial work carried out in February 2001. This breakdown is no more than an

arithmetical analysis of the figures given in the documents produced in evidence, into the following sections:

• Repairs to exterior cladding and plasterwork	$ 20,115.00
• Repainting walls and soffits	4,725.00
• Repairs to roof and associated flashings	6,623.00
• Replacing gutters	1,485.00
• Painting roof	2,137.00
	$ 35,085.00

For matters arising out of remedial work:

• Reclad the dwelling	$ 30,250.00
• Overclad decorative mouldings	7,900.00
• Parapet cappings	3,855.00
• Reconstruct mansard roof framing	8,000.00
• Re-roof the dwelling	12,000.00
• Contingency sum	3,100.25
• Supervision fees	2,000.00
• GST	8,388.16
• Consultants fees	1,330.00
• Legal fees	16,000.00
• Diminution of property value	58,500.00
	$ 151,323.41

3.5 The claims against Ms Stewart are for breach of clause 6.2(5) of the Sale and Purchase Agreement. In general terms, by this clause Ms Stewart warranted that all building work that was carried whilst she was the owner, was carried out with an appropriate building consent, and all the work complied with that consent and all obligations under the Building Act.

3.6 The claims against Mr Ford are that he was either the developer or the builder, or both, and that he allowed unauthorised substitutions in the course of the building work. This was a breach of his duty of care owed to subsequent owners of the dwelling.

3.7 The Owners claims against BBC are that it failed in its duties as a Certifier when it issued a Code Compliance Certificate for a building that did not comply with the building consent or the Building Act. It was also claimed that BBC failed to notify defects when the remedial work was being undertaken, although this claim was not actively pursued in the closing submissions.

3.8 The claims against Mr Marklew are that he was the person who supplied and installed the original exterior cladding system, which did not comply with the building consent, nor with the requirements of the Building Code and that this was in breach of his duty of care owed to subsequent owners of the building.

3.9 Mr Reid was the builder who organised quotations for the remedial work, carried out some of the work himself, supervised all of the work and is alleged to have failed or neglected to ensure that the work was properly done. The claims against Mr Reid are for breach of the terms of his contract with the Owners, in that he failed or neglected to ensure that the work was properly done.

3.10 Mr Tito carried out the remedial work to the exterior cladding as a subcontractor to Mr Reid. The claims against him are in tort for negligence.

3.11 Mr Malcolm was the person who designed the original house and the documents that were submitted to Council for a Building Consent. The claims against him are that he failed to provide sufficient details in his drawings and specifications to ensure that the house would be properly built.

3.12 The claims against Plaster Systems Ltd are made against the “workmanship” and “material components” guarantees issued by that company; and also for breach of the duty of care by failing to notice that Mr Tito had not complied with the technical data sheets when carrying out the remedial work.

3.13 I will firstly review the factual matters surrounding each claim, and make findings on the probable cause of any leaks, the appropriate remedial work, and the costs.

3.14 Initially, I will not be considering liability. Also, I will not be referring to the detailed requirements of the New Zealand Building Code, although it may be necessary to mention some aspects of the Building Code from time to time.

Generally, I will be trying to answer the following questions for each heading of claim:

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

4. THE ROOF

4.1 In this section of my Determination, I will analyse the factual details about the claims concerning the roof. When Mr Spraggs inspected the property in December 2000, he found that there were a number of problems with the roofing. He considered that the following were defects:

(a) Type of roofing material;
(b) Size and fixing of eaves gutters;
(c) Finish to small roof over entry.

4.2 He recommended that the entry canopy should be re-roofed with a membrane roofing and new sill flashings to the window above. He also recommended that the main roof should be replaced with the specified roof, and increased capacity eaves gutters.

4.3 The remedial work that was carried out or supervised by Mr Reid in February 2001 did not include re-roofing the entry canopy, or replacing the main roof. The description of the work done by Mr Reid according to his invoices included repairing the top cap flashing (on the roof), replacing the eaves gutters (spouting), and painting the existing roof.

4.4 Unfortunately, Mr Reid did not attend the adjudication hearing and did not send in any response or submissions for my consideration. However, he did speak to Mr Hazelhurst in April 2003 and his description of the remedial work was:

(a) remove existing hip and re-dress the edge of the existing hip with new aluminium edge;

(b) replace 190 No. roofing screws;

(c) hot water blast the roof;

(d) apply one primer coat and two top coats to the roof (150m²), except for under the hips;

(e) replace the 'Z' flashing behind the spoutings to the south and west elevations;

(f) repair to skylight over the lounge;

(g) supply and install Colorsteel spouting above the sloping parapet (originally there was no stop end to the spouting at this location);

(h) cut away and remove existing spouting and replace with Colorsteel spouting;

(i) make a roof flashing to take water into spouting.

4.5 Mr Hazelhurst, in his report dated 21 July 2003, gave the opinion that the roof cladding should be replaced with the originally specified material. He was not satisfied that the remedial work done in February 2001 had solved the problems, and expressed doubts as to whether some of the stated remedial work had actually been done.

4.6 The dominant issue in this section of my Determination is the type of roofing material that was specified, as compared with the material that was installed. I will then need to review the matter of the eaves gutters, or spoutings; and conclude with consideration of the small roof or canopy over the front entry door.

4.7 **Type of Roofing**

4.7.1 The drawings and specifications upon which the building consent was issued show the roofing material to be Longrun Hi Rib steel roofing, 0.45 BMT, with a Colorsteel G2z or Colorcote ZR8 finish. The roofing that was put on the house in 1997 was a Plumbdek trapezoid profile (27mm high

ribs) longrun steel roofing with a zincalume finish. There are no records to show that the change of materials was approved by the Council or BBC.

4.7.2 The technical literature issued by the manufacturers of these two roofing materials both recommend the use of Colorsteel G2z for severe or moderate coastal zones, and zincalume for moderate coastal zones. The dividing line between moderate and severe zones is when the building is 500m from breaking surf on an exposed coast, although Councils do have the right to classify locations as being severe, or even very severe, if the situation is more exposed. Mr Spraggs reported that this house was "approximately 500m from the Bay of Plenty ocean beach coastline". The WHRS Assessor reported that "the dwelling was located within 500m of the ocean". Mr Ford told me that he thought that the house was about 1,000m from the breaking surf.

4.7.3 When I visited the site, I paced the distance from the water's edge to the house as about 400 paces, which would be between 400 and 450 metres. However, the actual distance is not the determinative factor in this case. Mr Malcolm told me that the Council had assessed the particular location of his house and decided that it should be classified as being in a severe coastal zone. Therefore, the roofing had to be Colorsteel VP or G2z or Colorcote ZRX or ZR8 to comply with the Building Code.

4.7.4 There are other differences between the Hi Rib and Plumbdek roofing sheets. The Hi Rib has a higher rib and therefore the ability to span greater distances. The purlins were spaced at 900mm centres, which was well within the spanning capabilities of Hi Rib and was also satisfactory for Plumbdek. The other main difference is that Hi Rib can be fixed by concealed fixing clips so that there is no need to perforate the ribs for top fixings. Plumbdek can only be fixed by drive screws through the top of the ribs (or top fixing).

4.7.5 There is no evidence to suggest that the Plumbdek was structurally unable to span the 900m between purlins (although the roofing iron would flex more with Plumbdek), but the top-fixing method does lead to

quicker deterioration in exposed locations. The drive screws expose the base metal at each fixing point so that rusting can quickly commence if not sealed or protected.

4.7.6 Mr Spraggs recommended that the roof should be replaced with the originally specified Hi Rib Colorsteel G2z. Three years later, Mr Hazelhurst expressed the same opinion in his report. I have not heard any convincing opinions to the contrary.

4.7.7 It has been submitted by several of the Respondents that the roof was not leaking in 2000, when the Owners purchased the property, and is not leaking today. Therefore, the complaints about the roofing do not come within the boundaries of a "leaky building" and I have no jurisdiction to make any determination about the roofing material. I appreciate that there are alleged leaks around the skylights, but I will set these temporarily aside for the purpose of my consideration of jurisdiction.

4.7.8 When this matter was transferred from the District Court, it was as a result of an interlocutory application by the Owners. The application was opposed by Bay Building Certifiers on the grounds that it was not in the interests of justice (as distinct from economics) that such a transfer should be made. It was never suggested by any party to Judge Rollo that the WHRS adjudicator would not have jurisdiction to determine all matters raised in the proceedings. One of the main points of claim in the District Court proceedings was that an unauthorised substitution of roofing materials had been made when the house was built.

4.7.9 It seems to me that I have inherited this claim, and have been asked by the District Court to make a determination on this claim. My jurisdiction is founded in s.29 of the WHRS Act, which states that I am to determine liability and remedies in relation to **any** claim that has been referred to adjudication. This claim was a part of the proceedings that were transferred from the District Court and have been referred to adjudication.

4.7.10 However, I do accept that the WHRS does not provide a service for the resolution of general building disputes, and usually can only properly consider claims that relate to “leaky buildings”. Does the unauthorised substitution of the roofing material come beneath the umbrella of a leaky building?

4.7.11 The definition of a “leaky building” is given in s.5 of the WHRS Act as “a dwellinghouse into which water has penetrated as a result of any aspect of the design, construction, or alteration of the dwellinghouse, or materials used in its construction or alteration”.

4.7.12 The normal layman’s interpretation of the word “leak” conjures up a vision of water seeping, dripping or even flowing through cracks or holes. There is an expectation of seeing, or at least finding evidence of, moisture entering into the structure or into the inside of the dwelling. However, water can penetrate into a building when it has found a way through (or around) the weatherproofing layer, and this will not always be visible from the inside of the dwelling.

4.7.13 In the case of the roofing material, the sheet steel provides the structural strength to span over the roof framing, and to collect and transport the rainwater into the eaves gutters. It needs to be secured by fixing clips or drive screws to resist wind pressure and gravity, and the method of fixing must adequately allow for expansion and contraction due to temperature changes. The steel will quickly start to rust and deteriorate if not properly protected, so that the method of protection is vital to ensure durability of the roof.

4.7.14 The rusting of a sheet steel roof will usually start at laps, fixing points or cut edges. Mr Hazelhurst produced photographs of severe rusting under the Canterbury prickles, and I could see signs of rust around fixing nail heads and under the edges of flashings. This rust is evidence that water has penetrated through the protective coating and is corroding the base steel. Without constant maintenance, it is only a matter of time before the rust creates holes in the steel roofing material, and water will then leak into the roof space beneath.

4.7.15 It is my conclusion from the above facts that the roofing has already been damaged due to the penetration of water through the weatherproofing protective layer. This water penetration is a "leak" sufficient to bring the roofing within the definition of a proper claim under the WHRS Act.

4.7.16 Having determined that the roofing has leaked, I now need to decide what is the probable cause of the leaks. There has been a suggestion that the rusting at the Canterbury prickles may have been caused by the use of the wrong adhesive, sealant or paint, but no expert evidence was given in support of this suggestion. It is more likely that the rusting has been caused by moisture being trapped between the two surfaces, or corrosion creeping in from the cut edges of the roofing ribs and/or prickles.

4.7.17 The property is close enough to the beach and surf to be classified as being in a severe coastal zone. It is a known fact that salt water corrodes steel at a much faster rate than ordinary water. Therefore, it would be my finding that the cause of the deterioration of the protective coating would probably have been accelerated by the location and exposure to the marine environment. In other words, the cause of the leaking was the use of an inappropriately protected roofing material.

4.7.18 When the Owners arranged for remedial work to be undertaken in February 2001, the decision was made to repair some of the defects identified by Mr Spraggs but not to replace the roofing material. Instead, it was painted. This may have extended the life of the roofing material, but it did not solve the fundamental defect. Both Mr Spraggs and Mr Hazelhurst were of the opinion that the only proper remedy to the roof material problems was to replace the roof with a Colorsteel G2z or Colorcote ZR8 finish. I would accept that this is the remedial work that was needed, and is still needed to be done.

4.7.19 The only evidence that has been given to me on costs is the estimate of $12,000.00 prepared by Mr Hazelhurst. This estimate was to entirely replace the existing roof covering with Longrun Hi Rib 0.55 gauge Colorsteel G2z. No one challenged this estimate, but I have reviewed

the estimate using my own experience as a quantity surveyor. I would accept it as being a realistic estimate based on today's costs.

4.7.20 It should be noted that this work would automatically include replacing all apron, side and eaves flashings, including those around all roof penetrations and rooflights. It does not include the roof parapets or the eaves gutters.

4.8 **Eaves Gutters**

4.8.1 Mr Spraggs considered that the spouting was of an inadequate size or capacity, having a sloping front and low back. In his opinion the spouting needed to be replaced with a larger cross-section type, and with a Colorsteel finish.

4.8.2 The building consent documents show a square section gutter of approximately 140 x 100mm dimensions, and described as a 'colour steel continuous gutter'. The photographs taken by Mr Spraggs in December 2000 show that the main gutters at the base of the mansard roof were probably only 100 x 75mm and were painted galvanised steel. They were also set back against the line of the timber framing, rather than packed out to the line of the EPS sheeting.

4.8.3 There is no evidence to show whether the gutters had started to rust or deteriorate in 2000, and Mr Spraggs did not note any such problems. He recommended that the gutters needed to be replaced because they appeared not to be large enough to cope with peak amounts of rainwater, which could lead to water flowing over the back of the gutter and into the exterior cladding system.

4.8.4 I am satisfied that the eaves gutters were fixed in the wrong position, which would possibly have caused leaks of the sort that concerned Mr Spraggs. Furthermore, the size of the gutters, as originally supplied, was considerably smaller than those shown on the building consent drawings, and did not have the quality of protection (i.e., Colorsteel G2z) required by the consent drawings or the Building Code.

4.8.5 The claim about the gutters was included in the proceedings in the District Court, and was a part of the proceedings that were transferred to WHRS adjudication. The gutters on a building form part of the building's protection against the weather by collecting and directing water away from the exterior cladding. The combination of these factors means that I have jurisdiction to determine this claim about the gutters.

4.8.6 For the reasons stated above, I would find that the eaves gutters were defective in that they were not installed in accordance with the building consent documents, and did not comply with the requirements of the Building Code. They needed to be replaced with the correct size gutters, in the correct position and with the correct finish.

4.8.7 The cost of replacing the eaves gutters was included in the invoices submitted by Mr Reid, and identified as a separate cost by myself in paragraph 3.4 above. The total cost was $1,485.00. I have reviewed this cost against the remedial work that I have outlined in the previous paragraph, and using my own experience as a quantity surveyor. I would accept that this was a reasonable cost for the work done in February 2001.

4.9 **Small Roof over Entry**

4.9.1 When Mr Spraggs inspected the house in December 2000, he was concerned about the absence of a sill flashing at the rear of the small roof over the entry, and the absence of any method of draining water out of the windowsill member. In his recommendations he considered that this small roof needed to be re-roofed with a membrane roofing, presumably Butynol or similar.

4.9.2 Although Mr Spraggs gave no reasons to justify his recommendation to re-roof the entrance canopy, I have no difficulty understanding his concerns. He clearly had concerns about the durability of an EIPS clad surface that was 45º to the horizontal.

4.9.3 There is no evidence to show how Mr Spraggs' recommendation to rectify this small roof was carried out. I would accept the evidence that remedial work was done to the windowsill, and a flashing was installed,

and can only presume that Mr Tito carried out the necessary remedial work within his quotation.

4.9.4 The Owners say that water must have been leaking into the canopy structure, because the soffit light fitting was found to have water in the glass housing in November 2000. Mr Spraggs says that moisture was entering the fabric of the building due to the lack of a sill flashing. I would accept that there probably were leaks in this area. However, there is no evidence of moisture penetration now, so that this would suggest that the remedial work was effective.

4.9.5 If I return to my stock questions (refer paragraph 3.14 above), I would find that there were leaks into the entry canopy roof structure prior to November 2000, and these probably were caused by inadequate flashing at the rear junction with the windowsill. There does not appear to have been any permanent consequential damage, but remedial work was required in the form of installing a new flashing at the windowsill. The cost of this remedial work is "buried" within the figure of $20,115.00 for the total repairs to the exterior cladding and plasterwork (refer paragraph 3.4 above).

4.9.6 There is no evidence to show that this small roof is still leaking, and that is my finding.

5. EXTERIOR CLADDING

5.1 When Mr Spraggs inspected the property in December 2000, he found that there were a number of problems with the exterior cladding and considered that the following were defects:

- Unperforated PVC corner trims, with no mesh reinforcing;
- Absence of window flashings and/or sealant;
- Incorrect profile for Z flashing at gutter;
- Plaster finish hard against Butynol decking;
- Parapets with no slope or cappings.

5.2 It was his recommendation that the remedial builder should consult with Rockcote Architectural Coatings to determine exactly how much demolition was

necessary to permit the installation of PVC mouldings and flashings around windows and openings, and for a genuine Rockcote finish to all the walls. In his opinion, the exterior cladding system was failing, and already allowing moisture to penetrate the fabric of the building.

5.3 Mr Turner, a building inspector employed by BBC, was asked by Mr Reid to visit the house in November 2000. His views were put into a letter to Mr Reid sent soon after his visit. He noted the following:

(a) Side flashings to openings in the exterior of the building have not been installed as would be expected on this type of cladding.

(b) Non perforated flashings have been used on the corners.

(c) Reinforcing fibre mesh has not been used to cover the plastic jointers and flashings.

He expressed the view that the general appearance of the texture coating was in reasonable condition, but had failed in the areas mentioned above.

5.4 The drawings and specifications upon which the building consent was issued described the exterior cladding as a Rockcote insulated system with Armour finish, although the spelling and description does vary slightly between the various documents. The building consent was therefore issued on the basis of the exterior cladding being a Rockcote approved system, which automatically includes technical specifications and data sheets that must be followed by the builder or applicator.

5.5 It is common ground that a proper Rockcote system was not installed on this house. Mr Marklew, who was the contractor who erected and finished the exterior cladding system, did not attend the hearing to give evidence, but he did file a response to the Notice of Adjudication. He says that he was not a registered applicator for Rockcote, but he used a “Plaster system” and he purchased his materials from builders’ merchants (including the Plaster Centre).

5.6 Plaster Systems Ltd is the tenth respondent in this adjudication. This company launched and developed one of the first EIPS systems in New Zealand, under

the trade name of "Insulclad". I am uncertain as to whether Mr Marklew is suggesting that he used a Plaster Systems Ltd system, or whether he was using a generic term to describe an ad-hoc system that he had put together himself.

5.7 Several of the Respondents have made submissions along the lines that the exterior cladding was not leaking in 2000, and has never leaked since then except for one or two very minor leaks. In support of these submissions, they say that the Owners never mentioned leaks to anyone who visited in 2000. However, I am not convinced that this was the situation. Mr Spraggs states that the reason for his visit in December 2000 was to "investigate reports of leaks and deteriorating wall plaster". Mr Honeyfield, an electrician, says in his affidavit that he was shown a leak by the Owners in November 2000.

5.8 Whilst the main thrust of the complaints and concerns was directed at the deteriorating condition of the plasterwork, I would find that the building was leaking through the exterior cladding by the end of 2000. The Owners did write to several of the Respondents in January 2001 and mentioned that the wall cladding was failing and allowing moisture to penetrate inside the house.

5.9 The Owners arranged to have the repair work done by Mr Reid, who obtained quotations for the repairs to the exterior cladding. The quotation from Mr Tito was accepted, which had a job description of "repair and make good plaster work … $14,500.00" [+ GST].

> The repairs will be carried out under the Instructions of Plaster Systems Ltd. They are a owned by NUPLEX New Zealand. They have been in this industry for about 25 years and will give the best advice as to the rectification process. I will in turn give a full Guarantee with the work I complete. This price excludes all painting and supply of scaffolding.

5.10 The Owners also received a quotation from a Rockcote approved applicator, which offered to re-clad the building with a full guaranteed Rockcote system for $22,865.62. They chose to accept Mr Tito's quotation, which appeared to offer them a guarantee for an Insulclad system as marketed by Plaster Systems Ltd.

5.11 There was a considerable amount of evidence given about the work that Mr Tito did, offered to do, or should have done. Much of this evidence was self-serving and more about perceived responsibility and implied liability than reality. I may need to return to this matter when considering liability, but I do not have much

difficulty in reaching my conclusion on the extent of work undertaken by Mr Tito.

5.12 In overall terms, Mr Tito did what he considered was necessary to bring the exterior cladding up to a standard, which would enable him to provide the usual Insulclad workmanship and materials guarantees. He did explain at the hearing the extent of his work in greater detail, but at no stage did I detect any movement away from his overall objective. At the completion of his work on site he provided the Owners with two guarantees. The first was from Plaster Systems Ltd, and was entitled a "materials components guarantee" for 15 years from January 2001. The second was from Mr Tito of Duraseal Texture Systems Ltd, and was entitled a "workmanship guarantee" for five years from January 2001.

5.13 At this point in my deliberations, I will turn to answer my stock questions (refer paragraph 3.14 above) in relation to the state of the building in 2000, and before the remedial work was carried out in February 2001. The claim by the Owners for the reimbursement of these remedial costs was one of the main points of claim in the District Court proceedings. As mentioned in paragraph 4.7.9 above in relation to the roof claims, I believe that I have jurisdiction to determine this claim on the grounds that it was transferred from the District Court for WHRS adjudication.

5.14 Did the building "leak" in 2000? I have already decided that it did leak through the exterior cladding by the end of 2000 and, I should add for clarity, I do not accept that any of these leaks were caused by work done by the Owners or contractors on their behalf, after they had purchased the building in May 2000.

5.15 What was the probable cause of the leaks? The main cause was undoubtedly the absence of some critical flashings around the windows, as well as some cracking that was caused by a lack of mesh reinforcing.

5.16 What damage had been caused? There is no evidence to show that any permanent damage was caused to the timber framing or internal linings in the house. Some framing would have soaked up moisture, but the moisture has dried out and the boric-treated framing will probably be none the worse for the

experience. The damage that has been caused is the deterioration in the edge and perimeter details of the exterior cladding, and the consequential cracking.

5.17 What remedial work was needed? The evidence contained in Mr Spraggs' report, and the contemporaneous observations made by other witnesses persuades me that it would have been inappropriate to apply a 'Band-Aid' repair system. The indications strongly suggested that the defects were not localised, but widespread. The system had failed in the most exposed or vulnerable areas, but the signs were there to indicate that failures would continue. The integrity of the whole exterior cladding was in question, and a prudent owner would have wanted the whole system checked out, and brought up to a recognised standard.

5.18 What was reasonable cost for remedial work? In my view, the Owners could have justifiably accepted the quotation from the Rockcote applicator, at a greater cost of more than $6,000.00 than Mr Tito's quotation. They did not, and chose to go for the less costly option. I would find that the costs that the Owners did incur of $20,115.00 (refer to paragraph 3.4 above) were reasonable.

5.19 Now I will turn to consider the claim made by the Owners that the exterior cladding still leaks and is still defective. This claim relies heavily on the opinion of Mr Hazelhurst and is articulated in detail in his Assessor's report.

5.20 Mr Hazelhurst prepared an extremely thorough and detailed report, which provided an extensive explanation of his research and observations. The reasons for this unusual amount of detail are explained by Mr Hazelhurst under the heading "Terms of Reference" on pages 2 and 3. His record of observations made on the exterior cladding is given on pages 19 to 22 inclusive. This record includes a list of matters that "… appeared a potential location for water ingress"; "… exhibited poor workmanship …"; and were details that failed to comply with typical technical sheets or good trade practice.

5.21 However, Mr Hazelhurst could not find any leaks. On page 23 he stated,

> Non-intrusive moisture meter measurements (Humitest MC100) were taken at critical locations within the dwelling that related to areas of weakness in weathertightness at the

> exterior of the dwelling. No indications of the high moisture content were found to the interior surfaces of the dwelling.

This was repeated on page 45,

> The nature and extent of any damage caused by the water entering the dwellinghouse was not observed by the writer. Statements made by the various parties were the only information available at the time of my inspections (see *Statements by Others* above).
>
> No evidence of damage or high moisture content readings was discovered from non-intrusive moisture meter readings to the interior of the dwelling.
>
> The potential for water ingress was high in a number of areas and those locations are documented earlier in the report.

5.22 All of this detail led Mr Hazelhurst to his all-important conclusion on page 46,

> In my opinion, because of the exterior cladding's lack of compliance with the New Zealand Building Code, its lack of compliance with the Insulclad specification Data Sheets, and because of the number of areas that could allow water entry, the dwelling should be entirely re-clad.
>
> The reasoning for the above opinion and the documentation to support it are included in the body of this report.

5.23 His report was circulated to all parties at an early stage in these proceedings. Everyone, including myself, had the opportunity to absorb and consider the contents. I was concerned about the absence of any evidence of leaks after the remedial work had been done, and I made these concerns known to all parties at the Preliminary Conference in December. As a result of my comments, the Owners engaged Mr Murphy, a registered building surveyor, to inspect the building in January 2004. Mr Murphy's report was filed by the Owners well before the Hearing.

5.24 At the start of the Hearing on 15 March, I asked Mr Hazelhurst to return to the house and thoroughly check for any evidence of recent leaks or failures. He did this and was able to present his findings later on in the Hearing.

5.25 Mr Murphy's views on the exterior cladding in his report were similar to those given by Mr Hazelhurst, although no details were provided:

> The visual inspection to the exterior found there to be a relatively large amount of poorly executed detailing at junctions between different building elements that have significant potential for weathertightness and/or durability failure prior to the expiration of Building Code required performance.
>
> The exterior cladding system was also found to have a number of installation and workmanship shortcomings.
>
> The interior inspection included non-invasive moisture testing (CM) extensively to all outer walls. In most instances all readings were in the low range, which together with no evidence of visual clues/indications, gave no cause to carry out invasive tests.
>
> Numerous invasive tests (RM) were made into bottom plates especially, but also other risk locations, with readings ranging in the 9-20% bracket, which are within acceptable performance levels, though reached the suspicion level.

5.26 Mr Murphy found three locations, which indicated that water had penetrated the exterior cladding (or roof). These were located at:

- North-west corner of Dining room;
- Head of skylight in Lounge;
- East wall of Bedroom 1 (approximately 3m from north-east corner).

5.27 When Mr Hazelhurst revisited the house, he confirmed that there was evidence of leaks in these three locations, and also detected moisture on the west wall of Bedroom 2 in a location almost directly beneath the leak in the Dining room. I have also had the opportunity to inspect the house and see for myself the locations of these leaks, as well as look at the general detailing and finishing of the exterior cladding.

5.28 I will now turn to answer my stock questions (refer paragraph 3.14 above) in relation to the building in its present state. The first question is “does the building leak?”

5.29 The answer to this question is in the affirmative. There are three identified leaks where moisture has not only penetrated the weatherproofing layer, but has also found its way into the framing and internal linings. These three leaks need to be considered separately.

5.30 **Dining Room** The cause of this leak is not easy to identify with certainty. It is possible that the aluminium widow frame has not been properly sealed at the mitre, so that a blocked drainage hole in the windowsill would allow water to build up and seep through to the inside. It is also possible that the deck tiles have reduced the step-down at the sill to the extent that water could be driven under the sill to the inside. However, it is my conclusion from the evidence given to me that this leak has existed for a considerable period of time, and is probably caused by a seal failure between the window/ranchslider jambs and the corner post cladding. This leak has caused localised damage, which could be repaired without necessitating any major work.

5.31 **Skylight in Lounge** This leak can only be caused by a failure in the top flashing to the skylight. It displays all the signs of a longstanding but persistent small leak. The unusual head flashing to this skylight indicates that someone has already tried to fix this leak, but with limited success. The problem should be solved permanently when the roof is replaced, which will allow the head flashing to be properly reinstalled.

5.32 **Bedroom 1** There were several possible causes suggested for this leak, but I think that only two deserve serious consideration. Firstly, it is possible that moisture could be migrating upwards from the base of the cladding, either by capillary action behind the cladding, or by wicking up the unpainted concrete blocks. However, I think that the second possible cause is the most likely, or probable cause, in that the leak is from above. The apron flashing beneath the sloping parapet is probably failing to divert all the water into the gutter. This is a very untidy detail with the eaves gutter being cut into the EPS backing, and providing the wind-driven rain with several potential entry points to attack. This detail needs to be re-built to stop this leak.

5.33 **Bedroom 2** Having carefully considered the evidence about this leak, I am satisfied that it is probably caused by water seeping down from the leak in the Dining room. I am not persuaded that the pergola fixings, or the adjacent ground levels have contributed to this leak. The damage is localised and will necessitate minimal remedial work.

5.34 Although these were the only detected leaks, Mr Hazelhurst has formed the opinion (as previously stated) that the house should be entirely re-clad. I have

considered all of the evidence, and the details provided by Mr Hazelhurst that have caused him to come to this conclusion. On the other hand, Mr Tito and Plaster Systems clearly disagree with this conclusion. Mr Tito, who I accept is an experienced person when it comes to EIPS cladding, tells me that the cladding system is generally sound, although he did admit that some of the details were “less than perfect”.

5.35 I am not persuaded that the exterior cladding on this house needs to be completely removed and re-clad. There are two leaks that need to be fixed, but that is insufficient to justify the replacement of all the cladding. I am aware that some of the detailing does not strictly comply with the Insulclad technical data sheets, but the examples shown to me do not cause me to conclude that the whole cladding system is inadequate, and substandard.

5.36 In paragraph 5.17 above, I decided that the integrity of Mr Marklew’s cladding system was in doubt and the whole system needed to be checked out and brought up to a recognised standard. I am satisfied that Mr Tito has done just that, and I see no justification for doing it all again.

5.37 Some remedial work is needed to be done, and should be done. I have already reviewed the two leaks through the exterior cladding, and I am concerned that the parapet cappings were not installed by Mr Reid in 2001. It appears that he was paid to do this work, which was an important part of the remedial work that needed to be done in 2000.

5.38 I would assess that the cost of the remedial work to correct the leaks, and consequential damage caused by those leaks, would be in the order of $2,700.00. This cost includes all preliminary and general costs, temporary protection, necessary making good (repainting and the like), margins and GST.

5.39 I would assess that the cost of supplying and installing parapet over cappings in Colorcote steel would be in the order of $1,600.00. This cost includes all preliminary and general costs, necessary making good, margins and GST.

6. OTHER CLAIMS

6.1 I think that it is appropriate at this point in my Determination to summarise my findings on the substantive claims about the leaks, and how these relate to the quantum claimed (refer paragraph 3.4 above).

6.1.1 **Repairs to exterior cladding and plasterwork (2001)** – claimed as $20,115.00. I would allow this claim, and have assessed that the amount of $20,115.00 is reasonable.

6.1.2 **Repainting walls and soffits (2001)** – claimed as $4,725.00. I would allow this claim, and have assessed that the amount of $4,725.00 is reasonable.

6.1.3 **Repairs to roof and associated flashings (2001)** – claimed as $6,623.00. I have found that the roof needed to be replaced, not repaired. It would be my finding that the Owners cannot succeed with a claim for the recovery of these repair costs when they made the choice to not follow Mr Spraggs' recommendation in February 2001. I would dismiss this claim. I appreciate that a part of this claim was for capping the parapets, which I will return to later.

6.1.4 **Replacing gutters (2001)** – claimed as $1,485.00. I would allow this claim and have assessed that the amount of $1,485.00 is reasonable.

6.1.5 **Painting roof (2001)** – claimed as $2,137.00. I have found that the roof needed to be replaced, not painted. My reasons for not allowing this claim are already given in 6.1.3 above.

6.1.6 Other claims consequential to the remedial work in February 2001 will be considered at the conclusion of this summary, although costs and general damages will be deferred until later in this Determination.

6.1.7 **Re-clad the dwelling** – claimed as $30,250.00 plus GST. I have concluded that the dwelling does not need to be re-clad, although there are items of remedial work that are necessary. Therefore, I would allow this claim in part, and have assessed that a reasonable allowance for the cost of the remedial work would be $2,700.00 (inclusive of GST).

6.1.8 **Overclad decorative mouldings** – claimed as $7,900.00 plus GST. I have concluded that the dwelling does not need to be re-clad, so that there will be no need to overclad the decorative mouldings. I would dismiss this claim.

6.1.9 **Parapet cappings** – claimed as $3,855.00 plus GST. This claim was based on the assumption that the parapets would be re-clad with the Rockcote system. I have concluded that this re-cladding is not needed, but that the metal overcappings did need to be done in 2001. As they were not done in 2001, they remain as a part of the necessary remedial work to be done. I have assessed that a reasonable allowance for the cost of these overcappings would be $1,600.00 (inclusive of GST).

6.1.10 **Reconstruct mansard roof framing** – claimed as $8,000.00 plus GST. I am not persuaded that the roof framing to the mansard section of the roof needs to be reconstructed. I would dismiss this claim.

6.1.11 **Re-roof the dwelling** – claimed as $12,000.00 plus GST. I would allow this claim, and have assessed that the amount of $13,500.00 (inclusive of GST) is reasonable.

6.1.12 Other claims consequential to the future remedial work will be considered at the conclusion of this summary, although Costs and Diminution in Value will be deferred until later in this Determination.

6.2 I will now consider the other claims that have been made by the Owners that are consequential to the remedial work done in February 2001. These are:

- Alternative accommodation;
- Loan facility and interest;
- Consultants' fees.

[Note that claims for legal fees and general damages will be considered later].

6.3 **Alternative Accommodation**

6.3.1 The Owners are claiming that they had to move out of the house whilst the remedial work was carried out in February 2001, and that their motel costs were $3,375.00.

6.3.2 I am satisfied that it was reasonable for the Owners to temporarily move out of their house whilst the remedial work was carried out. The house was fully scaffolded during this period with tarpaulins draped over the structure to provide protection to the work, and although it was possible to remain in occupation, it would have been very inconvenient. I would allow this claim, and find that the amount claimed of $3,375.00 is reasonable.

6.4 **Loan Facility and Interest**

6.4.1 The Owners are claiming that they had to obtain a loan from the bank to enable them to finance the remedial work. Their claim has three component parts:

- Loan processing fee $ 500.00
- Legal costs 631.52
- Interest 2,552.08 +

6.4.2 I was provided with a copy of the term loan agreement with the ASB Bank, and a bill from the Owners' lawyers as supporting documentation to these claims. The Term Loan Agreement does not appear to have a date, but interest is stated to commence on 31 March 2002, and repayments from 30 April 2002. The loan processing fee is shown as $0.00. Based upon this information, I am not persuaded that the claim for a loan processing fee can succeed.

6.4.3 The lawyers' bill is for work done between 3 January 2001 and 26 January 2001, and is described as being for "professional attendances" re building defects. I am aware that the Owners' lawyers wrote several letters during this period to potential defendants, and I am not convinced that any of this bill relates to a term loan agreement dated more than fourteen months later. I would not allow the claim for legal costs.

6.4.4 I would allow a claim for interest on the grounds that the Owners acted reasonably in promptly attending to the remedial work rather than allowing the situation to probably worsen. I would allow interest on the costs of the allowed remedial work, at the annual rate of 6.5% simple. This interest will be allowed from the end of February 2001 to the date of this Determination. I have calculated the amount of interest and would allow the Owners' claim in the amount of $5,276.00.

6.5 **Consultant's Fees**

6.5.1 The Owners are claiming an amount of $1,905.29, for the recovery of fees paid to Mr Spraggs for his inspections, investigations and assistance in determining the extent of the remedial work. In support of this claim I have been given copies of invoices from Joyce Group for Mr Spraggs' time and costs.

6.5.2 It is reasonably foreseeable that the Owners would need to seek professional advice when faced with the problems about the exterior cladding and leaks. I have reviewed his charges and would find that they are reasonable. I would allow this claim by the Owners, in the full amount of $1,905.29.

6.6 I will now consider the other claims that have been made by the Owners that are consequential to the future remedial work. These are:

- Contingency sum;
- Supervision fees;
- GST;
- Consultant's fees.

[Note that claims for legal fees and diminution of property value will be considered later.]

6.7 **Contingency Sum**

6.7.1 The Owners are claiming an amount of $3,100.25, which is 5% of the substantive remedial costs, as a contingency for unexpected or unforeseen extra costs.

6.7.2 Whilst I appreciate that any estimator in the building and construction industry frequently includes 'contingency' sums in estimates, it cannot be allowed in the quantification of the amount of damages. If a realistic and prudent allowance needs to be made for some type of risk then it becomes part of the 'costs'. In this adjudication I have approached all estimates or assessments as needing to have suitable allowances for risk or the unknown. Until you remove a wall lining, you do not know for certain what you will find. You have to make a realistic allowance for what will probably be found. Unfortunately you may sometimes be wrong, but a good estimator should usually be right. I see no need to have a separate contingency allowance, and would not allow this claim.

6.8 **Supervision Fees**

6.8.1 The Owners are claiming an amount of $2,000.00 for supervision costs for the remedial work that needs to be done. During the Hearing Mr Hazelhurst admitted that this figure might be light, but I have not received any formal requests to change the amount claimed.

6.8.2 When owners are faced with the problems of having this sort of remedial work done, it is not uncommon for the owners to want to have the remedial work clearly specified and properly supervised by a professional consultant or surveyor. I am satisfied that it is a reasonable cost that should be considered as a part of the total costs of having the remedial work done.

6.8.3 The claim for $2,000.00 was based upon the remedial work being worth nearly $70,000.00, but I have only allowed approximately $18,000.00. However, I would have expected the professional fees to be in the order of 10% (for work up to $20,000.00) and I would allow this claim in the amount of $1,800.00.

6.9 **GST**

6.9.1 The Owners have claimed GST as a separate amount. As I have made all of my assessments and findings as figures that are inclusive of GST, I do not need to make any further additions.

6.10 **Consultant's Fees**

6.10.1 The Owners are claiming an amount of $1,330.00 for fees paid to Mr Murphy for his inspection and report done in January 2004.

6.10.2 This fee is a part of the Owners' costs associated with this adjudication. I will not consider it separately, but will consider it when I address the costs of this adjudication.

7. DIMINUTION OF VALUE

7.1 The Owners are claiming that their house has suffered a diminution in value due to the stigma that has attached to "leaky homes". The Owners referred me to a research paper by Song Shi prepared as a part of his studies towards a Masters degree at Massey University. The conclusion was that there was clear evidence of a "stigma" directed at monolithic-clad houses, and that an average loss in value of about 13% was being experienced.

7.2 Mr Tomaszyk also referred me to *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548, where he tells me that Hardie Boys J (as he then was) allowed a reduction on account of stigma of approximately one third. I am familiar with this case, but I think that the Court allowed $5,000.00 as a loss on a property worth $47,500.00 in total. This equates to a 10.5% diminution of value.

7.3 A similar argument was raised before the Adjudicators Carden and Gatley in *Putman v Jenmark Homes Ltd & Ors* (WHRS claim 26 – 10 February 2004) and their conclusions were as follows:

> We have considered all the evidence carefully and are of the view that there is no sufficient evidence of "stigma" value loss. As Mr Farrelly indicates, the repair work which we have considered appropriate does include a cavity, treated timber, and full compliance with the Building Code and Harditex Technical Information. That will be known and that information can be available to any purchaser. If there is any "stigma" then we suspect this will rather be because of the significant adverse publicity that dwellings of this nature have attracted and nothing that the claimants can do by way of repair will alter that. Indeed we consider it a significant prospect that if remedial work is done thoroughly and comprehensively as proposed that may well reassure purchasers even to the extent of possibly enhancing the value as compared with the property, had it been properly constructed in the first place, and the worries and misgivings that prospective purchasers may have had not knowing whether the building was suspect or not.

7.4 It would appear that the Adjudicators in *Putman* were not referred to the Song Shi research paper, and I appreciate that the background history and evidence in the *Putman* case could well differ from the instant case. However, this is a substantial claim and I prefer to have all the assistance that is available to give it a fair and thorough consideration.

7.5 Mr Tomaszyk has made helpful submissions on this claim. He accepts that there is a degree of uncertainty associated with allegations of stigma, which mean that any damages must be made conservatively. He also concedes that the Owners have no legal obligation to tell prospective purchasers that the building has had to be repaired, or that it has been the subject of a claim under the WHRS Act.

7.6 The only other submission received about this particular claim is brief, and points out that the claim is highly speculative, with no evidence to show that this house has, or would, suffer a loss in value.

7.7 The Owners have shown me a valuation of the property prepared by R J Hills in January 2003. Mr Hills is a registered valuer and prepared the valuation for mortgage finance purposes. He mentions that "the dwelling has been finished to a very high standard …", but makes no mention of its history of repairs or it being a leaky home.

7.8 The Owners had carried out extensive remedial work to the outside of the house in February 2001. I have been shown a photograph taken at the time, and there are no signs that any steps were being taken to conceal the fact that the outside was being re-plastered. The problems with leaky homes in New Zealand had been well publicised by January 2003 and legislation had already been passed to address the problems. If Mr Hills had considered that there was any substance to the suggestion that the value of this house should have been discounted or diminished, then I would have expected to see a reference to this fact in his valuation.

7.9 I have carefully read the Research Paper by Song Shi, and I would have preferred to have had his figures and table in colour (for easier comprehension) and to have been able to review the Appendices (which were not attached), but this has not prevented me from grasping the essential points. However, I feel

that his conclusions and analysis appear to show that the marketplace stigma is more pertinent to monolithic clad dwellings in general, rather than individual and identified leaky homes.

7.10 For this claim to succeed, the Owners have not only got to show that there is a public resistance to purchasing houses that might be known or perceived to be 'leaky homes', but also that the problems with their house would probably lead to a loss in value. Furthermore, if the stigma is of the type that will diminish with time, the stigma will only translate into a loss if the Owners sell within the period that the stigma still attaches to the property. The only evidence that I have about the value of this property is that the registered valuer saw no stigma or loss in value. The valuer would be in the same position as a prospective purchaser, and I would have expected him to send a warning to a mortgagee if the value of the house was affected by the stigma.

7.11 I am not persuaded that the Owners have shown that they have suffered, or would probably suffer, a loss as a result of the stigma of [it] being a leaky home. I would not allow this claim.

8. GENERAL DAMAGES

8.1 The Owners are claiming general damages of $20,000.00 for the stress, inconvenience and trauma associated with having to move out of their home for six weeks in February 2001, whilst remedial work was being undertaken. None of the Respondents chose to make any submissions on this matter.

8.2 In his closing submissions for the Owners, Mr Tomaszyk referred me to *Battersby and Battersby v. Foundation Engineering Limited* 22 TCL 32/8 [1999] BCL 771, which he suggested was closely analogous to the present situation.

8.3 I am aware that a similar claim was considered by Adjudicators Carden and Gatley in their Determination on *Putman v Jenmark Homes Ltd & Ors* (WHRS Claim 26 – 10 February 2004). In paragraph 14.12 they said:

> The availability of general damages for pain and suffering, humiliation, distress and loss of enjoyment has been part of our law for some time. In the context of house construction there was $15,000.00 awarded to the plaintiffs in *Chase v de Groot* [1994] 1 NZLR 613. That was a case of defective foundations requiring complete demolition of the house following a fire. The recorded judgment does not include Tipping J's detailed consideration

> of issues of damages but in *Attorney-General v Niania* [1994] 3 NZLR 98 at page 113 l22 he refers to his earlier judgment in *Chase* and the fact that the award in that case (and another in 1987, *Dynes v Warren* (High Court, Christchurch, A242/84, 18 December 1987)) had been made after a detailed examination of a number of comparative authorities. On the basis of what he said there the authors of Todd, *Law of Torts in New Zealand* 3rd edition page 1184 said that his remarks indicated "these amounts [in *Chase* and *Dynes*] were considered to be modest". We do not read those words into His Honour's judgment in *Niania*. We were also referred to *Stevenson Precast Systems Limited v Kelland* (High Court, Auckland, CP 303-SD/01: Tompkins J; 9/8/01) and *Smyth v Bayleys Real Estate Limited* (1993) 5 TCLR 454.

8.4 The Owners decided to purchase this house in March 2000, but did not return permanently to New Zealand until October 2000. When they did return, it must have caused considerable disappointment when they realised that their new home had some serious problems. They responded quickly by getting Mr Spraggs' report, obtaining quotes for the remedial work, and getting the work done. This all happened between November 2000 and February 2001.

8.5 The Owners cannot succeed with a claim that relies upon stress or anxiety as a result of litigation. The stress must be as a direct consequence of a breach of contract, or a breach of a duty of care. Therefore, the stress and trauma should have been considerably reduced or relieved by the time they moved back into the house in February 2001. They thought that the problems of the leaks had been solved, although the litigation had only just started.

8.6 I would accept that the Owners did suffer from stress, inconvenience and trauma as a direct result of finding out that the exterior cladding was failing and the roof material was of a lesser quality, but this was only for a relatively short period of time. In both the *Chase* and *Dynes* cases, the period of suffering was over many months, and both plaintiffs were awarded $15,000.00. Clearly, adjustments need to be made for inflation.

8.7 In *Putman* the Adjudicators awarded Mrs Putman $15,000.00 and Mr Putman $5,000.00. The Putmans discovered their problems in about December 2002 and were financially unable to carry out the remedial work until the matter had been determined by Adjudication. They lived in a house that had evidence of *stachybotrys atka* fungus and signs of destructive testing throughout the dwelling.

8.8 Having reviewed the situation in this case, I have come to the view that the Owners are entitled to a modest award of general damages, but it must be considerably less than the Putmans were given. I would set the amount of general damages at a total of $4,000.00.

9. LIABILITY OF RESPONDENTS

9.1 Ms Stewart

9.1.1 When Ms Stewart sold the property to the Owners, she signed a standard form of Sale & Purchase Agreement issued by the Real Estate Institute of New Zealand and the Auckland District Law Society (7th edition 1999). This Agreement included the following clause:

> 6.0 Vendor's warranties and undertakings
>
> ....
>
> 6.2 The vendor warrants and undertakes that at the giving and taking of possession:
>
> (5) Where the vendor has done or caused or permitted to be done on the property any works for which a permit or building consent was required by law:
>
> (a) The required permit or consent was obtained: and
> (b) The works were completed in compliance with that permit or consent: and
> (c) Where appropriate, a code compliance certificate was issued for those works: and
> (d) All obligations imposed under the Building Act 1991 were fully complied with.

9.1.2 Put quite bluntly, Ms Stewart gave her undertaking that all building work had been carried out with all necessary permits and consents, and that the work complied with the standards set by the Building Code.

9.1.3 The Building Act requires all work to comply with the New Zealand Building Code, which is found in the First Schedule to the Building Regulations 1992. The Building Code contains mandatory provisions for meeting the purposes of the Act, and is performance-based. That means it says only what is to be achieved, and not how to achieve it.

9.1.4 In this particular case, I think that the following clauses in the Building Code have relevance, and they are,

B.1 STRUCTURE

OBJECTIVE

(a) Safeguard people from injury caused by structural failure

(b) Safeguard people from loss of amenity caused by structural behaviour. and

FUNCTIONAL REQUIREMENT

B.12 Buildings, building elements and site work shall withstand the combination of loads that they are likely to experience during construction or alteration and throughout their lives.

PERFORMANCE

B1.3.1 Buildings, building elements and sitework shall have a low probability of rupturing, becoming unstable, loosing equilibrium, or collapsing during construction or alteration and throughout their lives.

B1.3.3 Account shall be taken of all physical conditions likely to affect the stability of buildings, building elements and sitework, including …

(e) Water and other liquids

B1.3.4 Due allowance shall be made for:

(a) The consequences of failure

(b) The intended use of the building

B2 DURABILITY

OBJECTIVE

B2.1 The objective of this provision is to ensure that a building will throughout its life continue to satisfy the other objectives of this code.

FUNCTIONAL REQUIREMENT

B2.2 Building materials, components and construction methods shall be sufficiently durable to ensure that the building, without reconstruction or major renovation, satisfies the other functional requirements of this code throughout the life of the building.

PERFORMANCE

B2.3.1 From the time a code compliance certificate is issued, building elements shall with only normal maintenance continue to satisfy the performances of this code for …

(a) 50 years for structural elements that are difficult to access or replace, or would go undetected during normal use and maintenance,

(b) 15 years for building elements that are moderately difficult to access or replace, or failure would be easily detected during normal maintenance,

(c) 5 years for elements that are easy to access and replace, and would be easily detected during normal use of the building.

E2 EXTERNAL MOISTURE

OBJECTIVE

E3.1(a) Safeguard people against illness or injury which could result from accumulation of internal moisture, and …

FUNCTIONAL REQUIREMENT

E3.2 Buildings shall be constructed to avoid the likelihood of:

(a) Fungal growth or the accumulation of contaminants on linings and other building elements …

(b) Damage to building elements being caused by use of water.

The Building Code also contains a number of Acceptable Solutions, which if used, will result in compliance with the New Zealand Building Code. They also serve as guidelines for alternative solutions which may, if approved by a Territorial Authority, be used if they comply with the Building Code.

9.1.5 It can be seen that water ingress or leaks into the building contravene E2 – External Moisture; fungal growth contravenes E3 – Internal Moisture; and water damage or rot of timber structural framing contravenes B1 – Structure, and B2 – Durability.

9.1.6 I would find that Ms Stewart was in breach of clause 6.2(5) of the Sale & Purchase Agreement because the roofing and exterior cladding was not

constructed in accordance with the Building Consent, and did not comply with the standards set by the Building Code. Therefore, she is liable to the Owners for the following damages:

Remedial work in February 2001		$
Repairs to exterior cladding and plasterwork		20,115.00
Repainting walls and soffits		4,725.00
Replacing gutters		1,485.00
Alternative accommodation		3,375.00
Interest		5,276.00
Consultants' fees		1,905.29
General Damages		4,000.00
Further remedial work required		
Parapet caps		1,600.00
Re-roof the dwelling		13,500.00
Supervision fee	80.0%	1,440.00
		$57,421.29

9.2 **Mr Ford**

9.2.1 The Owners say that Mr Ford was the builder of the house and is liable to them in negligence. I appreciate that the Claimant is Ms Miller-Hard, and that any liability that Mr Ford may have can be only to Ms Miller-Hard, but I find it more realistic to treat the Owners as the Claimants. I hope that the parties will tolerate this literary licence.

9.2.2 There was no contractual relationship between Mr Ford and the Owners so that any claim must be founded in the argument that there was a duty of care owed by the builder to subsequent purchasers, and that the builder has been negligent or in breach of that duty of care.

9.2.3 The existence of a duty of care has been clearly established in New Zealand in such cases, and I will refer to two reasonably recent Court cases:

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

> The law here, so far as it is applicable to the duty of builders and of a borough council to derivative owners of land, has been well and long established and has been

reaffirmed. Reference needs only to be made to *Bowen v Paramount Builders (Hamilton) Ltd* [1997] 1 NZLR 394, *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234, *Brown v Heathcote County Council* [1986] 1 NZLR 84 to show that this is a reasoned maintained approach of local authorities, builders and others who have been involved in claims which have been settled and in conduct which has anticipated and perhaps prevented the damage which this kind of case examples.

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

I look first at [the Builder's] position. In this respect the law can be stated as follows:

1. The builder of a house owes a duty of care in tort to future owners.

2. For present purposes that duty is to take reasonable care to build the house in accordance with the building permit and the relevant building code and bylaws.

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

The council's position can be more simply stated, again without prejudice to the scope of its duty of care in the present case. Subject to further discussion of that point the legal principles applying are:

1. A council through its building inspector owes a duty of care in tort to future owners.

2. For present purposes that duty is to exercise reasonable care when inspecting the structure to ensure that it complies with the permit and all relevant provisions of the building code and bylaws.

9.2.4 I am satisfied that it has been shown that Mr Ford was the builder of this house and, although he may have used a trading name such as "Ford Developers", he was operating in his personal capacity. I would find that Mr Ford was negligent, or in breach of his duty to take care, in his construction of the house or in his supervision of the contractors that he engaged for the construction work. He authorised or instructed the change in the roofing material. He failed to ensure that the roofing and exterior cladding were built in accordance with the building consent and to the standards set by the Building Code. His negligence or breach led to water penetration and resultant damage. Therefore he is liable to the Owners for the following damages:

Remedial work in February 2001		$
Repairs to exterior cladding		20,115.00
Repainting walls and soffits		4,725.00
Replacing gutters		1,485.00
Alternative accommodation		3,375.00
Interest		5,276.00
Consultants' fees		1,905.29
General Damages		4,000.00
Further remedial work required		
Parapet caps		1,600.00
Re-roof the dwelling		13,500.00
Supervision fee	80%	1,440.00
		$ 57,421.29

9.3 **Bay Building Certifiers Ltd (BBC)**

9.3.1 The claim against the Certifier must be in tort and based on negligence. It is now well established in New Zealand that both those who build, and those who inspect building work, have a duty of care to both building owners and subsequent purchasers.

9.3.2 This has been established, not only by the cases that I have mentioned when considering Mr Ford's liability, but also by Court cases such as:

- Cooke P in *Invercargill City Council v Hamlin* (1995) 72 BLR 45 at p 49

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

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

  The standard of care in all cases of negligence is that of the reasonable man. The defendant, and indeed any other Council, is not an insurer and is not under any absolute duty of care. It must act both in the issue of the permit and inspection as a reasonable, prudent Council will do. The standard of care can depend on the degree

> and magnitude of the consequences which are likely to ensue. That may well require more care in the examination of foundations, a defect which can cause very substantial damage to a building. This as I have said is not a question of foundations but rather of the exterior finishing and materials.

9.3.3 A certifier will not be held to be negligent if he carries out his inspections at such times and with due diligence so that he can say that he has reasonable grounds to conclude that the work complied with the Building Code. It is not a matter of strict liability.

9.3.4 BBC knew Mr Marklew and believed him to be an experienced and competent plasterer. It was submitted by Mr Hern, on behalf of BBC, that the building inspector is not a clerk of works, and cannot be expected to identify all the problems that might be concealed within an exterior cladding system, particularly when they knew and trusted the plasterer. I would accept that this is generally correct, but as Greig J said in *Steiller* (above) "The standard of care can depend on the degree and magnitude of the consequences which are likely to ensue." I would expect a certifier to take reasonable precautions to ensure that the plasterer was competent, familiar with the technical requirements, and exercising the appropriate amount of supervision when employing labour.

9.3.5 However, it is always easier to tell people what they should have done when one is aware of the problems that were later encountered. I would not dismiss the suggestion that a certifier is entitled to rely upon a known tradesman and trust the tradesman to build properly. This is entirely reasonable, but there must be checks to ensure that the tradesman is maintaining standards and quality control. If the certifier can show that he has taken reasonable steps to check the work, and the workers, then he may well show that he has discharged his duty of care.

9.3.6 It has been suggested that BBC failed to carry out the "insulation" inspection, and this failure caused BBC to not check the exterior cladding at a particular time when the defects would have been visible. I do not accept that this has any significance in this particular house. The EIFS system includes the insulation in the rigid backing, so that a traditional insulation check is not necessary. However, a prudent certifier would

have cast his eye over the exterior cladding when carrying out the pre-line inspection and, if it was not possible at that time to check on the integrity of the external cladding system, then he should have made arrangements with the builder to carry out further tests or inspections.

9.3.7 The question that needs to be answered is whether a prudent building inspector or certifier, carrying out all the inspections and tests that should be done by a prudent inspector should have noticed or detected that the exterior cladding system was deficient.

9.3.8 In 1997, it is my view that the certifier should have noticed that flashings were not being installed around all windows and exterior openings, and this should have set some alarm bells ringing. The certifier probably should have noticed that unperforated PVC angles were being used, which is definitely not a feature in the reputable cladding systems, and not a part of the Rockcote system that should have been used on this house. The certifier should have noticed that a 50mm clearance had not been allowed at the base of the cladding where it abutted the Butynol deck, and also at the base of the parapet cladding where it abutted the barge or top flashings of the roof, both being requirements in the Rockcote system. The certifier should have noticed that the top of the parapets were flat and had no cappings, again contrary to the Rockcote technical data sheets. And finally, the certifier should have noticed, and questioned, the detail at the end of the eaves gutters, where the gutters were “buried” into the polystyrene parapet cladding.

9.3.9 I would find that BBC failed to take all reasonable steps to ensure that the exterior cladding complied with the building consent documents or the Building Code. BBC are, therefore, liable to the Owners for the damages that flowed from those failings in relation to the inspections done in 1997.

9.3.10 I will now consider the roof. It was submitted by Mr Hern that zincalume was, in 1997, code compliant for moderate coastal areas, and that Mr Ford had obtained verbal approval from the Council to change the roof to zincalume. I think that Mr Ford is mistaken on this point, as a change to

the building consent would have been recorded on the consent documents, so that BBC would be aware of the change. I have found that the Council had classified this property as being in a severe coastal zone, and it certainly was not up to BBC to reclassify the zoning without consultation with the Council. It really does not matter whether BBC noticed the change to zincalume and wrongly approved it, or whether BBC failed to notice that the roof was not Colorcote as specified. In either case, BBC acted negligently and are liable to the Owners for the damages relating to the roof that have resulted from their negligence in 1997.

9.3.11 It was claimed in the original adjudication claims, that BBC were negligent (in 2000 and 2001) when they inspected the house and failed to notify the Council that the remedial work was not addressing the original defects. It was my understanding that the Owners have withdrawn that particular claim. However, if I am mistaken and it has not been withdrawn, then I would dismiss the claim for the following reasons.

9.3.12 Mr Turner, a building inspector employed by BBC, visited the house in November 2000 to look at the failings in the exterior cladding. I am not persuaded that he was asked to specify the extent or type of remedial work that was to be done. He simply recorded what he saw. BBC do not appear to have visited the property again, and did not inspect the upstairs bathroom because no Code Compliance Certificate has ever been issued for that work. Therefore, they had no reason to notice or detect any problems with the remedial work that was carried out in February 2001.

9.3.13 I would find that BBC is liable to the Owners for the damages of $57,421.29 as listed in paragraph 9.2.4 above.

9.4 **Mr Marklew**

9.4.1 The basis of the Owners' claims against Mr Marklew are substantially the same as the claims made against Mr Ford. The claims are founded in the argument that there was a duty of care owed by the plasterer to

subsequent purchasers, and that Mr Marklew was negligent or breached that duty of care.

9.4.2 It is unfortunate that Mr Marklew did not stay to give evidence at the Hearing. He did file a response to the claim in the form of comments about Mr Spraggs' report, and from that I can deduce some of his reasons for refuting liability.

9.4.3 Mr Marklew has suggested that the standards for plastering and painting in 1997 were completely different from the standards applied by Mr Spraggs when he prepared his report in 2000. However, he has not explained the grounds for making this sweeping statement, except to refer to changes in the requirements by Resene Paint, and some flashings. I would have preferred to have been given some supporting information, because it is not consistent with my own experiences.

9.4.4 As a contractor working on this building, Mr Marklew was obliged to build in accordance with the approved building consent documents, and also to the minimum standards set by the Building Code. If he was asked to deviate from the building consent, then this should have been confirmed in writing. The consent drawings specified a Rockcote insulated system with Armour finish. Mr Marklew should have constructed the exterior cladding in accordance with this specification, albeit using different brands of materials.

9.4.5 It is his view that the flaking and defects were generally caused by a breakdown of the paint, due to the dark colour that was used and the exposure to sun and marine salts. If he is correct, then why did Mr Marklew not apply a glaze coat (which he says is now a recommended finish in these types of exposed locations) in accordance with the consent drawings? The location of the house has not changed from the time he tendered the job, so that he knew it was exposed to the Bay of Plenty sun, and the salts of the Pacific Ocean. Why use a paint that was less than the specified type, and inadequate to cope with the environment?

9.4.6 I do not accept his suggestion that much damage was caused by concrete contractors. Some damage may have been caused, but it would not be a significant factor in the problems that were experienced. In 1997 it was recommended that EIFS systems finished about 50mm above abutting surfaces, and this was a specific requirement by Rockcote in 1997. Why did Mr Marklew decide not to provide this 50mm gap?

9.4.7 Mr Marklew suggests that in 1997 some flashings were not mandatory, and that the head flashings were the responsibility of the aluminium joiner or builder. Flashings were shown on the Rockcote technical sheets, and flashings were required in other systems (such as Hitex or Insulclad) in 1997. Although head flashings may be supplied and fixed by others, it was still Mr Marklew's responsibility to ensure that all details relating to his external cladding were in place and complete.

9.4.8 I would find that Mr Marklew was negligent, or in breach of his duty to take care, in his construction of the exterior cladding of this house. He failed to ensure that the cladding was constructed in accordance with the building consent, and the standards set by the Building Code. His negligence or breach led to water penetration and resultant damage, and he is liable to the Owners for the following damages:

Repairs to exterior cladding and plasterwork		$ 20,115.00
Repainting walls and soffits		4,725.00
Alternative accommodation	94.0%	3,172.50
Interest	94.0%	4,959.44
Consultants' fees	94.0%	1,790.97
General Damages	94.0%	3,760.00
		$ 38,522.91

9.5 **Mr Reid**

9.5.1 Mr Reid did not file a Response to the adjudication claim, nor did he attend the hearing, nor take any steps to explain his position or present his viewpoint. S.37 of the WHRS Act states that, under these

circumstances, an adjudicator's power to determine a claim should not be affected.

9.5.2 Furthermore, s.38 of the WHRS Act states:

> **Adjudicator may draw inferences and determine claim based on available information**
> If any failure of the kind referred to in section 37 occurs in an adjudication, the adjudicator may –
>
> (a) draw any inferences from that failure that he or she thinks fit; and
>
> (b) determine the claim on the basis of the information available to him or her; and
>
> (c) give any weight that he or she thinks fit to any information provided outside any period that he or she requested or directed.

9.5.3 The claims being made by the Owners against Mr Reid are that he failed and/or neglected to carry out the remedial work to the house in February 2001 to the extent specified in his tender, quotation and invoices. Furthermore, it is alleged that the work that he did do was substandard.

9.5.4 The Owners do not appear to have clarified what damages are being sought from Mr Reid. In his closing submissions, Mr Tomaszyk said that his client was seeking reimbursement of the $35,085.00 paid to Mr Reid for the remedial work "plus such further relief by way of general and associated damages as the adjudicator may see fit."

9.5.5 In the face of the uncertainties of this unparticularised claim, and no response, I will have to reach conclusions based on the limited arguments available.

9.5.6 Mr Hazelhurst was of the opinion that not all of the repairs mentioned in Mr Reid's quotation had been carried out, although Mr Reid had been paid the full amount of his quotation. Based on the comments and observations recorded by Mr Hazelhurst in his report, I am inclined to accept his conclusions that the hip flashings were not replaced, that Mr

Reid did not cut out the mouldings, and he did not supply or fix the capping to the parapets.

9.5.7 However, I do not have enough evidence to make a finding that Mr Reid overcharged or acted dishonestly in his dealings with the Owners. On the contrary, I am left with the impression that Mr Reid tried his best to rectify the problems that the Owners had inherited, without going overboard or spending more of their money than he felt was necessary.

9.5.8 He did not do enough, however, to overcome all the problems. He did not make sure that the new plasterer, Mr Tito, fixed all of the leaks, and he did not install the cap flashings to the top of the parapets, as he had quoted to do, and as he should have done. Mr Reid was in breach of his contract in that he did not carry out all the work that was quoted, and did not supervise his subcontractor to make sure that all the leaks were fixed. Therefore he is liable to the Owners for the following damages:

Repair existing leaks		$ 2,700.00
Parapet caps		1,600.00
Supervision fee	25.0%	450.00
		$ 4,750.00

9.6 **Mr Tito**

9.6.1 The Owners say that Mr Tito is liable to them in negligence. There was no contractual relationship between Mr Tito and the Owners, so that any claim must be founded in the argument that there was a duty of care owed by the plasterer to the Owners, and that Mr Tito has been negligent or in breach of that duty of care.

9.6.2 There is another area of potential liability and that is pursuant to the workmanship guarantee that Mr Tito gave to the Owners at the end of the remedial work. The relevant wording is:

> The licensed Insulclad® Contractor certifies that this project has been completed with materials that meet Plaster Systems Ltd's specifications and that all work has been carried out in accordance with Plaster Systems Ltd's installation instructions.

> The licensed Insulclad® Contractor guarantees for a period of five years, that should any defect in the plastering system occur due to an application fault, the contractor will, at their discretion, replace, repair or make a contribution to the rectification of the defect. The system must have been properly maintained and subjected to no more than normal conditions of exposure.

9.6.3 I would find that Mr Tito is liable to the Owners under this guarantee for the repair of the leaks that exist in the exterior cladding of this dwelling. Although Mr Tito has the right to fix these leaks, I do not think that this would be an appropriate option under the circumstances without the willing consent and co-operation of the Owners. Therefore, I find that Mr Tito is liable to the Owners for the following damages:

Repair existing leaks		$ 2,700.00
Supervision fee	16.0%	288.00
		$ 2,988.00

9.6.4 The Owners may wish to ask Mr Tito to return to fix the leaks that currently exist in this dwelling through the exterior cladding. If they do this, and Mr Tito wants to return and fix the leaks, then Mr Tito can expunge his liability to pay the $2,988.00 by returning and rectifying the leaks. I wish to make it quote clear that this can only happen if both the Owners and Mr Tito want it to happen, and co-operate in the normal manner about matters such as access, cleaning up and the like.

9.7 **Mr Malcolm**

9.7.1 The Owners are claiming that Mr Malcolm failed to provide sufficient details in his drawings and specifications to ensure that the house would be properly built. During the Hearing I did ask why Mr Malcolm had been identified as a Respondent in this adjudication because there seemed to be a paucity of supporting data to justify any claims being made against this designer. I was told that Mr Hazelhurst had suggested, in his Assessor's report, that Mr Malcolm should be a party to the claim. I should add that Mr Malcolm had not applied to be removed as a party from this adjudication, and when I did ask if all parties would agree to his removal, I did not receive a unanimous response.

9.7.2 Any claim that the Owners may have against Mr Malcolm must be in tort for negligent design. Negligent design does not only mean bad detailing, but also can cover bad documentation which could lead to misunderstandings, errors or defects. It could mean failing to provide essential design or specification detail.

9.7.3 Mr Malcolm was represented at the Hearing, and he was present through much of the evidence. He provided me with helpful evidence about the property and the original construction, and his closing submissions were very thorough and comprehensive.

9.7.4 I accept that Mr Malcolm was contracted by Mr Ford to design the house and to provide sufficient documentation for a building consent, and this was the extent of his work. He was not employed to organise contractors, suppliers or supervision. He drew up the drawings and specifications, submitted them to the Council, and answered all of Council's questions prior to the issue of the building consent.

9.7.5 Mr Malcolm is not an architect and does not charge architect's rates. He is a designer and draftsman and the standard of work required by him to meet his duty of care must be that of a reasonably skilled designer and draftsman.

9.7.6 The roof that he specified was not installed. The exterior cladding system that he specified was not properly constructed. He had no part in the remedial work in February 2001 either as a specifier or a supervisor. I was not shown one alleged error in his drawings or specifications. The only allegation that I did hear was a suggestion that he should have provided more directional detailing about some difficult junctions.

9.7.7 The end result is that neither the Owners nor any of the Respondents have got close to persuading me that Mr Malcolm should have any liability for the leaking problems in this house. I would dismiss all claims against him.

9.8 **Plaster Systems Limited**

9.8.1 The claims by the Owners against Plaster Systems Ltd (PSL) are that they were provided with "workmanship" and "material components" guarantees issued by PSL that provided certain assurances about durability and compliance with the Building Code. The Owners say that some of these assurances have been broken or were inaccurate.

9.8.2 There has been a considerable amount of footwork in this adjudication around the extent of Mr Tito's remedial work and the meaning of the guarantees. Having heard and considered all of the evidence, I do not think that all of this footwork was necessary. I will try to outline the situation as I have interpreted the evidence.

9.8.3 Mr Reid went to a specialist plasterer (Mr Tito) for advice on how to solve the problems with the exterior cladding. Mr Tito gave a quotation to "repair and make good plasterwork". This was a performance-based quotation which included a promise to "give a full guarantee for the work I complete" (I have taken the liberty of correcting Mr Tito's spelling). This quotation was accepted, the work was done, the price was paid, and the guarantees were issued. That should be the end of the story.

9.8.4 I was told that Mr Tito was a licensed applicator for the Insulclad system, and that PSL considered him to be one of their better and more reliable applicators. I have found that he repaired and made good the plasterwork as quoted, with the exception of two leaks for which he must take responsibility. Mr Faulkner, the local PSL representative, did check out the work done by Mr Tito and was satisfied after his visual inspection that Mr Tito had done the job properly. I do not see that Mr Faulkner was negligent or careless in his inspection because he failed to notice the two areas that did show evidence of leaks at a later date. Mr Hazelhurst did not notice these two leaks when he carried out his inspections in April 2003, and Mr Hazelhurst visited the house on three consecutive days.

9.8.5 I am not persuaded that it has been shown that PSL has any liability under the "material components" guarantee, as there is no evidence to show that the components or materials have failed. However, I am

satisfied that PSL has some liability under the "workmanship" guarantee, in the event that their licensed contractor improperly refuses to honour his obligations under this workmanship guarantee. This guarantee states that "Plaster Systems Ltd will not honour this guarantee until all work has been fully paid". Which strongly suggests that PSL will honour the guarantee when payment has been made.

9.8.6 It is my conclusion that PSL is liable to the Owners for the costs of the repairs to the existing leaks pursuant to the guarantees issued to the Owners. The extent of the damages would be:

Repair existing leaks		$ 2,700.00
Supervision fee	16.0%	288.00
		$ 2,988.00

10. CONTRIBUTION BETWEEN RESPONDENTS

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

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

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

10.3 The approach to be taken in assessing a claim for contribution is provided in s.17(2) of the Law Reform Act 1936. It says in essence that the amount of contribution recoverable shall be such as may be found by the Court to be just and equitable having regard to the relevant responsibilities of the parties for the damage. What is a 'just and equitable' distribution of responsibility is a question of fact, and although guidance can be obtained from previous decisions of the Courts, ultimately each case will depend on the particular circumstances giving rise to the claim.

10.4 Furthermore, if Respondents are found to have a liability in contract, they can seek a contribution from tortfeasors under the Contributory Negligence Act 1947, which states under s.3(1):

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:
>
> Provided that –
>
> (a) This subsection shall not operate to defeat any defence arising under a contract:
>
> (b) Where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.

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

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

10.5 Ms Stewart had nothing to do with the actual construction work on this house, and relied completely on others. There has been no claim or suggestion from any party to the contrary. Therefore, I would find that Ms Stewart is entitled to an indemnity from all other Respondents who have been found to have a liability in the matters for which Ms Stewart has been found liable. The liability of these Respondents will be limited to the amount of each Respondent's liability to the Owners.

10.6 In matters relating to the remedial work to the external cladding, I would expect Mr Marklew to shoulder the main proportion of responsibility as it was he who decided on the materials to be used and carried out the installation. I would set his portion at 55%. Bay Building Certifiers should have been more attentive and should not have entrusted Mr Marklew to the extent that they did, but I would set their contribution at no more than 15%. Mr Ford, who knowingly departed from the building consent without authority, albeit for the best of intentions, must bear the remaining 30%. These findings relate to the following:

Repairs to exterior cladding and plasterwork	$ 20,115.00
Repaint walls and soffits	4,725.00
Alternative accommodation	3,375.00
Loan facility and interest	5,276.00
Consultants' fees	1,905.29
General damages	4,000.00

10.7 In the matter of the roof and gutters, it is Mr Ford who must bear the brunt of the responsibility. He changed the type of roof and changed the finish. His roofing contractor should have warned him that this change would need to be approved by the Council, in writing, but Mr Ford went ahead. Bay Building Certifiers should have noticed and questioned these changes. The evidence of the changes was clearly visible at all times, and never concealed from the eyes of a prudent inspector. This oversight must put them at the higher end of the range in terms of liability for negligent inspections. I would set the contributions as 70% for Mr Ford, and 30% for Bay Building Certifiers. This finding relates to:

Replace gutters	$ 1,485.00
Re-roof	13,500.00
	$ 14,985.00

10.8 The responsibility for fixing the existing leaks must land squarely with Mr Tito. Mr Reid relied on Mr Tito to carry out the repairs in a thorough and complete manner. Plaster Systems also placed their trust in Mr Tito and took reasonable steps to make sure that their trust was not being abused. Mr Tito signed the workmanship guarantee, and he must honour it on his own. Both Mr Reid and Plaster Systems are entitled to full indemnity from Mr Tito for,

Repair existing leaks	$ 2,700.00
Supervision fee	288.00
	$ 2,988.00

10.9 In the event that Mr Tito defaults on his obligations with regard to these existing leaks, then Mr Reid is entitled to a full indemnity from Plaster Systems for these damages.

10.10 The last matter is the parapet cappings, which I assessed as having a cost of $1,600.00 plus a proportion of the supervision fees. Mr Ford should have installed proper caps when he built the house, as they were shown on the Rockcote details and approved as part of the building consent. Bay City Certifiers should have noticed that these cappings were not in place, but they failed to do so. Mr Reid was paid to provide and install these cappings in February 2001. I would set the contributions at 50% for Mr Reid, 38% for Mr Ford, and the remaining 12% for Bay Building Certifiers.

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

Remedial work in Feb 2001	Ford	BBC	Marklew	Reid	Tito
Repairs to exterior cladding	6,034.50	3,017.25	11,063.25		
Repaint walls and soffits	1,417.50	708.75	2,598.75		
Replace gutters	1,039.50	445.50			
Alternative accommodation	1,012.50	506.25	1,856.25		
Loan facility and interest	1,582.80	791.40	2,901.80		
Consultants' fees	571.59	285.79	1,047.91		
General Damages	1,200.00	600.00	2,200.00		
Further remedial work required					
Repair existing leaks					2,700.00
Parapet caps	608.00	192.00		800.00	
Re-roof	9,450.00	4,050.00			
Supervision fee	1,008.00	432.00		72.00	288.00
	23,924.39	11,028.94	21,667.96	872.00	2,988.00

11. COSTS

11.1 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.

11.2 There are three categories of cost claims that I will need to consider:

(i) The claim by the Owners against all of the Respondents:

(ii) Claims by Ms Stewart, Mr Ford and Plaster Systems Ltd against the Owners;

(iii) Claims by earlier Respondents who were struck out prior to the Hearing, against the Owners.

11.3 The Owners have claimed legal costs incurred whilst the remedial work was being carried out, and for the District Court proceedings prior to the transfer to WHRS. When Judge Rollo transferred the proceedings, he reserved the issue of costs until "after the adjudication has been concluded". I take this to mean that it was his intention that the Court would determine the costs of the Court proceedings when the WHRS adjudication was finished. Therefore, I make no order as to the costs of the District Court proceedings.

11.4 The Owners have also claimed costs against all Respondents in this adjudication. Mr Tomaszyk submitted that Ms Stewart, Mr Ford and Bays Builders Certifiers failed to respond to clear notice of the problems in January 2001, which significantly delayed an earlier resolution. In particular, he says, Bays Building Certifiers' approach and attitude throughout the process has been to impede progress of remedial work and a satisfactory resolution of the claims.

11.5 Whilst it is probably true that some of the Respondents have not been as co-operative as the Owners would have liked, or considered reasonable, that is frequently a feature in litigation. However, lack of co-operation does not automatically mean that the Respondent is acting in bad faith.

11.6 The Owners have been generally successful in this adjudication. I have substantially allowed their claims relating to the problems and remedial work done in February 2001. I have dismissed many of the Respondents' arguments on liability, but that does not mean that their arguments were without substantial merit. I think that some of the lines of defence were thin, but all justified careful consideration before being breached and overcome.

11.7 I am not persuaded that the Owners have been caused to incur costs or expenses, either by actions of bad faith or allegations that were without substantial merit. I do not think that the Owners are entitled to an award of costs in this adjudication.

11.8 Ms Stewart and Mr Ford have claimed costs against the Owners on the grounds that when the Owners lodged claims against Ms Stewart and Mr Ford there was no evidence of any water ingress that could be attributed to them. It is submitted that these allegations were without substantial merit.

11.9 I have found that there was water ingress into the building before the remedial work was carried out in February 2001, so that the submission must falter immediately. There was also evidence that the building still had problems when the claims were filed for this adjudication. The claims against Ms Stewart and Mr Ford not only had merit, but were successful. I would not allow their claim for costs.

11.10 Plaster Systems Limited has also claimed costs against the Owners, on the grounds that it was both unfair and unjust for it to remain as a Respondent because it had no case to answer. I have found that Plaster Systems Limited did have a case to answer, albeit for a modest amount which it is entitled to recover from Mr Tito. I would not allow this claim for costs.

11.11 The two outstanding claims for costs, mentioned in paragraph 1.14 of this Determination, will be considered and determined when all parties have had their opportunity for review and comment. The decisions on these two outstanding claims for costs are reserved.

12. ORDERS

12.1 For the reasons set out in this determination, I make the following orders.

12.2 Ms Stewart is ordered to pay to Ms Miller-Hard the amount of $57,421.29. She is entitled to recover all of this from Mr Ford or from Bay Building Certifiers Ltd, or a contribution of up to $38,522.91 from Mr Marklew, for any of the amount of $57,421.29 that she has paid to Ms Miller-Hard.

12.3 Mr Ford is ordered to pay to Ms Miller-Hard the amount of $57,421.29. He is entitled to recover a contribution of up to $11,028.94 from Bay Building Certifiers Ltd, or a contribution of up to $21,667.96 from Mr Marklew, or a contribution of up to $8,000.00 from Mr Reid, for any amount that he has paid more than $23,924.39 of the amount of $57,421.29 to Ms Miller-Hard.

12.4 Bay Building Certifiers Ltd is ordered to pay to Ms Miller-Hard the amount of $57,421.29. It is entitled to recover a contribution of up to $23,924.39 from Mr Ford, or a contribution of up to $21,667.96 from Mr Marklew, or a contribution of up to $800.00 from Mr Reid, for any amount that it has paid more than $11,028.94 of the amount of $57,421.29 to Ms Miller-Hard.

12.5 Mr Marklew is ordered to pay to Ms Miller-Hard the amount of $38,522.91. He is entitled to recover a contribution of up to $6,354.94 from Bay Building Certifiers Ltd, or a contribution of up to $12,858.39 from Mr Ford, for any amount that he has paid more than $21,667.96 of the amount of $38,522.91 to Ms Miller-Hard.

12.6 Mr Reid is ordered to pay to Ms Miller-Hard the amount of $4,750.00. He is entitled to recover a contribution of up to $608.00 from Mr Ford, or a contribution of up to $192.00 from Bay Building Certifiers Ltd, or a contribution of up to $2,988.00 from Mr Tito, or a contribution of up to $2,988.00 from Plaster Systems Ltd, for any amount that he has paid more than $872.00 of the amount of $4,750.00 to Ms Miller-Hard.

12.7 Mr Tito is ordered to pay to Ms Miller-Hard the amount of $2,988.00.

12.8 Plaster Systems Ltd is ordered to pay to Ms Miller-Hard the amount of $2,988.00. It is entitled to recover a contribution from Mr Tito of any of this amount that it has paid to Ms Miller-Hard.

12.9 As clarification of the above orders, if all the Respondents meet their obligations contained in these orders, it will result in the following payments to Ms Miller-Hard:

Mr Ford	$ 23,924.39
Bay Building Certifiers Ltd	11,028.94
Mr Marklew	21,667.96
Mr Reid	872.00
Mr Tito	2,988.00
	$ 60,481.29

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

12.11 Pursuant to s41(1)(b)(iii) of the Weathertight Homes Resolution Services Act 2002 the statement is made that if an application to enforce this determination by entry as a judgment is made and any party takes no steps in relation thereto, the consequences are that it is likely that judgment will be entered for the amounts for which payment has been ordered and steps taken to enforce that judgment in accordance with the law.

DATED the 26th day of April 2004

A M R Dean
Adjudicator