

CLAIM NO: 00756

UNDER

**The Weathertight Homes
Resolution Services Act 2002**

IN THE MATTER OF

an adjudication

BETWEEN

KAYE BARBARA MILLIGAN

Claimant

AND

**ROBERT BROWN
DEVELOPMENTS LIMITED
(Now struck out)**

First respondent

(Intituling continued next page)

Hearing: 19 August 2004

Appearances: Garry Thompson, counsel for the Claimant
Stewart Ross in person for the Second Respondent
Peter Smith and John Mulholland for the Third Respondent
Neil Eade for the Fourth respondent

Determination: 20 December 2004

DETERMINATION

AND

**STEWART ROSS Trading As
STEWART ROSS ARCHITECTS**

Second respondent

AND

**EASTWOOD CONSTRUCTION
LIMITED**

Third respondent

AND

**CHRISTCHURCH CITY
COUNCIL**

Fourth respondent

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INTRODUCTION

- [1] This is a claim concerning a “leaky building” as defined under s5 of the Weathertight Homes Resolution Services Act 2002 (“the Act”)
- [2] The Claimant, Kaye Milligan is the owner of a dwellinghouse, being Unit 36, 25 Peterborough Street, Christchurch (“the property”) and it is Ms Milligan’s unit that is the subject of these proceedings. The building on the property in which the Claimant’s dwelling is located is known as the ‘Peterborough’ and is listed in the Christchurch City Plan as a Heritage Building.
- [3] Ms Milligan’s unit is a new dwelling that was constructed above the existing historic two storied building and water is penetrating the building envelope on the southwestern elevation.
- [4] The Second Respondent, Stewart Ross, is an Architect who traded under the practice name of Stewart Ross Architects at the time the Claimant’s dwelling was designed and constructed, and was engaged by the First respondent (now struck out) Robert Brown Developments Limited to provide planning and general design advice and information for the development of the property. Stewart Ross, now trading as Stewart Ross Team Architecture Limited, is recognised by the profession and in the wider community as an Architect having specialist knowledge and expertise in relation to renovation and reconstruction of historic buildings.
- [5] The Third respondent, Eastwood Construction Limited (“Eastwood”) is a duly incorporated company that carries on the business of residential and commercial building work in Christchurch and elsewhere in the South Island. In or about 1998 Eastwood entered into a fixed price contract with Robert Brown Developments Limited to convert the existing

historic building at 25 Peterborough Street, Christchurch, into apartments, including the construction of the Claimant's unit, No.36.

- [6] The Fourth respondent, Christchurch City Council, ("the Council") was the Local Authority responsible for issuing the Building Consent and Code Compliance Certificate ("CCC") for the demolition, renovation and reconstruction work at 25 Peterborough Street, Christchurch.

MATERIAL FACTS

- [7] Distilling the situation as best I can, the relevant material facts are these:
- [8] This claim involves a very old building that is listed as a Heritage Building in the Christchurch City District Plan and the construction of a new dwelling on the roof of the existing building which incorporated the existing parapet walls into the external walls of the dwelling.
- [9] The developer, Robert Brown Developments Limited, ("RBD") purchased the building together with a concept design plan prepared by Stewart Ross Architects for the previous owner, for the conversion of the building into residential apartments.
- [10] RBD proceeded to sell the apartments "off the plan" and in or about October 1997, the Claimant entered into a conditional agreement with RBD to purchase the unit that is the subject of this claim.
- [11] Stewart Ross Architects was retained by RBD on a time reimbursement basis to provide planning information, to assist with the Resource Consent process, and to provide such architectural services as were required to obtain a building consent and to enable the building

contractor to carry out the conversion and construction work. Mr Ross has described the services provided by his practice as “partial services”, the essential and distinguishing factor from his perspective being that neither he nor his colleague, Mr Graeme Jacobs’ (who was largely responsible for the Peterborough project) had any contractual authority to certify (approve or condemn) the building works undertaken by Eastwood.

[12] In or about early 1998, Mr Jacobs applied for a Building Consent on behalf of RBD, to carry out the demolition and construction work at 25 Peterborough Street Christchurch. The Council approved the plans and specifications prepared by Stewart Ross Architects incorporating the plans, Producer Statements Design and Construction Monitoring Notices prepared and submitted by Holmes Consulting Group Limited (“Holmes”) for Structural Elements and Fire Safety Engineering, and Building Consent No. ABS 98001378 was issued by the Council to RBD in 3 stages between 18 March 1998 and 16 June 1998.

[13] In or about early 1998 RBD entered into a fixed price contract with Eastwood to carry out the conversion of the existing building into residential apartments. Eastwood was to provide building services only and all architectural services were to be provided by Stewart Ross Architects.

[14] During the course of the construction work, Graeme Jacobs attended site meetings, conducted regular site visits, prepared construction drawings and details for Eastwood where specific design was required, carried out inspections of the units and provided snag lists for each unit on completion. The Council also carried out inspections of the building works from time to time and recorded those inspections, including any requisitions, in Site Inspection Reports.

- [15] During the course of construction the Claimant requested RBD to change the cladding of the unit from weatherboard to brick veneer and RBD agreed to the Claimant's request.
- [16] Following a meeting between Eastwood, Holmes, RBD and Graeme Jacobs on or about 18 May 1998 to discuss how to "land the brick veneer on the parapet" a construction drawing was prepared by Holmes' engineers for the construction of a reinforced concrete beam to provide structural support for the veneer. To the structural design prepared by Holmes, Graeme Jacobs added the detail of an angle fillet, or nib, to be formed at the rear (inside face) of the beam to prevent any water that penetrated the veneer from running inside the dwelling. The amended detail was provided by Jacobs to Eastwood for construction and the supporting beam and the brick veneer cladding works were subsequently built by Eastwood.
- [17] The construction of the apartments was completed in late 1998, a final inspection of the works was carried out by the Council on 16 December 1998, and following the completion of several items of incomplete or defective work recorded on the Field Advice Notice, the provision by RBD of Producer Statements Construction Review from the Fire and Structural Engineers and the Lift Installer, and the provision of the Applicants Advice Notice of Completed Building Work, Form BA9 duly executed by Eastwood, the Council issued a Code Compliance Certificate on 8 January 1999.
- [18] Ms Milligan and her partner took possession of the unit in March 1999.
- [19] Approximately 18 months later, in or about October 2000, Ms Milligan discovered that the carpet and reading material stored in the study were

soaking wet. Ms Milligan engaged the services of Mr Noel Casey, a Building Consultant from Christchurch, to inspect the unit and prepare a report based on his observations.

[20] Mr Casey inspected Ms Milligan's unit on 16 October 2000, observed that the carpet and skirtings were damp and recommended that a section of the wall lining be removed to provide access to identify the source of water ingress.

[21] Mr Casey returned to the property on 4 April 2001 when a section of the wall lining on the exterior wall of the study had been removed and conducted a water test which identified that water was entering the dwelling when run on the junction between the parapet and the brick veneer. In a report dated 31 May 2001, Mr Casey recommended that a sill flashing be installed under the lowest brick course, the provision of ventilation and drainage perpendes in the brick veneer and painting the plaster of the parapet, or alternatively, the application of a new coating of plaster and paint over the brickwork complete with flashing and movement control joint along the lower course of the brick. Mr Casey estimated the cost of repair at between \$2,762 and \$3,428

[22] The Claimant's legal advisers wrote to RBD, Eastwood and Stewart Ross over a period of several months enquiring as to whether each would carry out the repair work at no expense to the Claimant. When all denied liability for the water ingress the Claimant's lawyers advised the parties that the Claimant would proceed to have the work undertaken by others and would then seek to recover the costs from them. The Claimant expected at that time to be able to have her dispute with the parties determined in the Disputes Tribunal on the basis of Mr Casey's estimate which put the cost of repair within the Tribunals' jurisdiction.

- [23] On or about 20 December 2001 Mr Casey obtained an estimate from Image Builders Limited (“Image”) to carry out the remedial work. Image estimated that the cost of the remedial work would be in the order of \$15,010.00 plus GST plus Council fees and the estimate also included other tags; the end result being that the cost of the remedial work exceeded the jurisdiction of the Disputes Tribunal.
- [24] The Weathertight Homes Resolution Service (“WHRS”) was established when the Act came into force on 27 November 2002 and Ms Milligan applied to use the service on 25 February 2003.
- [25] On 3 December 2003, the WHRS Assessor, Mr Murray Humm issued a report concluding that moisture had entered the building through the brick veneer cladding as no flashings and weepholes had been installed at the junction of the brick veneer and the original parapet and that moisture had run down to the concrete floor and seeped through the bottom plate into the dwelling having no other means of drainage. Mr Humm estimated the cost of rectifying those matters at \$10,024.99 which amount was updated prior to the hearing to \$11,487.72 inclusive of GST.
- [26] Ms Milligan’s claim was determined by the WHRS to be an eligible claim under s7 of the Act, whereupon Ms Milligan applied to the WHRS to have the claim determined by adjudication.

THE HEARING

- [27] This matter was scheduled to be heard during the week commencing 12 August 2004. That hearing date was vacated and the hearing adjourned until 19 August 2004 upon the application of the Third respondent. The

application was not opposed by the other parties who agreed pursuant to s40(2) of the Act to extend the time for making my determination in this matter to such time as I may determine at my absolute discretion.

[28] The matter was heard at the George Hotel, 50 Park Terrace, Christchurch, on 19 August 2004.

[29] The Claimant was represented by her solicitor Mr Garry Thompson at the hearing. The Second respondent Stewart Ross appeared in person, Mr Mulholland and Mr Smith, both directors of Eastwood represented the Third respondent Eastwood Construction Limited, and Mr Neil Eade, a Senior Building Control Officer employed by Christchurch City Council, represented the Fourth respondent, the Council.

[30] Mr Munn, the independent building expert appointed by WHRS to inspect and report on the Claimant's property, attended the hearing and gave sworn evidence.

[31] The witnesses (who all gave sworn evidence) in support of the claim were:

- Ms Kaye Milligan (Ms Milligan is the Claimant in this matter)
- Mr Noel Casey (Mr Casey is a Building Consultant)
- Mr Justin Busbridge (Mr Busbridge is a director of Image Projects Ltd. the building company that prepared the quotation(s) for the remedial work to the Claimant's dwelling and upon which the amount claimed has been based)

[32] The witnesses (who all gave sworn evidence) to defend the claim for the Second Respondent, Stewart Ross, were:

- Mr Stewart Ross (Mr Ross is a registered Architect)

[33] The witnesses (who all gave sworn evidence) to defend the claim for the Third respondent, Eastwood Construction Limited were:

- Mr John Mulholland (Mr Mulholland is a director of Eastwood)
- Mr Peter Smith (Mr Smith is a director of Eastwood)

[34] The witnesses (who all gave sworn evidence) to defend the claim for the Fourth respondent, the Council were:

- Mr Neil Eade (Mr Eade is a Senior Building Control Officer employed by the Christchurch City Council)

[35] I undertook a site visit and inspection of the Claimant's dwelling on the afternoon of 19 August 2004 in the presence of Ms Milligan, Mr Thompson, Mr Ross, Mr Mulholland, Mr Smith, and Mr Humm.

[36] Following the close of the hearing, all parties presented helpful closing submissions which I believe canvass all of the matters in dispute.

PRELIMINARY MATTER REGARDING THE ADJUDICATOR'S IMPARTIALITY

[37] A few days before the hearing, a letter was received by the Case Manager from the Council's insurers ("Riskpool") expressing "discomfort"

with my hearing this claim because in April 2000 I had reached a settlement with the North Shore City Council in respect of a personal claim and North Shore City Council was indemnified by Riskpool.

[38] At the start of hearing I brought the matter to the attention of parties, made a statement setting out the factual situation, reviewed the requirements for natural justice and lack of (apparent) bias, referred to relevant case law (in particular, *Erris Promotions Limited v Commissioner of Inland Revenue* CA 68/03, 24 July 2003 and *Ngati Tahingi v Attorney-General*, CA 163/03, 24 September 2003), referred to the IBA Guidelines on Conflicts of Interest, and invited submissions from the parties. A brief adjournment was then taken to allow the parties time to consider the matter before responding.

[39] The solicitor for the claimant and the representatives of all parties indicated that they agree to my continuing to hear the claim; the Council's representative advised that the Council had taken advice during the adjournment and was willing to proceed.

[40] After hearing from the Claimant's solicitor and the parties representatives, I reviewed the relevant principles as set out in the aforementioned Court of Appeal cases and the IBA Guidelines, advised of my WHRS adjudication record of cases and after carefully considering the contents of the Riskpool letter and the submissions and responses of the parties, I concluded that a reasonable and informed observer would not think that my impartiality might be/have been affected by the ground upon which the challenge was based.

[41] Accordingly, I did not consider that I should disqualify myself from further involvement in the claim and proceeded with the hearing.

THE CLAIM

- [42] Ms Milligan seeks the sum of \$30,969.00 based on a quotation dated 9 July 2004 from Image Projects Limited (“Image”) to remove the existing brick veneer from 3 faces of the dwelling above the parapet, replace the building paper and supply and fit flashings, supply and install a galvanised steel angle to support the veneer, relay the bricks, plaster the bricks on balconies and painting and scaffold hire.
- [43] The WHRS Assessor, Mr Munn, estimated the cost of the work to remedy the water penetration of the Claimant’s unit as \$10,024.99 in his report dated 3 December 2003. Mr Munn revised his estimate to the date of the hearing at the request of the claimant at \$11,487.72

THE DEFENCE FOR THE SECOND RESPONDENT (STEWART ROSS)

- [44] Mr Ross submits that he has no liability to the Claimant on the grounds that his practice provided a partial service, i.e. the practice provided planning and general design advice and information to RBD, it facilitated activities during construction, but it had no contractual authority for approval and certification of any work carried out on site.

THE DEFENCE FOR THE THIRD RESPONDENT (EASTWOOD)

- [45] Eastwood submits it has no liability to the Claimant on the grounds that it was not engaged to provide or involved with design issues, that it carried out the building works in a competent manner under the constant supervision of professional Architects, Engineers and Council inspectors.

Eastwood further submits that it followed all directions and instructions given by the professionals in every respect, that it constructed the brick veneer as directed by the Architect's representative, Mr Graeme Jacobs, and that the water ingress is likely to have resulted from cracking of the mortar joints in the brick veneer following extensive pile driving which was carried out 12 to 18 months after the completion of the Claimant's brickwork.

THE DEFENCE FOR THE FOURTH RESPONDENT (THE COUNCIL)

[46] The Council submits that it has not been negligent in performing its duties in relation to the claimants unit and issued the CCC only after being satisfied on reasonable grounds that the work complied with the building code.

[47] The Council submits that the inspections it undertook, together with the high standard of work it observed over the entire project, the involvement of other building professionals, and the reliance it placed on the BA9 Form (Applicants Advice Notice of Completed Building Work) submitted by Eastwood on completion of the works, gave the Council the confidence to issue the CCC, and moreover, the Council could not have been expected to conclude there was a potential weathertightness problem when it conducted its pre-line inspection on 21 August 1996 because the inspection is predominantly an internal inspection and the critical area would have been hidden from view by building paper.

THE DAMAGE TO THE CLAIMANT'S DWELLING

[48] It is common ground that water has penetrated the Claimant's unit and the extent of the damage that has resulted is set out in the reports

prepared by the WHRS Assessor, Mr Humm, and the Claimant's Building Consultant, Mr Casey.

[49] The damage may be summarised as follows:

- Wetted carpet and underlay; and
- Rusted spikes on the smooth edge strips that retain the carpet in place around the exterior walls; and
- Fungal fragments on bottom plate timbers on the South West exterior Wall.

THE CAUSE(S) OF THE WATER PENETRATION

[50] Mr Casey gave evidence that he conducted a water test on 4 April 2001 when a section of the wall lining on the exterior wall of the study had been removed by the Claimant and the test identified that water entered the dwelling when run on the junction between the parapet and the brick veneer. When cross- examined on this issue by Mr Ross, Mr Casey advised that "the water came in high up about the level of the bottom of the brickwork."

[51] In a letter to the Claimant's partner dated 31 May 2001, Mr Casey advised: "the basic problem is that the reconstruction above the old parapet has not been adequately flashed or sealed." Mr Casey reported that the gap between the existing parapet and the newly constructed exterior timber wall framing of the study had been filled with concrete and the brick veneer had been constructed on top of the concrete infill. When he ran water on the junction between the brick veneer and the

parapet he observed water quickly ran down inside the parapet and onto the floor. Mr Casey thus concluded that long periods of rain had caused water to flow around the wall and out into the carpeted area wetting the floor coverings and damaging the painted skirtings. Mr Casey considered that in the long term the water penetration would lead to dampness problems and timber decay.

[52] Mr Casey stated that the basic construction suffered from 4 omissions, namely:

- No sill flashing under the bottom course of bricks to divert water to the outside
- No open perpend to allow moisture egress or ventilation of the cavity between the back of the veneer and the timber wall framing
- No apparent seal between the new concrete infill and the old plaster of the parapet
- No paint protection of the parapet to minimise water ingress

[53] At section 4.2 of his WHRS report dated 3 December 2003, Mr Humm stated that the building [the Claimant's unit] fails to meet both the functional requirements and performance expected of such buildings by the Building Regulations 1992 because water is penetrating the exterior walls of the unit and could cause damage to building elements.

[54] In particular, Mr Humm states that the construction of the brick veneer failed to meet the requirements of NZS 3604:1990 Timber Framed Buildings Not Requiring Specific Design; Appendix F – Masonry Veneer Exterior Wall Covering, and NZS 4219:1989 Code of Practice For

Masonry Construction: Materials and Workmanship, because of the absence of weepholes and ventilation openings in the brick veneer and because water is penetrating the structural wall supporting the veneer.

[55] At paragraph 5.1.2, of his report Mr Humm reported the cause(s) of the water entering the dwellinghouse are as follows:

“During periods of heavy rain and strong southeast winds moisture has entered the cavity through the brick veneer cladding. As no flashings and weepholes have been installed at the junction of the brick veneer and the original parapet the moisture has run down to the concrete floor and seeped through the bottom plate into the dwelling having no other means of drainage.”

[56] Mr Humm also considered that water may be able to enter the dwelling through cracks he observed on the parapet where “the plaster has been formed” being a reference to the junction between the new and old concrete construction at the top of the parapet.

[57] In Eastwood’s written response to the adjudication claim, Mr Mulholland advised that he had observed cracking of the vertical mortar joints in the brick veneer which would in his opinion, allow water entry at times of heavy rain and high wind. Mr Mulholland believed that the hairline cracking was most likely the result of extensive pile driving that was carried out 12-18 months following the completion of the brickwork on Unit 36. Mr Mulholland also advised that the junction between the new and old structures could allow water entry, but in his view it was unlikely that these were contributing to the problem.

[58] Mr Ross gave evidence that he considered the brick veneer was not the principal source of the weathertightness problem and in his view removing and replacing the whole of the brick veneer wall may do little to rectify the problem because he considers that water running off the new

brickwork is soaking into the old plastered parapet, either through the plaster itself, or particularly into the many cracks which have never been filled or sealed.

[59] Mr Ross also gave evidence that the concrete beam constructed by Eastwood to support the brick veneer at the top of the parapet was constructed very similar to the detail discussed at the meeting on 18 May 1998 which was attended by Eastwood, Holmes, RBD and Graeme Jacobs apart from the lack of a preformed angle fillet in the cavity or any flashing.

[60] In his closing submissions Mr Ross submitted that he believes the assumptions of Mr Casey and Mr Humm are flawed and before any drastic demolition takes place a more authoritative analysis of the problem should be carried out.

[61] Mr Eade gave evidence that the only way to remedy the problem of water penetration in relation to the brick veneer is by the installation of a flashing below the bottom course of bricks.

[62] I have carefully considered the extensive evidence given in this regard but in the end the issue really became quite straightforward in my view.

[63] It is common ground that the brick veneer as constructed by Eastwood does not comply with the relevant New Zealand Standards or the Building Code because the cavity is neither vented nor drained. The reason for having a cavity and drainage and ventilation openings in brick veneer construction is helpfully set out in Appendix 2 to Ms Milligan's Reply Statement, namely because bricks and mortar joints are not waterproof and adequate ventilation of the cavity is essential to dry out any moisture that penetrates the veneer or mortar joints to prevent the

setting up of timber rot. In other words, moisture can and will penetrate brick veneer cladding because of the nature of the materials used and accordingly the veneer and the supporting building elements must be formed in such a manner as to ensure that any moisture that does penetrate the veneer is removed or dissipated before damage can occur to the supporting timber wall framing.

[64] Mr Casey gave evidence that the brick veneer should have been constructed in accordance with NZS 3604:1990 Appendix F, Fig. 1. which construction requirements and details include inter alia, a ventilated and drained cavity and a D.P.C flashing or a rebate in the supporting structure (concrete beam) to direct moisture out of the cavity and away from the supporting timber framing.

[65] Mr Casey gave evidence that he conducted a test that involved running water on the junction (mortar joint) between the brick veneer and the parapet and when he did so he observed water running down the inside of the parapet and onto the supporting timber framing.

[66] I believe that the reason for that occurring has become obvious from the evidence, firstly because no drainage openings have been provided at the base of the veneer to allow moisture that penetrates the veneer to drain to the outside, and secondly, and more notably, the absence of a flashing or rebate in the concrete supporting beam to prevent moisture that penetrates the veneer from making contact with the supporting timber structure and to direct any such moisture to the outside.

[67] I accept as persuasive, Mr Casey's evidence that even if the moisture ingress was a result of fine cracks in the mortar joints caused by pile driving as contended for by Mr Mulholland, the provision of drainage holes and a flashing or rebate at the base of the veneer would have

prevented moisture penetrating the dwelling beyond the cavity where it is designed to be collected and discharged to the outside of the dwelling. It seems therefore that the underlying cause of the water penetration of the dwelling is the absence of a drained and flashed cavity; the cause of the penetration of the cavity by water is of lesser moment given that it is anticipated by design that water will penetrate the brick veneer.

[68] Whilst Mr Humm stated under cross examination by Mr Ross that he could not discount moisture entering the dwelling through cracks in the plastered parapet, there has simply been no evidence of testing or of conclusive observations to support Mr Ross' contention that moisture is in fact entering the Claimant's unit through the old plastered brick parapet. Mr Ross submitted that "a more authoritative analysis of the problem should be carried out " and that may very well be so, but save for the proposed application of a flashing and painting of the parapet as part of the remedial work recommended by Mr Humm and Mr Casey (supported by Mr Eade) the Claimant has not sought to claim any costs associated with investigating or undertaking repairs to the parapet, and I am driven to conclude that Mr Ross' evidence falls short of establishing on the balance of probabilities that the old brick plastered parapet is the principal source, or at least a source of moisture penetration of the Claimant's dwelling.

[69] Accordingly, and whilst there is obviously a tinge of logic to Mr Ross' theory, I can only find that his contention is speculative, and that places it beyond my ability to reach any conclusive finding in these proceedings. Any further enquiry in that regard is a matter for the Claimant to follow up.

Summary of causes of damage to Claimant's dwelling

[70] After viewing the Claimant's property and considering the extensive evidence given in relation to this matter, I have come to the conclusion, that:

- Moisture is entering the Claimant's dwelling through the brick veneer; and
- The absence of drainage openings at the base of the veneer is preventing moisture that penetrates the veneer to drain to the outside; and
- The absence of ventilation openings at the base and the top of the veneer is preventing ventilation of the cavity to dry out moisture that penetrates the veneer; and
- The absence of a flashing or rebate in the concrete supporting beam enables water that penetrates the veneer to run inside the dwelling, wetting floor coverings and the supporting timber structure, which could cause undue dampness or damage to building elements.

THE REMEDIAL WORK

[71] The scope of the work recommended by Mr Munn to remedy that situation was set out at page 8 of his report, but in essence that work included:

- The removal of the existing brick veneer; and
- The installation of a flashing at the top of the parapet; and

- Replacement of brick veneer complete with new building paper and weepholes at the top and bottom courses of brickwork; and
- Painting exposed plasterwork with a high build acrylic paint.

[72] Mr Humm estimated the cost of undertaking the remedial work he proposed at \$10,024.99, which amount was increased to \$11,487.72 prior to the hearing to take account of current market conditions. When cross-examined by Mr Thompson on the accuracy of these figures, Mr Humm conceded that his calculations were based on figures obtained from Rawlinson's New Zealand Construction handbook, adjusted for small jobs, that the amount was an estimate, that only one quote has been obtained for the work and possibly the real value/cost of the remedial work lays between the two.

[73] Mr Casey recommended a similar approach but included the supply and installation of a galvanised "shelf angle" to support the veneer and obtained a 'tagged' estimate in or about December 2001 from Image Builders Ltd to carry out that work in the amount of \$15,010 plus GST

[74] On July 9 2004 the Claimant obtained a quotation from Image Projects Ltd ("IPL") in the sum of \$27,528.00 plus GST which is the amount the claimants now seek in this claim. IPL's quotation was based on discussions between Mr Casey and Mr Busbridge and included the supply and installation of the galvanised steel support shelf recommended by Mr Casey.

[75] Mr Busbridge gave evidence that the cost of carrying out the remedial work had increased significantly in the 2 ½ years between the estimate and the quotation and in response to questions put by Mr Ross, he

stated that the cost of supplying and installing the galvanised shelf was included in the quotation in the amount of \$3,200.00 plus GST.

- [76] Mr Ross and Mr Eade both disputed the need to remove the brick veneer and submitted that it would be possible to install a complying flashing by removing the bottom course of bricks in sections, securing the flashing in place and replacing the bricks progressively. Neither Mr Ross nor Mr Eade provided any quotations or costings for carrying out the more limited scope of works that they proposed.
- [77] For completeness, I record that options for re-cladding the unit using brick facings or EIFS systems were raised by the parties at various stages during these proceedings, but because of the heritage listing of the building, alternative claddings presented planning and approval difficulties, and other options including brick facings had simply not been adequately investigated or costed by the parties, to be considered.
- [78] The solution submitted by Mr Eade and Mr Mulholland to construct the flashing by progressively removing bricks from the base of the wall obviously had appeal from a practical and cost perspective, but the lack of a fixed price quotation (or any quotation or costings) from a contractor willing to undertake that work with its inherent risks, militates against finding for that solution.
- [79] Of the inconsistent views on the necessary scope of the remedial work, I prefer on balance the evidence and opinions of Mr Casey, Mr Humm and Mr Busbridge (subject to the qualification regarding the steel shelf to follow), whose proposed solution should ensure that there are no further problems in relation to water penetration through and about the brick veneer and should maintain the character of the unit and the surrounding development.

[80] I accept Mr Ross' and Mr Mulholland's evidence that the design and construction of the concrete beam that the brick veneer lands on is suitable for its intended purpose i.e. to support the veneer (the structural design for the beam was undertaken by Holmes) and accordingly I accept that there is no need for an additional support shelf to be provided which according to Mr Busbridge's evidence will reduce the cost of the work by \$3,200 plus GST (a total amount of \$3,600.00).

[81] In conclusion, I accept that the remedial work proposed by Mr Casey and Mr Humm is the appropriate work to be undertaken, with the exception of the supply and installation of a galvanised steel support shelf, and I determine that the proper cost of that work is \$27,369.00 (being the amount quoted/claimed of \$30,969.00 less the allowance for the steel shelf of \$3,600.00)

L IABILITY FOR DAMAGE TO THE CLAIMANT'S DWELLING

[82] The Claimant contends that all of the respondents are in some way liable for the losses she has suffered.

[83] In essence, Ms Milligan claims that all respondents bear some responsibility for the damage, Mr Ross for his architectural work and project supervision, Eastwood because it did the work, and the Council because it issued a CCC even though full compliance with the Building Code had not been completed.

The liability of the Second respondent, Stewart Ross

[84] Mr Ross submits that he has no liability to the Claimant for any defects or omissions in the project because he and his associates provided only a partial service and had no contractual authority or final approval of any work carried out on the site.

[85] In his evidence and closing submissions, Mr Ross described the role of Stewart Ross Architects in relation to the Peterborough project as follows:

- Stewart Ross Architects were employed by RBD on a time charge basis to provide general design and planning services with responsibilities for assisting with Resource Consent applications and providing additional advice on request during the construction process
- Stewart Ross Architects prepared drawings sufficient to obtain a Building Consent which was issued by the Council
- Stewart Ross Architects was not a party to the contract between RBD and Eastwood and had no authority or certification role within the contract
- The Contract was a fixed price contract in which Eastwood could determine the method of construction in order to achieve the fixed price
- The exterior fabric of the building was not the responsibility of Stewart Ross Architects apart from waterblasting the stone and brickwork as directed by the Council Heritage Architects

[86] Mr Mulholland said that Eastwood considered Stewart Ross' involvement with the project to be far more extensive than contended for by Mr Ross

and referred to site meetings that were attended and reported on by Graeme Jacobs, regular site visits taking place to the extent that the attendances were greater than normal because of decisions that needed to be made on site, the preparation of snag lists for every unit, pre-lining inspections, and the provision of specific design and detail because of the unique nature of the building.

[87] Against this, Mr Ross said that the project was “developer driven” and the involvement of his practice in the preparation of snag lists in particular was essentially in relation to aesthetics.

[88] Mr Thompson correctly submits that the matter to be determined in relation to the liability, if any, of Stewart Ross is whether his input was sufficient to make him responsible or partially responsible. There was no contractual relationship between Stewart Ross and the Claimant, therefore for liability to attach to Stewart Ross, he must firstly be found to have owed a duty of care to the claimant in the exercise of the provision of his services, and secondly he must have breached that duty causing damage to the claimant that was a sufficiently proximate consequence of that breach.

[89] For an Architect or Engineer providing professional services, liability to third parties may arise out of either negligent design or negligent supervision of contract works (*Young v Tomlinson* [1979] 2 NZLR 441. *Morton v Douglas Homes Ltd* [1984 2 NZLR 548])

[90] Stewart Ross clearly provided architectural design services in respect of the claimants unit and he acknowledges that Graeme Jacobs contributed to the design (by Holmes) of the brick veneer supporting beam to the extent that he required and detailed an angle fillet to be formed at the rear of the beam for weatherproofing purposes. There has been no

evidence provided by any party that Graeme Jacobs failed to exercise due care and skill in relation to the design of the beam, or any other aspect of the building works, and accordingly I find that negligent design on the part of Stewart Ross has not been established in this case.

[91] That leaves only supervision and/or certification of the contract works as possible grounds for liability of Stewart Ross in a negligence claim.

[92] In the circumstances I am satisfied that the evidence establishes overwhelmingly that Stewart Ross had no contractual responsibility for checking, inspecting, and/or certifying the building works save for in relation to overall design compliance and aesthetics, that Stewart Ross did not by his conduct assume responsibility to RBD or Eastwood, or impliedly to any other person in respect of approving and certifying the contract works, and accordingly I conclude that no duty of care was owed by Stewart Ross to the Claimant in relation to the (supervision and approval of) construction of the brick veneer and the supporting beam and therefore Stewart Ross has no liability to any party to these proceedings for the water ingress and damage to the claimant's dwelling.

The liability of the Third respondent, Eastwood

[93] Following a long line of cases including *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394, *Mt Albert Borough Council v Johnson (CA)* [1979] 2 NZLR 234, *Morton v Douglas Homes Limited* [1984] 2 NZLR 548, *Lester v White* [1992] 2 NZLR 483, *Chase v de Groot* [1994] 1 NZLR 613, *Riddell v Porteous* [1999] 1 NZLR 1, the law is well settled in New Zealand, that those who build and/or develop properties owe a non-delegable duty of care to subsequent purchasers.

- [94] Eastwood was the builder of the Claimant's unit, and by all accounts according to the evidence of Mr Ross, had a reasonably free hand in determining the method of construction to be employed to achieve RBD's objectives for the contract price that it quoted. I am not to be taken as suggesting that there was anything untoward in Eastwood's conduct, in fact the evidence is that the building work was undertaken to a very high standard overall, but Eastwood clearly enjoyed a greater level of contractual freedom than most contractors would be accustomed to when it came to determining how the building was actually constructed.
- [95] Eastwood was involved in the discussions with RBD, Holmes, and Graeme Jacobs on 18 May 1998 that culminated in the preparation of a detailed drawing for the construction of the concrete beam that supports the brick veneer.
- [96] The evidence establishes overwhelmingly that the brick veneer and the supporting concrete beam were not constructed in accordance with either the design detail provided by Holmes and Graeme Jacobs or in accordance with New Zealand Standards or industry norms and practices, water is able to penetrate the dwelling and cause damage to the building elements as a result, and accordingly that building work does not comply with the Building Code.
- [97] Eastwood was the builder of the Claimant's unit and by application of the principles illustrated in the authorities cited (*supra*), I find that Eastwood owed the Claimant a duty of care as the purchaser of the property Eastwood built, Eastwood breached that duty of care by constructing, or permitting to be constructed, defective building works, namely the brick veneer and the supporting beam, and by reason of the said breaches,

the Claimant has suffered loss and damage to her property for which Eastwood is liable.

[98] Accordingly, I find Eastwood liable to the Claimant for damages in the sum of \$27,369.00

The liability of the Fourth respondent, the Council

[99] In essence, the Claimant claims that at all material times the Council owed her a duty of care to exercise all due and proper care and skill in the exercise of its statutory and supervisory functions under the Building Act 1991 and that the Council breached its duties by issuing a CCC even though the work did not fully comply with the Building Code.

[100] Against that the Council submits that it took all reasonable steps when conducting its inspections of the building work, that at the time it conducted the pre-lining inspection of the Claimant's unit the critical area was obscured from view by building paper and it could not be expected to have observed the lack of a flashing or rebate on the top of the beam supporting the brick veneer, and it only issued the CCC only after being satisfied on reasonable grounds that the work complied with the Building Code.

[101] The Council is a duly incorporated Local Authority and is the Territorial Authority responsible for the administration and enforcement of the Building Act 1991 in Christchurch City where the Claimant's dwelling is located.

[102] The Council's functions, duties, and obligations under the Building Act 1991, relevant to this matter include, inter alia:

- Inspect building work (s76(1)(a))

Inspection is defined as “the taking of all reasonable steps to ensure...that any building work is being done in accordance with the building consent...”

- Enforce the provisions of the Act and the Regulations made under it (s24(e))

The Building Code is the First Schedule to the Building Regulations 1992

- Issue Code Compliance Certificates (s24(f))

A Territorial Authority may only issue a Code Compliance Certificate if it is satisfied on reasonable grounds that the building work to which the certificate relates complies with the Building Code and the Building Consent (s43(3))

[103] There is no contractual relationship between the Council and the Claimant, therefore any liability that the council may have to the Claimant for the damage and the losses that she has suffered as a result of her home being a leaky building may only be in tort, that is to say, for breach of the duty of care that a Council owes a subsequent homeowner when discharging its functions and duties under the Building Act 1991.

[104] Following a long line of authorities, the law is now well settled in New Zealand that a Council owes a duty of care when carrying out inspections of a dwelling during construction, and that position was confirmed in *Hamlin v Invercargill City Council* [1994] 3 NZLR 513:

“It was settled law that Councils were liable to house owners and subsequent owners for defects caused or contributed to by building inspector’s negligence.”

- [105] The duty of care owed by a Council in carrying out inspections of building works during construction is that of a reasonably prudent building inspector.

"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 reasonably prudent Council would 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 in which can cause very substantial damage to a building."

Stieller v Porirua City Council (1983) NZLR 628

- [106] Notwithstanding that the common law imposes a duty of care on Councils when performing duties and functions under the Building Act 1991, a Council building inspector is clearly not a clerk of works and the scope of duty imposed upon Council building inspectors is accordingly less than that imposed upon a clerk of works:

“ A local Authority is not an insurer, nor is it required to supply to a building owner the services of an architect, an engineer or a clerk of works.”

Sloper v WH Murray Ltd & Maniapoto CC, HC Dunedin, A31/85 22 Nov. Hardie Boys J.

- [107] The duty of care imposed upon Council building inspectors does not extend to identifying defects within the building works which are unable to be picked up during a visual inspection. This principle was confirmed by the High Court in *Stieller* where it was alleged the Council inspector was negligent for failing to identify the omission of metal flashings concealed behind the exterior cladding timbers:-

"Before leaving this part of the matter I should refer to some further item of claim made by the plaintiffs but upon which their claim fails. They are as follows:

Failure to provide continuous metal flashings for the internal angles behind the exterior cladding. It seems from the hose test that this is a defect in the corners of the wall at the southern end of the patio deck but I am not satisfied that there is any such defect in other internal angles. It is at all events not a matter upon which the Council or its officers were negligent either in issue of the permit or in the inspection. It is a matter of detail which the Council ought not to be expected to discover or indeed which can be discoverable on any proper inspection by the building inspector "

Stieller v Porirua City Council (1983) NZLR 628

[108] The extent of a Council inspector's duty does not extend to including an obligation to identify defects in the building works that cannot be detected without a testing programme being undertaken. In *Otago Cheese Company Ltd v Nick Stoop Builders Ltd*, CP18089 the High Court was considering the situation where no inspection of the foundation was carried out prior to the concrete pour. The Court held as follows:-

"I do not consider that any inspection of the sort which a building inspector could reasonably be expected to have undertaken would have made any difference. There is no question that the builder faithfully constructed the foundation and the building in accordance with the engineer's plans and specifications. No visual inspection without a testing programme would have disclosed to the inspector that the compacted fill was a layer of peat and organic material. If there was a failure to inspect I do not consider that any such failure was causative of the damage which subsequently occurred."

Otago Cheese Company Ltd v Nick Stoop Builders Ltd, CP18089

Did the Council exercise the requisite standard of care when performing its functions, duties, and obligations under the Building Act 1991 in this case?

[109] In short Mr Eade submits that the Council officers carried out the inspections of the building works with suitable care and skill and the

Council acted reasonably when it issued the CCC in reliance on its inspections, the involvement of other building professionals, the provision of its Form BA9 (Applicants Advice Notice of Completed Building Work) by Eastwood, and its assessment of the standard work undertaken over the entire project.

- [110] Mr Eade referred me to the determination made by Adjudicator Douglas in Mulcock v Williams and Ors [Claim No.00435/14 May 2004] as authority for the Council's submission that it has no liability in negligence if it is deemed to have acted reasonably in assessing whether or not the building work complies with the Building Code.
- [111] Determining the liability of the Council in negligence requires an analysis of law and fact i.e. an inquiry into the standard of care owed to the claimant and whether there is any evidence of failure to attain that standard on the part of the Council, together with an analysis of the Council's conduct directed at determining whether the building work at issue complied with the Building Code. If such an inquiry establishes that the Council's conduct was objectively reasonable in all the circumstances, it follows that the Council will have discharged the duty of care it owed to the claimant and will have no liability in negligence for any damage suffered by the Claimant.
- [112] In *Sloper and Stieller* (supra) the Courts made it clear that a Local Authority is not required to provide the services of an architect, an engineer or a clerk of works and the duty of care imposed upon Council building inspectors does not extend to identifying defects within the building works which are unable to be picked up during a visual inspection.

- [113] It would seem to follow that if a defect was capable of being detected during a visual inspection that would be a factor weighing in favour of a finding of negligence and clearly a weathering rebate in the concrete beam supporting the brick veneer could have been viewed before the brick veneer was constructed.
- [114] A factor militating against a finding of negligence would be whether it was necessary or prudent for a council inspector to inspect the particular work in question and moreover whether the Council requested, or was invited, to inspect that particular building work before it was covered up.
- [115] There was certainly no evidence that the Council ought to have checked the rebate/beam before the brick veneer was constructed as a matter of course or prudence, based on best practices of Local Authorities current at the time, or that the Council was ever invited to inspect the beam/rebate during construction, rather the evidence was that the Council carried out a pre-lining inspection of the interior of the Claimant's unit but the beam/rebate construction detail would have been obscured from view by building paper, and moreover, that the cladding was changed from timber weatherboard to brick veneer after the issue of the Building Consent and without notice to the Council.
- [116] It would seem clear to me that if the Council had no knowledge of RBD's decision to change the cladding of the Claimant's unit from weatherboard to brick veneer, the construction detail for same was not a matter the council could direct its mind to, and therefore the Council could not be negligent for failing to inspect same at the time the change was implemented and before it had knowledge of the changed specification.

- [117] What then of its later inspections when the change from weatherboard to brick veneer must have been evident? Clearly any rebate would have been obscured from view but the provision, or lack of, drainage and ventilation openings at the base and head of the brick veneer cladding could have been viewed during a visual inspection and must therefore weigh in favour of a negligence finding.
- [118] The Council says that it carried out various inspections of the building, including a final inspection but when it came to issuing a CCC, it relied not only on its own inspections which had lead it to conclude that the building work had been carried out to a high standard over the entire building, but on the skill and expertise of the other building professionals responsible for the project, namely Holmes and Stewart Ross Architects, together with Producer Statements from Holmes for Fire and Structural compliance and the provision by Eastwood of a duly executed Form BA9 (Applicants Advice Notice of Completed Building Work) wherein the applicant (Eastwood) confirmed that the building work in respect of which a CCC was sought complied with the Building Consent.
- [119] Any argument that a local authority is under any obligation to ensure or guarantee absolute compliance of a project with the Building Code can, I think, be readily disposed of by reference to section 43(3) of the Building Act 1991 which imposes on a territorial authority an obligation to issue a CCC if it is satisfied on reasonable grounds that the building work complies with the building code and the building consent. (Emphasis added). It follows therefore that the certificate cannot be a contractual warranty or guarantee in circumstances where the territorial authority is only required to be satisfied on reasonable grounds that the building work is compliant. What will be critical to determining whether a Council discharged its duty of care when issuing a CCC will be an objective assessment of the reasonableness of the Council's approach and

conduct directed to determining whether the building work at issue complied with the Building Code and the Building Consent.

[120] It is a matter of common knowledge in the building industry that the Building Industry Authority (“the BIA”), forced to address this issue in November/December 2003 following the implementation by at least one Council of a policy of declining to issue CCC’s for properties with monolithic claddings that do not have cavities behind, advised in BIA News No.137 that a building specific approach is required, that whether there are reasonable grounds for issuing a CCC will vary from building to building, and the BIA provided guidance as to the aspects that a Council could take into account in order to be satisfied that building work complies with the Building Code. Those aspects included:

- The council’s own inspections
- Inspections by the owner’s engineer, usually reported to the council in the form of a ‘producer statement’
- The skill and experience of the person who actually did the work
- A producer statement, perhaps from the builder or the person who actually did the work. Factors to take into account regarding producer statements include:
 - (a) Whether the person making the statement can be sure that the work was properly done
 - (b) Whether the person who made the statement can actually be relied on
 - (c) Any other relevant matter

[121] The BIA also advised that if a council does not have reasonable grounds for being satisfied that the building complies with the Building Code, it must refuse to issue a CCC.

[122] In this case, it would appear that the Council recognised the specialist nature of the building project and its function and obligations relevant to the issue of the Building Consent and CCC, and directed its mind to compliance issues from the outset of its involvement with the project. The Council advised RBD at the time the Building Consent was applied for that it would be required to provide Producer Statements Design and Producer Statements Construction Review for structural and fire safety compliance and Certification by the Applicant (RBD) that the work covered by the Building Consent had been completed in accordance with the Building Consent and the Building Code before a CCC could issue. (See Assessor's report App.A6)

[123] In accordance with the guidelines issued to the industry by the BIA, and whilst not seeking to define any priority, the factors that weigh against a finding of negligence in relation to the issue of the CCC by the Council in the circumstances of this case would seem to be:

- The Council sought Producer Statements Design and confirmation of Construction Monitoring as part of the building Consent documentation/application
- The council advised the applicant that it would be required to certify completion and compliance of the works before the Council would issue a CCC

- The Council carried out inspections of the building work during the course of construction in addition to those it understood would be carried out and certified by Holmes
- As a result of conducting its own inspections, the Council observed and concluded that the skill and experience of the person (Eastwood) who actually did the work was of a high standard
- The Council sought and obtained Producer Statements Construction Review from Holmes and the Council's Form BA9 (Applicants Advice Notice of Completed Building Work) duly executed by Eastwood on completion of the building works
- As a result of conducting its own inspections, the Council observed, and was satisfied, that the persons making the statements (Eastwood and Holmes) could be sure that the work was properly done and could be relied on

[124] I am satisfied therefore, that an analysis of the Council's approach and conduct directed to determining whether the building work at issue complied with the Building Code and the Building Consent (a weighing of the factors pointing towards and against a finding of negligence) discloses that the Council's approach and conduct was objectively reasonable in all the circumstances and the grounds upon which the Council satisfied itself that compliance had been achieved were likewise reasonable in the circumstances. Accordingly, and notwithstanding that the building work does not comply with the Building Code in every respect, I am driven to conclude that the Council discharged its duty of care when issuing the CCC and has no liability to any party to these

proceedings for the water ingress and damage to the claimant's dwelling.

COSTS

[125] The power to award costs is addressed at clause 43 of the Act, which provides:

43 Costs of adjudication proceedings

- (1) An adjudicator may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if the adjudicator considers that the party has caused those costs and expenses to be incurred unnecessarily by-
 - (a) bad faith on the part of that party; or
 - (b) allegations or objections by that party that are without substantial merit
- (2) If the adjudicator does not make a determination under subsection (1) the parties must meet their own costs and expenses.

[126] I think it is fair to summarise the legal position by saying that an adjudicator has a limited discretion to award costs which should be exercised judicially, not capriciously.

[127] I am not persuaded that any respondent has necessarily acted in bad faith, or that its case was without substantial merit such that an award of costs would be appropriate in this case.

[128] I therefore find that the parties shall bear their own costs in this matter.

CONCLUSION AND ORDERS

For the reasons set out in this determination, and rejecting all arguments to the contrary, I determine:

- [a] The Third respondent, Eastwood Construction Limited is in breach of the duty of care owed to Kaye Barbara Milligan (the Claimant) and is liable in damages for the loss caused by that breach in the sum of \$27,369.00

Therefore, I make the following orders:

- (1) Eastwood Construction Limited is liable to pay Kaye Barbara Milligan the sum of \$27,369.00

(s42(1))

- (2) The parties shall bear their own costs in this matter

(s43)

Dated this 20th day of December 2004

**JOHN GREEN
ADJUDICATOR**

STATEMENT OF CONSEQUENCES

IMPORTANT

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

If the adjudicator's determination states that a party to the adjudication is to make a payment, and that party takes no step to pay the amount determined by the adjudicator, the determination may be enforced as an order of the District Court including, the recovery from the party ordered to make the payment of the unpaid portion of the amount, and any applicable interest and costs entitlement arising from enforcement.