CLAIM NO: 00540

UNDER The Weathertight Homes Resolution Services Act 2002

IN THE MATTER OF an adjudication

BETWEEN	**GRAEME TUCKER and GLENYS TUCKER and STEPHEN SUDBURY as trustees of the Ngahere Trust**
	Claimants
AND	**ALLAN TUCKER**
	First respondent
	(Intituling continued next page)

Hearing: 13, 14 & 15 December 2004

Appearances: John Ross, counsel for the Claimants
David Grindle, counsel for the First Respondent
Roger Bowden, counsel for the Second Respondent
Scott Robertson for the Fourth Respondent
Wayne Tong for the Fifth Respondent
Michael Locke, counsel for the Sixth Respondent
Brian Oliver the Seventh Respondent in person

Determination: 4 April 2004

DETERMINATION

AND	**BUTT DESIGN LIMITED** Second respondent
AND	**WHANGAREI DISTRICT COUNCIL** **(Now struck out)** Third respondent
AND	**PLASTER SYSTEMS LIMITED** Fourth respondent
AND	**SUPERIOR BALUSTRADES WHANGAREI LIMITED** Fifth respondent
AND	**TERRY WELLS** Sixth respondent
AND	**BRIAN OLIVER** Seventh respondent

INDEX

INTRODUCTION 5

MATERIAL FACTS 6

THE HEARING 10

THE CLAIM 12

CAUSES OF ACTION 13

THE DEFENCE FOR THE FIRST RESPONDENT 13

THE DEFENCE FOR THE SECOND RESPONDENT 14

THE DEFENCE FOR THE FOURTH RESPONDENT 15

THE DEFENCE FOR THE FIFTH RESPONDENT 17

THE DEFENCE FOR THE SIXTH RESPONDENT 17

THE DEFENCE FOR THE SEVENTH RESPONDENT 18

THE DAMAGE TO THE CLAIMANTS' DWELLING 19

THE CAUSE(S) OF THE DAMAGE TO THE CLAIMANTS' DWELLING 20

The North Eastern Deck 20
- **Fixing of the balustrade** 22
- **Wiring for the exterior lights** 22
- **The step down from the floor to the deck** 23
- **The joinery/flashings & junction with the cladding** 25

The North Western Deck 27
- **Joint between the Insulclad and block wall in rumpus room** 28
- **The joinery/flashings & junction with the cladding** 32
- **Lack of proprietary flashings to deck joists** 33
- **Lack of building paper** 35

The weathertightness of the Insulclad Cladding System 36
- **The Insulclad System** 36
- **The feature bands** 38

Summary of causes of damage to Claimants' dwelling 40

THE REMEDIAL WORK 41

The North Eastern deck area 41
The North Western deck area 42
The Cladding 43
The feature bands 46
Summary of remedial work 46

THE CLAIM FOR PROFESSIONAL CONSULTANCY FEES AS DAMAGES 47

THE CLAIM FOR GENERAL DAMAGES 51

Jurisdiction to award general damages 53
Are trustees entitled to claim general damages in their capacity as owners? 54

LIABILITY FOR DAMAGE TO THE CLAIMANTS'' DWELLING AND THE COST OF REPAIR 56

The liability of the First respondent in contract 56
The liability of the First respondent in tort 60
The liability of the Second respondent 61
The liability of the Fourth respondent 64
- **Defective product – Insulclad Cladding System 65**
- **Defective product – feature bands 65**

The liability of the Fifth respondent 66
The liability of the Sixth respondent 69
The liability of the Seventh respondent 71

CONTRIBUTION 72

COSTS 75

CONCLUSION AND ORDERS 80

STATEMENT OF CONSEQUENCES 86

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 Claimants, Graeme Tucker, Glenys Tucker and Stephen Sudbury are trustees of the Ngahere Trust and the owners of a dwellinghouse (“the owners”) located at 8 St Andrews Place, Kamo, Whangarei (“ the property”) and it is the owners’ dwelling which is the subject of these proceedings.

[3] The First Respondent, Allan Tucker, is a building contractor of Whangarei. Allan Tucker is the brother and brother-in-law of Graeme and Glenys Tucker, two of the owners and the occupiers of the subject dwellinghouse. Allan Tucker built the owners’ dwellinghouse as a ‘spec house’ and sold the property to the owners at a stage when the dwellinghouse was partially completed.

[4] The Second respondent, Butt Design Ltd (“BDL”), prepared the plans and specifications for the dwellinghouse for the First respondent, Allan Tucker.

[5] The Third respondent (Now struck out), Whangarei District Council, was struck out as a party to these proceedings because it issued the Building Consent in good faith in reliance on a Building Certificate issued by Building Certifiers (Whangarei) Limited (“BCWL”) (Now in Liquidation). BCWL carried out all inspections of the owners’ property and BCWL issued the Code Compliance Certificate for the owners’ dwellinghouse. Under Section 50(3) of the Building Act 1991 no civil proceedings may be brought against a Territorial Authority for anything done in good faith in reliance on a building certificate, or a Code Compliance Certificate establishing compliance with the provisions of the Building Code.

[6] The Fourth respondent, Plaster Systems Limited ("PSL"), is a duly incorporated company based in Auckland and carries on the business of manufacturing and selling proprietary plastering systems and materials as part of Nuplex Industries Ltd Construction Products Group. PSL supplied the materials and the "Insulclad Wall System" technology used by the Sixth respondent, Terry Wells, to clad the exterior of the owners' dwelling.

[7] The Fifth respondent, Superior Balustrades Whangarei Limited ("SBWL"), supplied and installed the aluminium and glass balustrade to the decks of the owners' dwelling for the First respondent, Allan Tucker.

[8] The Sixth respondent, Terry Wells, was at all material times a licensed Insulclad applicator trading under the name of Whangarei Tanks and was contracted by the First respondent, Allan Tucker, to supply and install the Insulclad cladding on the owners' dwelling and the waterproofing membrane on the deck over the garage.

[9] The Seventh respondent, Brian Oliver, is a waterproofing contractor of Whangarei and specialises in the supply and installation of 'Aquadex' fibreglass reinforced liquid applied waterproofing membrane. Brian Oliver was contracted by the First respondent, Allan Tucker, to repair the waterproofing membrane laid by the Sixth respondent Terry Wells

MATERIAL FACTS

[10] Distilling the situation as best I can, the relevant material facts are these:-

[11] In or about 1996, Allan Tucker obtained plans and specifications for a ‘spec house’ to be constructed at 8 St Andrews Place Kamo, from BDL.

[12] On 18 February 1999, Allan Tucker applied for a building consent to construct a new dwelling at 8 St Andrews Place Kamo. The plans and specifications prepared by BDL were approved by BCWL and Building Consent Number 32837 was issued on 10 March 1999 by Whangarei District Council.

[13] Construction of the owners’ dwelling began in or about late 1999.

[14] On 18 January 2000, BCWL issued Building Certificate No. 3055 recording certain changes to the internal layout of the proposed dwelling although it would appear that the final layout was a combination of the two floor plans for which building approval was granted.

[15] On 15 June 2000, the owners entered into an Agreement for Sale and Purchase of Real Estate (“the Agreement”) to purchase the property from the First respondent, Allan Tucker. The purchase price was $480,000 and settlement date was 4 August 2000.

[16] Pursuant to the terms of the Agreement, the First respondent warranted that the construction of the dwelling would comply with the provisions of the Building Act 1991. Pursuant to clause 6.2(5)(d) in particular, the First respondent warranted that all obligations imposed under the Building Act 1991 would be fully complied with “*at the giving and taking of possession*”.

[17] The Agreement also contained a special condition (15) that provided that the *“Vendor warrants that the home will be completed in a good and*

workmanlike manner and in accordance with the plans and specifications provided to and approved by the purchaser."

[18] The owners took possession of the dwellinghouse on 4 August 2000 and engaged 'Green Gables' to carry out the landscaping of the property.

[19] Between 18 January 2000 and 6 November 2000 BCWL undertook various inspections of the dwelling in the course of construction. It is notable that there is evidence that water was penetrating the dwelling from an early stage in its construction (See photos 4 & 5) and same is also recorded in the Field Advice Notice issued by BCWL on 19 July 2000.

[20] A final building inspection of the dwelling was undertaken on 6 November 2000 and on 14 November 2000, BCWL issued a Final Code Compliance Certificate.

[21] In or about January 2001, the owners became aware and concerned about water penetration when the ceiling in the garage collapsed.

[22] The owners engaged the First respondent Allan Tucker to rectify the problems. Allan Tucker inspected the property and carried out certain remedial work that involved inter alia, lifting tiles on the deck, repairing the membrane damaged by removal of the tiles, sealing between the sill section of the bifold doors from the upper level lounge to the deck with sealant and drilling new drainage holes in the face of the sill section of the bifolding doors.

[23] In December 2002 the owners filed a claim with the Weathertight Homes Resolution Service ("the WHRS") and in September 2003, the WHRS Assessor, Mr Templeman, provided a report concluding that the owners'

dwelling was a leaky building, he detected mould and fungal growth including *stachybotrys actra,* and he assessed the cost of repairing the damage to the owners' dwelling at $52,312.00

[24] During 2004, the First respondent Allan Tucker carried out further remedial work in accordance with the advice and recommendations contained in the WHRS Assessor's report. That work included the removal and replacement of water damaged wall linings, timber wall framing and cladding to the rumpus room below the family room on the North west corner of the dwelling and the reconstruction of the open timber deck outside the family room including the installation of a new stainless steel flashing between the new deck construction and the existing wall framing. Mr Tucker charged the owners $24,287.54 for that work.

[25] In October 2004, the owners' concerns lead them to commission a report by Mr Ian Beattie, a Building Surveyor, to update the position from the December 2002 report prepared by the WHRS Assessor Mr Templeman, to respond to matters raised by the respondents in these proceedings, and to reassess the remedial costs. Mr Beattie concluded that the leaking and damage was more extensive than assessed by Mr Templeman and included extensive cracking and leaking in the cladding to the extent that Mr Beattie recommended: the reconstruction of the North Western open timber deck because of the timber used by the First respondent in carrying out the repair work referred to above; the dismantling and reconstruction of the North Eastern tiled deck; and, the removal and replacement of the cladding system over a drained and vented cavity. Mr Beattie assessed the cost of carrying out that work at $91,260.00.

THE HEARING

[26] This matter was scheduled to be heard during the week commencing 29 November 2004. That hearing date was vacated and the hearing was adjourned until 13 December 2004 upon the application of the First respondent following the late provision of the Beattie report by the Claimants. The Claimants consented to the adjournment and the matter was heard at Forum North, Rust Avenue Whangarei on 13, 14 & 15 December 2004.

[27] The Claimants and the First, Second, and Sixth Respondents were represented by counsel at the hearing. The Fourth and Fifth respondents were represented by the managers of those companies and the Seventh respondent appeared in person.

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

[29] The witnesses (who all gave sworn or affirmed evidence) in support of, of the claim were:

- Mr Graeme Tucker (Mr Tucker is a Claimant in this matter)
- Mr Ian Beattie (Mr Beattie is a Building Surveyor)

[30] The witnesses (who all gave sworn or affirmed evidence) to defend the claim were:

- Mr Alan Tucker (Mr Tucker is a builder and the First respondent in this matter)

- Mr Ian Butt (Mr Butt is an architectural designer and his company, Butt Design Limited is the Second respondent in this matter)

- Mr Clint Smith (Mr Smith is a Building Consultant and operates as Advanced Building Solutions Limited)

- Mr Scot Robertson (Mr Robertson is the Manager of Plaster Systems Limited the Fourth respondent in this matter)

- Mr Martin Jennison (Mr Jennison is a former employee of Plaster Systems Limited and was the Contracts Manager at the time the Claimants' dwellinghouse was constructed)

- Mr Wayne Tong (Mr Tong is the Managing Director of Superior Balustrades Whangarei Limited, the Fifth respondent in this matter)

- Mr Terry Wells (Mr Wells is a cladding and waterproofing contractor and trades under the name of Whangarei Tanks. Mr Wells is the Sixth respondent in this matter)

- Mr Richard Maiden (Mr Maiden is a Building Surveyor who was engaged by Mr Wells)

- Mr Brian Oliver (Mr Oliver is a waterproofing contractor and is the Seventh respondent in this matter)

[31] I undertook a site visit and inspection of the Claimants' dwelling on the afternoon of 14 December 2004 in the presence of representatives of all parties and the WHRS Assessor, Mr Templeman.

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

[33] Pursuant to my Procedural Orders dated 27 August 2004, the parties were required to provide all supporting documents prior to the hearing, however, a number of further exhibits were produced during the hearing and where appropriate they are referred to in this determination as [Exhibit (No.)]

[34] Notable among the supporting documents provided by the parties for their utility in these proceedings were a bundle of indexed documents provided by the Claimants and a bundle of photographs provided by the First respondent. These documents were frequently referred to during the hearing and accordingly, and where appropriate in this determination, documents in the Claimants' bundle will be referred to as [(Section) - (no.)] meaning the indexed section in the Claimants' bundle and the relevant page number, and the First respondent's photographs will be referred to as [Photo (No.)]

THE CLAIM

[35] In the Notice of Adjudication filed on or about 15 June 2004, the owners sought the sum of $65,312 based on the value of the remedial work as assessed by Mr Templeman in the WHRS report dated 22 September 2003 and costs they had incurred effecting remedial work to that date.

[36] During the course of the adjudication proceedings, the owners amended their claim, and advised that they sought the aggregate amount of $138,835.04 calculated as follows:

Cost of remedial work as assessed by Mr Beattie:	$ 91,260.00
Reimbursement of monies paid to First respondent for urgent remedial work:	$ 24,287.54
Reimbursement of Mr Beattie's professional costs:	$ 8,287.50
General damages for discomfort and distress:	$ 15,000.00
Total amount claimed	$138,835.04

CAUSES OF ACTION

[37] The owners claim against Alan Tucker, the builder, as First respondent for breach of contract, and alternatively, in tort for negligence in respect of faulty workmanship. The contractual liability is claimed to arise out of the warranties contained in the Sale and Purchase Agreement.

[38] The owners also claim against the various other respondents in tort for negligence in respect of faulty workmanship.

THE DEFENCE FOR THE FIRST RESPONDENT (ALAN TUCKER)

[39] The First respondent accepts that the owners' home is suffering from damage caused by lack of weathertightness but he denies responsibility for the deficiencies and faults causing water penetration and says that he employed experts to design the dwelling, to supply and install waterproofing membranes, to supply and install an aluminium and glass balustrade, and to supply and install a cladding system.

[40] The First respondent submits that he has been proactive in helping to resolve and mitigate damage to the owners, that he has made himself

available to carry out work to remedy the faults regardless of who is liable and his actions have mitigated damage to the dwellinghouse and are in keeping with the attitude he has shown since the dwelling's construction.

THE DEFENCE FOR THE SECOND RESPONDENT (BUTT DESIGN LIMITED)

[57] The Second respondent denies responsibility for any leak in the dwelling and submits that the one matter that all the leaks have in common is poor construction practice.

[58] The Second respondent accepts the remedial costs as determined during the hearing as appropriate sums to be awarded.

[59] The Second respondent submits that general damages are awarded in cases such as this for the stress, hurt and loss of dignity to feelings suffered by the homeowner. In this case however, the claimants are simply trustees of the Trust, they have a nominal ownership of the property, not the beneficial ownership and should therefore be subject only to nominal damages.

[60] The Second respondent claims there have been a series of allegations and objections without substantial merit which have led to the Second respondent having to be part of these proceedings and defend itself unnecessarily. The Second respondent claims that it should be awarded $15,000 to cover a proportion of the professional costs incurred.

THE DEFENCE FOR THE FOURTH RESPONDENT (PLASTER SYSTEMS LIMITED)

[61] The Fourth respondent denies liability for any damage to the owners' dwelling caused by water penetration which it submits has occurred through the gap between the curved head flashings and the aluminium joinery, through the joint formed at the junction of the Insulclad and the block wall in the rumpus room, and through a failure in the joint between the sill of the bifold doors in the living room and the tiled deck over the garage below.

[62] PSL claims that it is a manufacturer and seller of materials only and does not carry on the business of inspecting or supervising the installation of the products that it sells. PSL claims that it supplied plaster cladding materials to Terry Wells, the Sixth respondent, who was the plastering contractor who carried out the cladding work on the owners' dwelling. Terry Wells was a licensed Insulclad applicator who contracted with Allan Tucker to carry out the cladding work on the owners' dwelling and there is no evidence of any failure of the plaster materials or Insulclad System components sold to Mr Wells, or of any defective specification or detailing for the installation of the Insulclad System supplied to, and installed by, Mr Wells.

[63] PSL submits that its licensed contractors are solely responsible for ensuring the Insulclad System is applied according to PSL's latest technical information and that it is entitled to an indemnity from Terry Wells for any damage, loss, or expense which is not proved to be the direct consequence of defective manufacture of PSL's products.

[64] PSL accepts that the deck joists on the North Western deck have not been flashed in accordance with the Insulclad approved detail current at

the time of construction, namely a galvanised steel flashing that extends behind the cladding above the deck and carries out 100mm across the deck joists and terminates with a downturned drip edge. However, PSL contends that Mr Jennison, its Contracts Manager who visited the site from time to time to liaise with Mr Wells on matters relating to his role as a licensed Insulclad applicator and the supply of PSL's products, would have been unable to detect the absence of that flashing during his visits because the surrounding deck structure would have obscured the flashing from view. Notwithstanding the absence of the flashing, PSL contends that the degradation of the sealant joint (formed by Mr Wells between the cladding and the deck joists) and the omission of the flashing in this area has not caused any 'issues'.

[65] PSL accepts that the feature bands supplied to surround and 'frame' the perimeter of the windows have cracked and warped. PSL claims that it sourced the bands from Impakt Systems Limited but it was not until late 2001 that PSL became aware that there was a problem with the rigidity, or lack of 'memory' in the epoxy coating that was applied to the bands. PSL submits that the cost of repairing these items should rest squarely with the manufacturer of those items, namely Impakt Systems Limited.

[66] PSL disputes the quantum of the claim.

[67] PSL disputes the claimants' entitlement to claim general damages.

[68] PSL disputes the claimants' entitlement to claim reimbursement of Mr Beattie's professional costs.

THE DEFENCE FOR THE FIFTH RESPONDENT (SUPERIOR BALUSTRADES WHANGAREI LIMITED)

[69] SBWL denies that there is any damage that requires remediation as a result of the fixing of the balustrade into the nib surrounding the deck above the garage.

[70] Notwithstanding that SBWL denies liability for any damage resulting from the work it undertook on the owners' dwelling, SBWL has offered to install under each base plate (to each stanchion), a butyl gasket that would provide a better seal than presently exists. SBWL submits that the butyl gaskets are a proprietary product that was not available at the time the balustrade was installed on the claimants' dwelling and has been developed since.

THE DEFENCE FOR THE SIXTH RESPONDENT (TERRY WELLS)

[69] The Sixth respondent claims that he has no liability in respect of the claims by the claimants, or in respect of any apportionment between respondents.

[70] The Sixth respondent denies that any works carried out by him were in breach of the Building Act or the Building Code, or otherwise than in accordance with the manufacturer's recommendations or good building practice.

[71] The Sixth respondent denies that the works carried out by him have caused or materially contributed to the water ingress and consequential damage to the building structure and furnishings.

[72] To the extent that any such building defects are the responsibility of the Sixth respondent, Mr Wells says that these are the responsibility of the Fourth respondent, PSL, as the party responsible for supplying, providing technical specifications and requirements for, and supervision and inspection of, the application of the Insulclad proprietary cladding system.

[73] The Sixth respondent accepts that the feature bands around the windows should be replaced, but says he was not negligent in supplying the feature bands which were an accepted and approved product within the industry and that the failure of the bands has not been shown to have caused any water penetration or damage to the property, aside from purely cosmetic concerns which are not within the jurisdiction of the Tribunal. In any event the bands would need to be replaced during the course of the remedial works necessary to remedy the water ingress via the semi-circular aluminium window joinery.

[74] The Sixth respondent denies that the claimants are entitled to claim general damages.

[75] The Sixth respondent disputes the claimants' entitlement to claim reimbursement of Mr Beattie's professional costs.

THE DEFENCE FOR THE SEVENTH RESPONDENT (BRIAN OLIVER)

[76] The Seventh respondent denies liability for any damage to the owners' dwelling caused by water penetration.

[77] The seventh respondent claims that any damage resulting from water ingress under the sill of the bifold doors in the living room is the

responsibility of the First respondent, Allan Tucker, who he advised to remove the doors in order that a membrane could be laid through the door threshold. The First respondent refused to remove the doors.

[78] The Seventh respondent did not provide a guarantee in relation to the membrane because he claims the First respondent refused or neglected to remove the doors to allow him to apply a proper impermeable membrane.

THE DAMAGE TO THE CLAIMANTS' DWELLING

[79] In simple terms, the damage to the owners' dwelling is the penetration of the dwellinghouse by water. (See: Smith v Waitakere City Council and Ors - Claim No. 00277/12 July 2004 at paras. 95-99)

[80] In this case, it is common ground that the penetration of the owners' dwellinghouse by water has also caused consequential damage, the detail of which has been well reported by Mr Templeman, Mr Beattie, Mr Smith, Mr Allan Tucker, and Mr Graeme Tucker, any may be summarised as follows:

- Collapse of the ceiling in the garage
- Degradation of timber wall framing, internal linings and floor coverings in the rumpus room
- Degradation of timber framing, floor and deck joists, particle board flooring and wall linings in the living room and the family room
- Toxic mould and fungal growth

THE CAUSES OF THE DAMAGE TO THE CLAIMANTS' DWELLING

[81] Following the investigations undertaken by the various experts who have given evidence on this issue and the site inspection conducted during the course of the hearing, it is common ground that water has entered the dwelling in three main areas:

[a] The North Eastern deck. This area comprises a tiled deck constructed over the garage below that is accessed by bifolding doors from the upper level living room.

[b] The North Western deck area. This area comprises an open timber deck constructed on 200x50 joists that penetrate the cladding of the rumpus room below. The deck is accessed from the family room through bifolding doors. On the Northern wall of the family room above the deck is a large bifolding window unit coupled at its head to an arched fixed glazed window unit for 2/3 of the length of the bifold window.

[c] The cladding. This area comprises the Insulclad Cladding System including the feature bands around the exterior windows and doors.

[82] There is however, disagreement as to the cause(s) of water penetration in each location, the resultant damage, and the scope of the work required to remedy the water penetration and the resultant damage

The North Eastern Deck

[83] The suggested causes of water penetration in this area can be summarised as follows:

- Failure of the waterproofing membrane

- Lack of sufficient fall on the deck
- Lack of a perimeter drain
- Lack of a sump at the drainage point
- Tek screws fastening the base plates of the aluminium stanchions to the balustrade
- Electrical cable to the light mounted on the balustrade passing through the membrane
- Lack of sufficient step down from the living room floor to the deck
- The window joinery and/or flashings and/or junction with window joinery and Insulclad surfaces

[84] After viewing the Claimants' property and considering the extensive evidence given in relation to these issues, the matter really became quite straightforward.

[85] There is simply no evidence that the membrane has failed, or that the lack of fall on the deck, or the lack of a perimeter drain, or the lack of a sump has in any way caused or contributed to water penetration. It should be noted that whilst these matters, and others along with a change in the specification of the waterproofing membrane used on the deck and deletion of building paper may constitute breaches of contract as between the Claimants and the First respondent, they are not causative of water penetration and therefore fall outside my jurisdiction to consider.

[86] That leaves only the fixing of the balustrade, the wiring for the exterior balustrade lights, the step down from the floor to the deck, the joinery/flashings and junction with the cladding, and the weathertightness of the Insulclad cladding system as possible sources of water ingress in this area.

Fixing of the balustrade

[87] The base plates on the stanchions of the balustrade are fixed by Tek screws with rubber washers through a powder coated aluminium cap-flashing over a timber nib formed to the perimeter of the deck and over which Mr Tucker, Mr Wells, Mr Smith and Mr Oliver all gave evidence that the waterproofing deck membrane was taken. (Refer Smith report para 5.1.15)

[88] The issue therefore is whether or not water is penetrating the dwelling where the Tek screws pass through the waterproofing membrane and into the timber structure below.

[89] Mr Templeman, Mr Smith and Mr Allan Tucker all conclude that the poorly fitted aluminium cap flashing and the gap between the flashing and the base of the stanchion enables water to reach the Tek screw where it penetrates the membrane on the top of the nib and tracks down the thread of the Tek screw into the timber deck structure below. (See First respondent's closing submissions at para 2.6, Templeman at paras 4.1.4 & 5.1.2, Smith at paras. 5.1.16 –18 and photo 9 at page 15, [Photo 31]).

[90] I am satisfied that the evidence establishes that water is penetrating the dwellinghouse through or around the balustrade fixings.

Wiring for the exterior lights

[91] Exterior lights are mounted on the balustrade at various locations along its length with the wiring for each light passing through the stanchion to which it is affixed and into the timber deck structure below.

[92] Mr Smith reported at paras. 5.1.19 – 20 of his report dated 7 September 2004 that he observed lichen growing on the Insulclad cladding at soffit level immediately below the stanchion supporting the light fitting over the driveway and upon further investigation observed moisture penetration in the floor joists and plywood deck substrate below. (See photos 7 & 8 of his report)

[93] I am satisfied after hearing from Mr Smith on this issue and after viewing the photographs appended to his report that water is penetrating the owners' dwellinghouse where the lighting cables that pass through the balustrade stanchions penetrate the waterproofing membrane on the deck.

The step down from the floor to the deck

[94] This issue occupied a significant portion of the evidence. Mr Templeman reported that "the floor level of the lounge is the same as the finished deck level" and concluded that "the essence of the problem is the failure to provide an adequate set down from the lounge floor to the deck floor." (Templeman - paras 4.1.3 & 5.3.1)

[95] Mr Smith reported at para 5.1.3 of his report that "the step down from inside floor level to outside tile level was measured at 7.0mm in front of the bifold doors" and concluded at para 7.1.1 of his report that "water entering around the bifolds is a combination of inadequate step down and flashings not being taken directly to deck level."

[96] Mr Beattie measured the difference between the interior floor and the tiled deck surface at about 5.0mm and concluded that "the surface of the balcony has been constructed at a level that does not provide sufficient differential between the interior floors and the balcony surface" and "has

contributed to inundation of the particleboard flooring and sub-structure causing the particleboard to disintegrate". (See Beattie Report: paras 5.6.2 & 5.7.1-1 – 1-4)

[97] Mr Butt submits that his plans provided for "a step of approximately 47.5mm from the top of the tiles to the lounge floor." (Butt Written Response to Adjudication Claim – para 4.3)

[98] Mr Allan Tucker accepts that the plans specified a step down of 50mm but he denies that it was possible to achieve a 50mm step down because falls need to be achieved from all points of the deck to one drain outlet. The deck is approximately 8 metres in length and to achieve the required fall the deck needs to start at a point higher up than indicated on the plans. Mr Allan Tucker submits that although the step down is not as designed there has been a failure of the waterproof membrane that has caused the ingress of water into the house and not a failure to build a step down as designed.

[99] There is I think a certain difficulty with that argument because it stands to reason that if there is no step down (or only 5-7mm as in this case) the only barrier to water penetration is the aluminium door sill itself or any other material placed against it to act as a weather seal.

[100] Mr Oliver gave evidence that when he attended the property in or about August 2001 after the ceiling in the garage had collapsed he observed water leaking out of the mitred corners of the sill section of the bifolding doors. He says that he advised Mr Allan Tucker to remove the doors to allow him to apply an impermeable membrane over the door threshold which Mr Tucker refused to do, but moreover, Mr Allan Tucker sealed up the drainage holes in the aluminium door sill and placed a bead of silicon between the tiles and the sill and drilled 2 new holes in the face of the

aluminium sill section to allow the joinery to drain. This action has stopped most of the water ingress (other than that leaking from the windows above) however, the procedure could not be regarded as a total solution. (I note that there is simply no evidence that the membrane installed by Mr Wells under the door threshold and around the perimeter of the deck and onto which Mr Oliver attached the membrane that he later laid over the body of the deck, has failed to any extent.)

[101] In cross-examination by Mr Oliver, Mr Allan Tucker confirmed that he had installed a bead of silicone to stop wind driven rain going under the door. It follows therefore, that the only means of preventing wind driven rain from entering the dwelling under the door due to a lack of separation between the interior and exterior levels is a bead of sealant of indefinite durability, any failure of which would likely go undetected for some time whilst damage occurred to the dwelling.

[102] Of the competing views given on this issue, I prefer on balance the evidence of Mr Templeman (and to a large measure those of Mr Smith and Mr Beattie although they may not always have been as unequivocal under cross-examination) and I am driven to conclude that the separation between the floor level of the lounge and the level of the tiled deck is simply insufficient to prevent water penetration and as Mr Oliver deposed, the use of a silicone bead "could not be regarded as a total solution" which I would categorise in the circumstances as being no more than a 'band-aid or temporary fix'.

The joinery/flashings and junction with the cladding

[103] A brief test carried out on site during the course of my visit clearly established that water is penetrating the dwelling around the curved head(s) of the aluminium joinery and is a major source of water ingress.

The water is able to escape into the timber wall framing and run down the studs at the side of the joinery and thence to the bottom plate, particle board and midfloor framing, and down on to the lower levels of the dwelling. The water is entering either through the coupling bar, or the joints between the components of the window joinery, or between the head flashing and the joinery, or between the head flashing and the Insulclad cladding.

[104] The First respondent submits that he installed the head flashing as supplied by the window manufacturer correctly and that there is no evidence adduced to disprove this.

[105] Mr Wells stated at para 6(b) of his witness statement that “All the window flashings, jams [sic], sills, corner soakers, bans [sic] were fixed to Insulclad specification.”

[106] Mr Robertson opined that the water ingress was due to a failure by Mr Allan Tucker to correctly seal, stop end and detail the junction between the top of the curved windows and the head flashing.

[107] However, none of the parties or their experts properly tested this area of water ingress sufficient to determine unequivocally the actual source of water penetration (as between the options set out in para 103 above) and in the end, I am left to conclude on balance that water is penetrating through or around the curved heads of the aluminium joinery as a result of its design and/or manufacture and/or installation.

[108] For the reasons set out above and rejecting all arguments to the contrary, I determine that the causes of water penetration in and around the North Eastern deck area are as follows:

- Tek screws fastening the base plates of the aluminium stanchions to the balustrade
- Electrical cable to the light mounted on the balustrade passing through the membrane
- Lack of sufficient step down from the living room floor to the deck
- The window joinery and/or flashings and/or junction with window joinery and Insulclad surfaces

The North Western Deck

[109] The suggested causes of water penetration in this area can be summarised as follows:

- Pressure from decking on cladding
- Joint between Insulclad and block wall in rumpus room
- Deletion of block wall to Northern wall of rumpus room
- Landscaping materials placed against or adjacent to Insulclad
- The window joinery and/or flashings and/or junction with window joinery and Insulclad surfaces
- Lack of proprietary flashing to deck joists
- Lack of building paper

[110] Mr Maiden and Mr Templeman gave evidence that the Kwila hardwood decking planks were installed very close together and any swelling of the decking adjacent to the cladding could easily damage the joint between the cladding and the timber deck joist by compressing the cladding and pushing it along the joist destroying the seal. Mr Maiden also suggested that the manner in which the soffit of the deck was constructed prevented effective drainage and drying of the deck joists. In the end however, there is simply no evidence (as conceded by Mr Templeman under cross examination by Mr Grindle) to support Mr Maiden's theory

that pressure on the cladding from swollen decking was the cause of water ingress around the deck joists. I do accept however that the construction of the soffit to the deck would delay drying of the deck joists after rain, but once again, there is no material evidence to prove that the open sarking of the soffit to the deck caused water ingress in this area.

Joint between Insulclad and block wall in rumpus room - Deletion of block wall to Northern wall of rumpus room - Landscaping materials placed against or adjacent to Insulclad

[111] All of these issues are closely related. It has been alleged that water has entered the dwelling because a block retaining wall on the Northern wall of the rumpus room was deleted by Mr Allan Tucker and water has penetrated through the joint formed by Mr Wells between the Insulclad cladding on the Northern timber framed wall of the rumpus room and the end of the block retaining wall on the Western wall ("the joint") i.e. the North Western corner of the rumpus room. It is also alleged that the level of the garden outside the Northern wall of rumpus room was higher than the cladding which then acted as a retaining structure putting pressure on the cladding and the joint to the extent that the joint and/or the cladding failed and water penetrated the dwelling.

[112] The rumpus room has been constructed with a block retaining wall on the Western wall varying in height from 800mm at the (lower) Northern end and increasing in height to correspond with the ground that slopes to the South outside and above the rumpus room. The plans (B-B1) detail an 800mm high block wall returning along the Northern wall of the rumpus room but that wall was not constructed by Mr Allan Tucker.

[113] Mr Smith stated in his witness statement at para 11. “That [deletion of block wall] failure is undoubtedly the cause of dampness and fungal rot in the lower part of the north wall of the rumpus room.”

[114] Mr Allan Tucker stated in his evidence that he deleted the block wall because the ground levels outside the rumpus room were below the floor level at that point and he produced a photograph (Exhibit 2) that was taken at the time the mid floor was constructed that shows the ground level outside the Northern wall of the rumpus room approximately 200mm -300mm below the concrete floor.

[115] On that point, I accept Mr Allan Tucker’s evidence and accordingly it follows that the deletion of the block wall on the Northern wall of the rumpus room by Mr Tucker could not possibly of itself have caused water ingress.

[116] Accordingly, for any water ingress to have occurred at this juncture, water running down the face of the cladding must have penetrated the joint because the joint failed, or alternatively (as it has been alleged) landscaping materials were placed against the Insulclad cladding (by the owners’ landscaping contractors) so that the cladding (and the joint) acted as a retaining structure putting pressure on the cladding and the joint to the extent that the joint and/or the cladding failed and water penetrated the dwelling.

[117] Mr Templeman stated at para 4.1.5 of his report that his examination of the lower lounge area indicated external ground lines both above and in close proximity to the floor level and at para 5.1.3 of his report, Mr Templeman recorded his view that the inadequacy of the ground clearance at the foot of the wall in some areas was a contributing factor of the water ingress in the rumpus room. However, under cross

examination by Mr Grindle, Mr Templeman conceded that he did not actually see soil piled up against the wall but it was his recollection that the ground level was close or slightly above the base of the cladding and he had concluded from that, that the exterior ground level was a contributing factor to the water ingress in the rumpus room.

[118] Mr Butt, in his report dated 4 September 2004 stated, “The surrounding earth had been removed when I visited but until then the Insulclad had been acting as a retaining structure about 600 high in the north west corner to approximately 100 high in the north east corner.” However, under Cross examination by Mr Grindle, Mr Butt conceded that he never saw any dirt piled up against the cladding, he only saw the debris after the area had been cleared.

[119] Mr Allan Tucker and Mr Graeme Tucker were both adamant in their evidence that no landscaping materials were placed against the Insulclad cladding. Both deposed that the weed mat for the garden outside the rumpus room was under the saw stools depicted in photo 14 appended to Mr Smith’s report and only loose garden rocks were placed above that level.

[120] Mr Allan Tucker gave evidence that he believed the joint between the Insulclad and the end of the block wall formed by Terry Wells failed and allowed water to penetrate the dwelling at that point because the timber framing adjacent to the joint was “absolutely rotten” and “greater than farther away” although when cross examined on this point by Mr Robertson and Mr Locke, Mr Allan Tucker conceded that he could not be certain that the water that had caused the damage to the timber adjacent to the joint had not “come from above” or “run down the linings and not come from the corner”.

[121] Mr Robertson stated that Mr Wells should have formed the joint in accordance with the detail on PSL's Data Sheet 17 which involved the installation of a PVC angle at the edge of the polystyrene and a backing rod and a 10mm sealant joint between the PVC angle and the blockwork. There is no evidence that the joint was formed by Mr Wells in that manner and I am left with the clear impression that Mr Wells simply applied sealant to the joint in the manner evidenced in a cladding to joist joint that he formed elsewhere (Photo 33). However, and notwithstanding that impression, there is no actual evidence that the joint failed. It would have been possible for Mr Allan Tucker to test that joint before the cladding was removed but he did not do so.

[122] In the circumstances, I am left to conclude that the manner in which the joint between the Insulclad cladding and the block retaining wall on the Western wall was formed, was not causative of water penetration. (Although I am left in no doubt that it would certainly have failed in time.) There is no evidence that landscaping materials were placed against the cladding by the owners' contractors causing water penetration, although I rather suspect that that may have occurred at least to some extent. For reasons that are to follow, even if I am wrong in reaching these conclusions, nothing will turn on it. This is because my findings in relation to other causes of water entry are such that the scope of the remedial work in relation to those other causes involves replacement of the framing, cladding and wall linings in the rumpus room. I am satisfied that that remedial work is no more extensive than it would have been even if there had been a failure of the joint, or water penetration had occurred as a result of high exterior ground levels.

The window joinery and/or flashings and/or junction with window joinery and Insulclad surfaces

[123] On the Northern wall of the family room above the rumpus room and the open timber deck is a large bifolding window unit coupled at its head to an arched fixed glazed window unit for 2/3 of the length of the bifold window.

[124] During the course of my visit a panel of Insulclad was removed from below the window unit. When water was played onto the joinery at the point where the curved head was joined to the bifold window unit, water ran down inside the wall cavity. That test clearly established that water is penetrating the dwelling around the curved head of the aluminium joinery and is a major source of water ingress. The water is able to escape into the timber wall framing and run down the studs at the side of the joinery and thence to the bottom plate, particle board and midfloor framing, and down on into the rumpus room below.

[125] I am satisfied that the staining evident on the inside of the Insulclad cladding in the rumpus room in the First respondent's photographs (Photos 35-43) and the damage to the bottom plate and particle board flooring evident in (Photos 44 & 45) is consistent with the water penetration observed during the site visit.

[126] Once again, none of the parties or their experts had previously investigated and tested this area for water ingress sufficient to determine the actual source of water penetration (as between the options set out in para 103 above). In the end, I am left to conclude on balance that water is penetrating through or around the curved heads of the aluminium joinery as a result of its design and/or manufacture and/or installation.

Lack of proprietary flashing to deck joists

[127] This issue occupied a significant portion of the evidence. The 200x50 deck joists that support the open decking on the North Western deck penetrate the cladding of the rumpus room.

[128] It is common ground that the deck joists on the North Western deck have not been flashed in accordance with the PSL approved detail current at the time of construction, namely a galvanised steel flashing that extends behind the cladding above the deck and carries out 100mm across the deck joists and terminates with a downturned drip edge.

[129] Mr Wells gave evidence that the flashing was omitted on the instruction of Mr Allan Tucker and that the joint between the cladding and the deck joists was sealed with two beads of sealant in accordance with instructions he received from PSL.

[130] It is alleged that the failure to install a PSL proprietary flashing over the deck joists in accordance with PSL Data Sheet 7 has caused water penetration around the deck joists.

[131] Mr Templeman stated at para 5.1.3 of his report that “The water ingress into the wall frame of the lower lounge area is attributed to saturation transfer from the deck joists and a failure to provide an adequate flashing system at the penetration of the deck joist into the wall frame.” Under cross-examination by Mr Bowden, Mr Templeman affirmed his view that the main problem with the deck was the lack of the flashing which was a vital part of the Insulclad system.

[132] At para 4.1.5 of his report, Mr Templeman reported that his investigations disclosed that the deck joists that penetrated the wall were

saturated and were reliant on a perimeter bead of sealant to achieve weathertightness and the sealant had lost adhesion at the top edge of the joists and was in a deteriorated condition.

[133] Mr Smith stated in his evidence that the “correct [flashing] detail has not been executed as required by the Insulclad manual and that “there was damage to the floor joists at mid floor level adjacent to the slat deck.”

[134] Mr Beattie agreed that the deck joists had not been flashed in accordance with PSL’s recommended detail which “would have helped shed water”.

[135] Mr Templeman and Mr Tucker both gave evidence that they observed water penetration of the dwelling around the deck joists.

[136] I do not propose to trawl through all of the evidence given in relation to this issue and how it came about that the flashing was omitted and a sealant joint was formed. This is because notwithstanding those arguments, I am not persuaded that Mr Wells formed the joints between the joists and the cladding, either in accordance with good trade practice and the typical Insulclad detail (See PSL data sheets 7 & 17), or in accordance with the instructions he says he was given by Mr Dennison (See appendices 1(a) & (d) to the Butt report). I accept Mr Templeman’s evidence that Mr Wells simply applied a perimeter bead of sealant to achieve weathertightness and the sealant lost adhesion at the top edge of the joists and allowed water to penetrate the dwelling. Mr Templeman’s evidence regarding the manner in which the joint was actually formed was corroborated by the First and Second respondents’ photographic evidence; namely (Photo 33 & 34) and the photographs at appendix 1(a) & 1(d) of Mr Butt’s report.

[137] It would seem clear to me that the PSL flashing detailed on Data Sheet 7 is designed to shed water away from the sealant joint and thus I am satisfied that its omission undoubtedly contributed to water penetration around the deck joists when the sealant joint failed.

Lack of building paper

[138] Mr Smith reported at para 4.2.4 of his report that the specification for the dwelling (C - 15) provided that the whole of the exterior framing was to be covered in building paper. Mr Smith also reported that the BRANZ Appraisal Certificate issued for Insulclad in 1998 states that "polystyrene boards will perform the function of a breather type building paper although both BRANZ and PSL strongly recommend the use of building paper behind the polystyrene in all circumstances."

[139] Notwithstanding that 'recommendation' the evidence of Mr Robertson and Mr Maiden firmly established that building paper is not required to be installed in conjunction with the Insulclad Cladding System. Thus whilst its omission may constitute a breach of contract on the part of the builder, it is not a breach of the Building Code and has not of itself caused water penetration of the dwelling.

[140] Mr Beattie reported that although building paper is not intended to be a waterproof medium it does provide the only means of deflecting moisture away from the untreated framing timber.

[141] Mr Maiden gave evidence that the omission of building paper is unlikely to have had a bearing on the problems [damage] with this home and in the absence of any evidence that the extent of the damage to the dwelling resultant upon the water penetration is more extensive that it would otherwise have been if building paper had been used, I am driven

to conclude its omission has not contributed to the damage in any material way in this case.

[142] For the reasons set out above and rejecting all arguments to the contrary, I determine that the causes of water penetration in and around the North Western deck area are as follows:

- The window joinery and/or flashings and/or junction with window joinery and Insulclad surfaces
- Lack of proprietary flashing to deck joists and failure of the sealant joint between the deck joists and the cladding

The weathertightness of the Insulclad Cladding System

[143] This area of alleged water ingress comprises the entire Insulclad Cladding System including the feature bands around the exterior windows and doors and occupied a significant amount of the evidence. I propose to treat the Insulclad Cladding System and the feature bands as two separate sources of water ingress for reasons that will readily become apparent.

The Insulclad System

[144] It was Mr Beattie's evidence that the Insulclad Cladding System is deficient and that "the textured plaster system allows ingress of water into the wall cavities to the detriment of the untreated framing."

[145] Mr Beattie claimed water is penetrating the entire surface of the cladding by percolation (See para 5.5.8 of his report) and that moisture vapour is being driven through the cladding by solar diffusion (See para 5.6.18 of his report) to the extent that he recommended the removal and

replacement of 80% of the cladding. Mr Beattie based his conclusions on tests that he conducted with his moisture meter through the cladding and banding around the windows and elsewhere that he says produced readings on the meter that indicated elevated levels of water in the cladding.

[146] Mr Robertson, Mr Smith and Mr Maiden took issue with the testing/investigation methodology adopted by Mr Beattie and strongly disagreed with the conclusions that he reached based on his investigations.

[147] I found Mr Templeman's evidence in relation to the principles of solar driven diffusion and the suitability of the moisture meter to measure moisture content of polystyrene uncertain, although he did helpfully state that he had seen no evidence to suggest substantial penetration of water through the exterior walls of the dwelling.

[148] Of the competing views on the suitability and appropriateness of using a moisture meter to measure moisture in polystyrene cladding by inserting the probes through the plastered surface (and the conclusion(s) to be drawn from that exercise), I prefer the evidence of Mr Smith, Mr Robertson, and Mr Maiden, to that of Mr Beattie, who under cross examination by Mr Locke, advised that he had no expertise in the area of solar diffusion and relied on technical information in the WHRS Assessor's Manual as the basis for his theory and the conclusions that he reached.

[149] In the end, Mr Beattie's contentions were not supported by any other evidence and after considering the extensive and interesting evidence given by the other experts in relation to this issue, I am simply not persuaded that Mr Beattie's claim that the Insulclad Cladding System is

deficient and that the textured plaster system allows ingress of water into the wall cavities to the detriment of the untreated framing, is made out.

The feature bands around the exterior windows and doors

[150] Following the site visit (which was the first time Mr Robertson had viewed the property), Mr Robertson conceded that the bands have failed, that there was a manufacturing problem with the bands that PSL had experienced on other projects previously whereby the epoxy coating on the surface had no memory or elasticity that caused the bands to warp and crack and that they need to be replaced. The First respondent's photos (Photos 9 –16) clearly disclose extensive cracking and delaminating of the feature bands.

[151] In the closing submissions that he filed on behalf of PSL, Mr Robertson submits that the cracking bands around the windows is an aesthetic problem not a waterproofing one, i.e. a matter going to jurisdiction.

[152] In the Sixth respondent's closing submissions, Mr Locke submits that there is no evidence to suggest that the cracking and warping of the bands has permitted water to enter the cladding or to cause damage to the building structure.

[153] Mr Grindle submits that the extensive cracking that has occurred throughout the feature bands on this property is likely to be a cause of water ingress because Mr Beattie's testing indicates this to be so and because the plaster coating behind the bands is not painted (Photo 16). Evidence was given that to ensure the weathertightness of the Insulclad Cladding System, it must be coated in 2 coats of acrylic paint. The fact that water has been able to get behind the feature bands for some time and sit on the unpainted plaster coating behind, means that some water

must enter the property. Therefore there must be some weathertightness related issues arising out of the failure of the bands supplied by PSL.

[154] In Claim No 00277 – *Smith v Waitakere City Council and Ors* – 12 July 2004 the issue of jurisdiction presented and for the purpose of addressing the technical aspects of claims brought under this Act in a straightforward and easy to understand way, I determined inter alia:

> "that water need only penetrate the outermost building element of a dwelling (if it was not intended by design, that water should penetrate that particular element, or penetrate that element to the extent disclosed in any particular case) for the dwelling to be defined as a *"leaky building"* and for a resulting claim to meet the eligibility criterion under section 7(2)(b). For example, a coat of paint or a protective coating of some description, or a particular cladding material may in some cases be the outermost building element into which, or through which, water has passed, thus qualifying the dwellinghouse concerned as a dwellinghouse into which water has penetrated. i.e. *"a leaky building"* (See also the Determination by Adjudicator Dean in Claim 765: Miller – Hard) and that definition is synonymous with functional requirement E2.2 of the Building Code, which provides that "Buildings shall be constructed to provide adequate resistance to penetration by, and the accumulation of, moisture from outside."
>
> [98] For a claim to meet the eligibility criterion under section 7(2)(c), damage to the dwellinghouse is required to have resulted from the dwellinghouse being a leaky building.
>
> [99] There is a degree of circularity surrounding the meaning of damage to the dwellinghouse resulting from the dwellinghouse <u>being</u> a leaky building i.e. the cause of the water penetration and the resultant damage caused by the water penetration, but it follows that the unplanned penetration of a building element by water is physical injury to the dwelling per se and is, I conclude, *"damage that has resulted from the dwellinghouse being a leaky building".* Accordingly, the eligibility criterion under s7(2)(c) is in my view met prima facie in every case of a *"leaky building"* and it is not necessary that evidence of present and immediate consequential damage is provided by a Claimant to establish

eligibility of a claim – it is sufficient only to demonstrate that a dwellinghouse, the subject of a claim, is a *"leaky building"*

[155] It follows in this case that as water has entered the outermost building element, being the paint coating over the feature bands designed to protect the dwelling from the penetration and accumulation of water, that unplanned penetration of the paint coating by water is physical injury to the dwelling and is damage that has resulted from the building being a leaky building and is a matter in respect of which I have jurisdiction.

[156] For the reasons set out above and rejecting all arguments to the contrary, I determine that the cause of water penetration in and around the Insulclad Cladding System is:

- Cracking and delamination of the feature bands round the exterior windows and doors

Summary of causes of damage to Claimants' dwelling

[157] To summarise the position therefore, the causes of water penetration of the owners' dwellinghouse are as follows:

- Tek screws fastening the base plates of the aluminium stanchions to the balustrade.

- Electrical cable to the light mounted on the balustrade passing through the membrane.

- Lack of sufficient step down from the living room floor to the deck.

- The window joinery and/or flashings and/or junction with window joinery and Insulclad surfaces.

- Lack of proprietary flashing to deck joists and failure of the sealant joint between the deck joists and the cladding.

- Cracking and delamination of the feature bands round the exterior windows and doors.

THE REMEDIAL WORK

[158] The owners have already repaired the damaged timber wall framing, wall and ceiling linings, exterior cladding and floor coverings in the rumpus room and reconstructed the North Western Deck to separate the deck framing from the house structure with a stainless steel flashing. Mr Allan Tucker undertook that work at a cost to the owners of $24,287.54 (D – unnumbered invoices).

[159] There is no dispute about the need for, or the scope and cost of the work undertaken by Mr Allan Tucker.

The North Eastern deck area

[160] There has been water damage and decay to the wall framing in the lounge, the particleboard flooring, the deck and midfloor joists, the garage ceiling, and the carpet.

[161] Mr Templeman contends that the remedial work will involve removing the lounge door and frame, replacement of flooring and installation of a weathered sill, the modification and replacement of the door unit,

removal of the balustrade, reforming the weathered edge detail and associated waterproofing, refixing the balustrade, and redecoration internally and externally. Mr Templeman assessed the cost of that work at $22,500 inclusive of GST in September 2003. In his oral evidence, Mr Templeman stated that the cost of the remedial work should be increased by $1,200 plus GST to allow for consent fees. Therefore the total cost of remedial work in this area (save for replacement of the cladding and framing on the gable ended walls of the lounge and bedroom, see [176] supra) is $23,850 according to Mr Templeman's assessment.

[162] Mr Beattie assessed the cost of the remedial work in this area at $29,025 inclusive of GST in November 2004.

[163] I accept the evidence of Mr Templeman and Mr Beattie as to the scope of remedial work required (which was not challenged) and I prefer the evidence of Mr Beattie as to the cost of that work being $29,025, his costings having been carried out a year after Mr Templeman's and current at the time of the hearing.

The North Western deck area

[164] The remedial work in this area has been largely completed by Mr Allan Tucker at a cost to the owners of $24,287.54.

[165] Mr Beattie claims that some of the timber used by Mr Tucker to construct the repaired deck is not suitable and should be replaced at a cost of $2,430.00.

[166] Mr Tucker contends that the timber used is fit for purpose, the work is not complete, and once painted the timber will comply with NZS 3640:

2003. Mr Tucker deposes that the selection of the timber is not a weathertightness issue and Mr Beattie should be prohibited from commenting on it in this forum.

[167] I do not think that is strictly correct because the owners are claiming the cost charged by Mr Allan Tucker to effect the remedial work that included the supply and installation of the non compliant (without paint) timber. Because the work is incomplete and requires painting or replacement of the deck joists, there will be an additional cost to the owners in respect of the remedial work in this area.

[168] In the circumstances I am satisfied the justice of the matter will be served if I accept Mr Beattie's costings and determine that the cost to complete the remedial work to the North Western deck area (save for the replacement of the cladding and framing on the gable ended walls that contain the joinery with curved heads) is $2,430.00.

The cladding

[169] Mr Beattie assessed the cost of replacing 80% of the cladding at $59,805.00 inclusive of GST.

[170] I have already determined that there is no basis for replacing the cladding save for on those North facing gable ended walls of the lounge and the family room where joinery units with curved heads have been installed.

[171] Unfortunately little or no investigation work was undertaken by the experts to determine the source and extent of water ingress around the joinery units with curved heads. However, I am satisfied having observed the simple hose test undertaken during the site visit that this is the

source of the largest proportion of water penetration and damage to the dwelling as submitted by the First, Second, Fourth and Fifth respondents.

[172] When it became obvious that the joinery units would need to be removed, the joinery and framing repaired, and the internal linings and the cladding replaced, it was put to Mr Templeman during his oral evidence to assess the additional cost of that work over and above his earlier estimates for remedial work.

[173] Mr Templeman stated that the cost to carry out the remedial work to the North facing wall in the lounge that contains the bifold doors coupled to the curved head would increase by $2,000 i.e. from $12,000 (See para 5.4 of his report) to $14,000 plus GST, the cost to effect repairs to the North facing wall of the family room would be the same, i.e. $14,000 plus GST and the cost to effect repairs to the West facing wall in the dining room that contains bifold doors coupled to a curved head would be $12,000 plus GST. (Mr Templeman reported that his inspection of the boundary joist below this joinery unit had produced moisture meter readings that were off the scale of the instrument). The only challenge to Mr Templeman's assessment of the cost of that work was made by Mr Robertson.

[174] In PSL's closing submissions, Mr Robertson submitted that the cost to replace the cladding on the Northern elevation with an Insulclad Cavity System would be approximately $3,000 plus GST, but he properly acknowledged that his costings did not allow for the costs of removal, disposal, building paper, waterproofing window and door penetrations, new head flashings, alterations to the building or windows that may be required, or any costs associated with flashing the additional width of the cavity at the gables.

[175] In his closing submissions for the Sixth respondent, Mr Locke helpfully considered the implications of the evidence available in these proceedings in relation to water penetration around the joinery units with curved heads and quite correctly, I believe, submitted "Regrettably one must extrapolate from the known facts, in particular the propensity for the semicircular aluminium windows to leak badly. There is a similar detail above the bifold doors on the Western elevation and also above the window on the Eastern elevation."(The joinery in the dining room and the master bedroom).

[176] I accept Mr Locke's extrapolation of the evidence and his submission on the likely extent of water penetration and the scope of the damage as persuasive and compelling on the balance of probabilities.

[177] Accordingly, I determine that the proper scope of the necessary remedial work in relation to the repair of the cladding, windows and doors (with curved heads) and related works, includes repairs to all four walls into which the joinery units with curved heads have been installed, namely bedroom1, the lounge, the family room and the dining room, and the cost of undertaking that work is $45,000 calculated as follows:

Lounge (additional cost)	$ 2,000.00
Family room	$ 14,000.00
Dining room	$ 12,000.00
Bedroom 1	$ 12,000.00
Subtotal (exclusive of GST)	$ 40,000.00
Add GST	$ 5,000.00
Total inclusive of GST	$ 45,000.00

The feature bands

[178] Mr Robertson advised that the cost to replace the failed feature bands would be $50.00 per lineal metre plus GST and that evidence was corroborated by Mr Wells.

[179] At the conclusion of the hearing the parties agreed that I should use my own knowledge in resolving any differences or ambiguities that may arise in relation to the parties' assessment of the extent and cost of replacing the defective bands around the exterior joinery. That agreement was recorded at para 1.7 of Procedural Order No. 7 dated 16 December 2004.

[180] Only the Fourth respondent PSL quantified this item in its closing submissions, although on this issue, Mr Locke submitted that the Sixth respondent "is content for the Adjudicator to rely upon or obtain such information from his own knowledge or from such other sources, as he may consider appropriate" to estimate the cost of repairs.

[181] PSL estimated that there are approximately 135 lineal metres of bands around the windows of the residence. That measurement accords closely with my own measure and in the circumstances therefore, I determine that the cost to replace 135 lineal metres of failed feature bands is $7,357.50 inclusive of GST.

Summary of remedial work

[182] Therefore to summarise the position, I determine that the proper cost of effecting the necessary work to prevent water penetration of the owners' dwellinghouse and to remedy the damage that has been caused by the

dwellinghouse being a leaky building is $108,100.00 inclusive of GST calculated as follows:

<u>North Eastern deck area</u>	
Cost of remedial work (See para 163)	$ 29,025.00
<u>North western deck area</u>	
Costs to date (See para 158)	$ 24,287.50
Cost to complete deck (See para 168)	$ 2,430.00
<u>Cladding</u>	
Cladding and window repairs (See para 177)	$ 45,000.00
Feature bands (See para 180)	$ 7,357.50
Total cost of remedial work	$108,100.00

THE CLAIM FOR PROFESSIONAL CONSULTANCY FEES AS DAMAGES

[183] The owners seek reimbursement of Mr Beattie's professional costs in the amount of $8,287.50 (See: 3 – unnumbered invoice and Exhibit 'B') for time engaged on the investigation and preparation of his report (including disbursements) and for analysing the submissions and preparing for the adjudication.

[184] Mr Ross submits that the owners are entitled to recover these costs because there is no provision in the Act for Mr Templeman to update his report and it was essential for the owners to update matters because of the remedial work that had been undertaken after Mr Templeman's report was done and to readdress the matter of Quantum.

[185] Mr Ross submits that it is reasonably foreseeable that the owners would take professional advice and incur professional fees in order to establish the nature and extent of the damage and to respond to the allegations of the parties. As authority for the entitlement to claim reimbursement of professional costs in claims under the Act, Mr Ross referred me to the decision of Adjudicators Scott and Douglas in *Widdowson v Bekx and Ors* Claim No.00092: 15 September 2004 at para 16.19 where they determined:

> "A claim is made for $6,093.19 for the cost of expert reports to establish the extent of damage to the property. In support of this claim copies of the invoices from Prendos Ltd and Crowther & Co were included with the Statement of Claim. It is reasonably foreseeable that the Owners would need to seek professional advice when faced with the problems with this dwellinghouse. The Adjudicators consider the charges reasonable and allow this claim."

[186] Against that, Mr Locke submitted that the adjudicator lacks jurisdiction to award costs of witnesses, expert or otherwise, unless the adjudicator considers that a party has caused those costs and expenses incurred unnecessarily by bad faith or allegations that were without substantial merit under Section 43 of the Act. Mr Locke submits that there is no evidence that any parties to this proceeding have acted in bad faith or that any respondent has raised matters without substantial merit.

[187] Mr Locke noted that subclause 9(2) of the Schedule to the Act empowers an adjudicator to disallow the whole or any part of any sum payable in respect of witness expenses under section 9(1). Mr locke submits that in the present case, Mr Beattie's evidence in many respects overreached the available technical evidence and served to obscure, rather than enlighten matters, that his evidence added nothing of any

substance to that of the WHRS Assessor Mr Templeman, and his charges were probably quite excessive.

[188] Mr Robertson submits that the costs sought in relation to the Beattie report are unreasonable because if the claimants wanted further work done or had further questions to be answered they should have been directed to the WHRS Assessor first; that the Beattie report was largely irrelevant and added nothing more than speculation and conjecture to the claim; that Mr Beattie did not add anything that the other experts had not done previously; and the hearing could have been completed a lot earlier with less speculation, and a lot less cost if Mr Beattie had not been involved at all.

[189] As I understand the claim, the owners are not seeking witness expenses under Clause 9 of the Schedule to the Act, being costs they incurred having Mr Beattie attend the hearing to give evidence either of his free will or pursuant to a witness summons, rather they are seeking reimbursement of the professional costs they incurred by engaging Mr Beattie to investigate and advise them in relation to the technical aspects of the claim prior to the hearing.

[190] Claimants in claims brought under this Act are invariably lay persons with limited or no knowledge of the language and science of building and in particular they seldom have any knowledge or understanding of the materials used and processes that were followed in the construction of their dwelling. On the other hand, all respondents will have been involved to some extent in the building process that led to the construction of the claimants' dwelling, and all are, or indeed should be, conversant with the language and science of building and capable of understanding the factual and technical matrix upon which the claim is based.

[191] That position is balanced to some extent by the role of the WHRS Assessor, however, the WHRS Assessor, unlike a party appointed expert is, and remains independent of all parties. His or her principle purpose is to report on whether the claim meets the eligibility criteria set out in section 7(2) of the Act, and if so; to provide a view as to the cause of water penetration; the nature and extent of any damage caused by the water penetration; the remedial work required and the cost of that work; and, who should be parties to the claim. Once the Assessor completes his or her report, the Claimant does not have any further access to the Assessor for technical advice in relation to the claim or in relation to any written response to the claim filed by a respondent.

[192] It is foreseeable therefore that claimants may engage building experts in order to establish the nature and extent of the damage prior to filing a Notice of Adjudication and/or to check and verify the assessment of the claim made by the WHRS Assessor and/or to respond to the allegations of the respondents. However, any determination that those costs and expenses must be met by any of the parties may only be made under Section 43 of the Act.

[193] Under Section 43 of the Act the only grounds upon which an Adjudicator may determine that those costs and expenses must be met by any of the parties are if the Adjudicator considers those costs and expenses to be incurred unnecessarily by bad faith on the part of that party or allegations or objections by that party that are without substantial merit.

[194] In this case neither of those grounds is pleaded by the Claimants as the reason for incurring Mr Beattie's costs, neither do I consider those costs to have been incurred by reason of those grounds when I examine the evidence, and accordingly the claim fails. I note that in *Smith v Waitakere City Council & Ors* Claim No.00277: 14 July 2004 I found the

claimant was entitled to recover professional costs that he had incurred prior to embarking on the proceedings; I understand the situation to have been similar in *Widdowson v Bekx and Ors* Claim No.00092: 15 September 2004 – Adjudicators Scott and Douglas referred to by Mr Ross. Whilst in some circles the relative inability to recover costs and expenses is seen as a failing or shortcoming of the Act, it should be noted that the upside is that a claimant is almost invariably spared the impact of a costs award against it in favour of respondents who are found to have no liability (unless the grounds in s43 are made out). Because these claims involve complex factual and technical matters and in some cases vast quantities of documents, they take considerable time, effort, and cost to resolve on the part of all persons involved. Accordingly, it is not inconceivable that if a claim was litigated in court it could, because of its very nature, result in a costs award against a claimant that could vastly exceed any amount recovered. Thus in WHRS Adjudication, a claimant is not financially or strategically constrained to choose one or two deep pocketed parties to bring a claim against. A Claimant can therefore confidently proceed with a claim against all persons so closely involved in the construction process that resulted in the dwelling being a leaky building, that they ought to be bound by, or have the benefit of, an order of the Adjudicator, or their interests are affected by the adjudication to the extent that all matters of liability and contribution can be resolved for those persons in the one forum.

THE CLAIM FOR GENERAL DAMAGES

[195] The owners claim general damages in the amount of $15,000 for discomfort and distress for the ceiling collapse, the fungal growth and damage to their dwellinghouse, and the inconvenience associated with: visits of the parties and their experts; the invasive testing conducted to

establish the nature and extent of the problem; the remedial work already completed; and, the remedial work that is yet to be undertaken.

[196] Mr Ross submits that the two owners who are also the occupiers of the dwellinghouse, namely Mr Graeme Tucker and his wife Glenys, are entitled to an award of general damages. Mr Ross concedes that no award can be made in favour of the third trustee who is not also an occupier.

[197] Against that, Mr Locke submits that the claimants are unable to claim general damages, first because the evidence for general damages is scanty, and secondly, because the claimants sue in their capacity as trustees of a family trust. Mr Locke submits that the trustees of a family trust simply hold the bare legal title for the benefit of the beneficiaries, who are presumed in this case to be the claimants. Mr Locke submits that the trustees of a family trust can hardly, by definition, suffer pain and suffering, distress, or loss of enjoyment of the property, because the property is not theirs to enjoy. Mr Locke further submits that the trustees are simply legal owners and the administrators of the property for the beneficiaries and that they are unable to sue in their capacity as beneficiaries of the trust and lack standing to bring such a claim because to do so would be to rob the trust of its separate legal identity and render the trust a sham.

[198] Mr Locke also submits the Adjudicator lacks jurisdiction to award general damages and understands that the matter is presently subject to at least one appeal.

[199] Mr Robertson submits that as the home is owned by the Ngahere Trust it would seem unfair on the respondents to pay any amount in general damages.

[200] I accept in principle that general damages can be awarded for stress, anxiety, disturbance and general inconvenience that was foreseeable in the event of a breach of a contract where the object of the contract was to bring about pleasure, enjoyment, relaxation, peace of mind or freedom from distress and the contract concerns one's personal, family or social interests, or, for stress, anxiety, disturbance and general inconvenience that was a reasonably foreseeable or contemplated consequence of a respondent's breach of a duty of care owed to a Claimant i.e. in a negligence cause of action.

Jurisdiction to award general damages

[201] The question of whether an Adjudicator has jurisdiction to make an award of general damages under the Act has been the subject of much public debate. However the issue has been dealt with by the District Court on appeal from the determinations of Adjudicators on two occasions now and in each case the Court upheld the Adjudicator's jurisdiction to award general damages, and in one case the amount awarded was increased on appeal.

[202] In *Waitakere City Council v Sean Smith* CIV 2004 - 090 - 1757, 28 January 2005, an appeal from my determination in Claim No. 00277, Judge FWM McElrea held in a reserved judgment issued on 28 January 2005, at para 78, that:

> "Standing back and looking at the matter overall, I am clear that the purpose and intent of the Act is not inconsistent with a power to award general damages but is in fact enhanced by it. Both in s29 dealing with jurisdiction and in s42 dealing with the substance of decisions, parliament used the widest language possible, and it would be inappropriate for the courts to try and cut that down so as to impose restrictions on the jurisdiction of the

> WHRS. The Act should be interpreted in a way that allows it to afford the fullest possible relief to deserving claimants."

[203] In *Maureen Young and Porirua City Council v Dennis and Jane McQuade & Ors* CIV–2003–392/2004 Judge Barber followed Judge McElrea's decision, and in that case, increased the amount awarded by the Adjudicator for general damages.

Are trustees entitled to claim general damages in their capacity as owners?

[204] In essence, Mr Locke submits that the claimants are unable to claim general damages because they are trustees of a trust and as such, they are simply legal owners and the administrators of the property for the beneficiaries and the property is not theirs to enjoy.

[205] I think that there is a certain difficulty with that argument because whilst all three trustees are indeed the legal owners of the property and claimants in this matter, clearly two of them, Graeme and Glenys Tucker, are the occupiers of the dwelling. It would seem clear therefore, that Graeme and Glenys Tucker should be entitled to the quiet enjoyment of that property. Graeme and Glenys Tucker are claiming general damages as compensation for the stress and anxiety that they claim they suffered as a result of the dwelling in which they reside being a leaky building. General damages is not claimed in favour of Mr Sudbury, who whilst a trustee, is not an occupier.

[206] Notwithstanding that position, it is not difficult to envisage that non-resident owners could also suffer stress and anxiety as a result of a dwelling that they own being a leaky building. Ultimately it is not the vehicle by which ownership is secured that determines the entitlement to

an award of general damages, rather it is the relationship and proximity of the owner (resident or otherwise) to the events that are claimed to give rise to the stress and inconvenience in respect of which compensation is sought.

[207] I am aware that in the Auckland High Court, Justice O'Regan awarded general damages to a trustee of a trust in *La Grouw v Cairns*, CIV 2002-404-156, for distress and anxiety caused by the dwelling being a leaky building.

[208] I accept Mr Graeme Tucker's evidence that he and his wife Glenys have suffered stress and anxiety as a result of the house that they own in their capacity as trustees of the Ngahere trust, and in which they reside, being a leaky building, as persuasive on balance. Accordingly, in the context of a long line of New Zealand property cases where awards for distress and anxiety have been made including inter alia: *Stieller v Porirua City Council* [1986] 1 NZLR 84(CA), *Rollands v Collow* [1992] 1 NZLR 178*, Chase v De Groot* [1994] 1 NZLR 613, *A-G v Niania* [1994] 3 NZLR106 at 113, *Stevenson Precast Systems Ltd v Kelland* (High Court Auckland, CP 303-SD/01, it is my view that Graeme and Glenys Tucker should each be able to recover distress damages from a respondent, or respondents, found liable for breach of contract, or breach of the duty of care, to the extent of $5,000 each in this matter. I note that a detailed examination of the authorities to which I have referred, discloses that the approach of the courts has generally been to award a modest amount for distress damages to compensate the stress and anxiety brought about by the breach, and not the anxiety brought about by the litigation itself.

LIABILITY FOR DAMAGE TO THE CLAIMANTS' DWELLING AND THE COST OF REPAIR

[209] The Claimants claim against the First respondent Allan Tucker (the builder) for breach of contract, and alternatively in tort for negligence in respect of faulty workmanship.

[210] The Claimants also claim against the various other respondents in tort for negligence in respect of faulty workmanship.

The liability of the First respondent, Allan Tucker, in contract

[211] The alleged contractual liability arises out of the warranties contained in the Sale and Purchase Agreement dated 15 June 2000 between the Claimants and the First respondent.

[212] The vendor of the property was the First respondent, Allan Donald Tucker as confirmed by the copy of the Agreement For Sale And Purchase included at (2-B) of the Claimants' bundle of documents. The agreement included the following contractual warranty at clause 6.2(5)(d):

> "The vendor warrants and undertakes that at the time of giving and taking possession:…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: …All obligations imposed under the Building Act 1991 were fully complied with."

[213] Mr Ross submits that Section 7 of the Building Act 1991 requires that all building work is to comply with the New Zealand Building Code.

[214] The Building Code is found in the First Schedule to the Building Regulations 1992 and contains mandatory provisions for meeting the purposes of the Building Act. The Building Code is performance based, that is to say it states what objectives and functional and performance requirements are to be achieved in respect of building work.

[215] Mr Ross submits that the relevant provisions of the Building Code are B1-Structure; B2-Durability; E2-External moisture. Those provisions state, inter alia, the following objectives and functional and performance requirements that are to be achieved in respect of all building work:

> "**CLAUSE B1 - 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.1.2 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
>
> B 1.3.1 Buildings, building elements and siteworks shall have a low probability of rupturing, becoming unstable, losing equilibrium, or collapsing during construction or alteration and throughout their lives.
>
> B 1.3.3 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
>
> (m) Differential movement
>
> B1.3.4 Due allowance shall be made for:
>
> (b) The intended use of the building

CLAUSE B2 - DURABILITY

OBJECTIVE

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

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

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 the lesser of; the specified intended life of the building, if any or:…..

CLAUSE E2 - EXTERNAL MOISTURE

OBJECTIVE

E.2.1 The objective of this provision is to safeguard people from illness or injury which could result from external moisture entering the building.

FUNCTIONAL REQUIREMENT

E.2.2 Buildings shall be constructed to provide adequate resistance to penetration by, and the accumulation of moisture from the outside.

PERFORMANCE

E.2.3.2 Roofs and exterior walls shall prevent the penetration of water that could cause undue dampness, or damage to building elements.

E.2.3.3 Walls, floors and structural elements in contact with the ground shall not absorb or transmit moisture in quantities that could cause undue dampness, or damage to building elements.

E.2.3.5 Concealed spaces and cavities in building shall be constructed in a way which prevents external moisture being transferred and causing condensation and the degradation of building elements.

[216] The decision of the Court of Appeal in *Riddell v Porteous* [1999] 1 NZLR 1 is authority for the proposition that a vendor will be liable to a purchaser for a breach of warranty that building work undertaken by the vendor complies with the Building Act 1991.

[217] Mr Ross submits that Special Condition 15 of the Agreement for Sale and Purchase also provides that the "Vendor warrants that the house on the property will be completed prior to possession date and in a good and workmanlike manner in accordance with the plans and specifications provided to and approved by the purchaser."

[218] The Specifications referred to in Special Condition 15 of the Agreement contain inter alia, the following provisions:

> "**SPECIFICATIONS/CARPENTER and JOINER:**
>
> - General
>
> All work and materials shall conform to the New Zealand Building Code 1992
> - Workmanship
>
> The whole of the work…must be carried out in the most perfect workmanlike manner to the entire satisfaction of the owner and work that does not measure up to his standard will be taken down and re-executed."

(As an aside I must say that I am both impressed and surprised that any builder would include such a provision in a contract. It would indeed be rare because in doing so he or she expressly assumes a duty to fulfil his or her obligations under the contract to a standard beyond that implied as a matter of law, namely with reasonable care and skill, and moreover, requires performance to be to the satisfaction of the owner. However, whilst the standard becomes subjective rather than objective, the builder is protected to some extent by the requirement that the owner must act reasonably.)

[219] It is common ground that moisture has entered the dwelling through the external envelope and that there has been decay and degradation of the timber framing and interior linings and finishes.

[220] It is clear therefore, that the water penetration contravenes the provisions of the Building Code Clause E2-External Moisture; the resultant decay and damage to the timber framing contravenes Clause B1-Structure; the resultant damage and reconstruction of the dwellinghouse contravenes Clause B2-Durability; and it seems to me that the presence of the fungal growth *Stachybotrys atra* identified by Biodet Services Ltd in the annexure to Mr Templeman's report, is also evidence of the contravention of Clause E3-Internal Moisture.

[221] Accordingly, the building work undertaken by the First respondent does not comply with the Building Code, has not been carried out in the most perfect workmanlike manner to the entire satisfaction of the owner, and the Claimants have established a prima-facie case that the First respondent Allan Tucker is in breach of the terms of the Agreement for Sale and Purchase.

[222] Therefore, I find the First respondent, Allan Tucker breached the terms of the Agreement for Sale and Purchase and is liable to the claimants for damages for that breach in the amount of $108,100.00.

The liability of the First respondent, Allan Tucker in tort

[223] 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. The non-delegable duty on the owner/builder/developer is not merely to take reasonable care for the safety of others, it generates a special

responsibility or duty to see that care is taken by others, for example by an agent, or independently employed contractors, such as the Fifth, Sixth and Seventh respondents in this case. Non-delegable duties need not be discharged by the employer personally, but liability rests with the employer if their discharge involves negligently inflicted harm or damage.

[224] There is no dispute in this case that the First respondent, Mr Allan Tucker, was the builder and developer of the property which he then sold to the owners.

[225] The evidence establishes overwhelmingly that moisture has entered the dwelling through the external envelope and that there has been decay and degradation of the timber framing and interior linings and finishes.

[226] Mr Allan Tucker was the builder of the Claimants' dwelling and by application of the principles illustrated in the authorities cited (supra), I find that the First respondent, Allan Tucker owed the Claimants a duty of care as the purchasers of the property he built, Allan Tucker breached that duty of care by constructing, or permitting to be constructed, defective building works, and by reason of the said breaches, the Claimants have suffered loss and damage to their property for which the First respondent is liable.

[227] Accordingly, I find the First respondent, Allan Tucker liable to the Claimant for damages in the sum of $108,100.00.

The liability of the Second respondent, Butt Design Limited

[228] There is no dispute that in or about 1996 BDL was approached by the First respondent, Allan Tucker, to design a 'spec' house to be constructed at 8 St Andrews Place, Kamo. Those plans and

specifications prepared by BDL were used by Allan Tucker to obtain a Building Consent on 10 March 1999 and save for some minor amendments to the internal layout, those plans and specifications were used by Allan Tucker to construct the owners' dwellinghouse.

[229] 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).

[230] Mr Butt's evidence and Mr Allan Tucker's evidence establishes overwhelmingly that BDL was not consulted about changes that Allan Tucker made to the plans from time to time and that BDL had no supervisory role in relation to this project.

[231] Therefore the issue to be determined in relation to any liability on the part of BDL, is whether or not the plans prepared by BDL were negligently prepared to the extent that they contain design and construction details that were followed by the builder and lead to water penetration of the owners' dwelling.

[232] The Second respondent denies responsibility for any leak in the dwelling and submits that the one matter that all the leaks have in common is poor construction practice.

[233] There was criticism by Mr Beattie and Mr Templeman that the plans contained insufficient detail of the tiled deck area, and criticism of the design detail for the step down from the living room floor to the exterior deck over the garage (the North Eastern area) where water penetrated the dwelling through, under, or around the bifold door threshold. Notwithstanding that criticism, both acknowledged that there was no

requirement for any particular step down at the time the dwelling was constructed.

[234] Mr Bowden submits that the plans prepared by BDL provide for a step down of 47.0mm but Mr Tucker constructed the deck with a step down at that point of only 7.0mm. Mr Bowden submits the evidence suggests the step down is not the cause of any leaks and the cause of the leak is the inadequate membrane laid across the deck and through the door threshold.

[235] Mr Bowden submits that any water penetration caused by a failure of the waterproofing membrane over the North Eastern deck cannot be the responsibility of BDL because the specified membrane was not used, and the water penetration due to the method of fixing the balustrade and the penetration of the waterproofing membrane by the electrical cable which feeds the lights on the top of the balustrade are not, and could not be the responsibility of BDL because BDL did not design the balustrade which was a proprietary system chosen by the builder and BDL did not design the light cabling or arrange for the placement of the light.

[236] Mr Bowden submits that there is no credible evidence of leakage through the deck joists and beams on the North Western deck, but in any event liability in respect of this issue rests clearly with the First and Sixth respondents who between them decided to dispense with a flashing in this location, and that to the extent there is any leak through the joint between the block wall and the Insulclad on the corner of the rumpus room, any failure has come about after the block wall detailed by BDL was deleted.

[237] Generally, any claim that an Architect's drawings were defective because they showed inadequate details will receive scant regard in

circumstances where the drawings were accepted first, by the person who commissioned them, secondly by the builder and/or contractors reliant on them to effect their works, and thirdly, where the same drawings were approved by a Territorial Authority or Building Certifier for the purpose of issuing a Building Consent.

[238] Mr Allan Tucker gave evidence that he could not build the North Eastern deck as detailed by BDL but that he did not revert to Mr Butt for further or different details when the problem arose, instead he tried to create the necessary falls and made the deck work as he saw fit. In short, by that act he became the designer of the deck and will therefore be responsible for its success or failure and BDL is abrogated from any responsibility in relation to that work.

[239] In the absence of any evidence that a particular construction detail designed by BDL failed to the extent that water penetrated the dwelling when the building works were constructed in accordance with that detail, I can only conclude that the water penetration was caused by poor construction or negligent design by other persons and BDL has no liability to any other party to these proceedings for the water ingress and damage to the claimants' dwelling.

The liability of the Fourth respondent, Plaster Systems Limited

[240] In essence, it has been alleged that PSL has caused or contributed to the water penetration of the owners' dwelling because first, it supplied defective product, and secondly because PSL gave negligent advice in relation to the flashing of the deck joists on the North Western deck.

Defective product - Insulclad Cladding System

[241] Mr Beattie claimed that the Insulclad Cladding System was deficient to the extent that the textured plaster system allows the ingress of water into the wall cavities to the detriment of the untreated timber. The evidence did not establish even remotely that this was the case and accordingly PSL has no liability to any party to these proceedings under that head of claim.

Defective product - feature bands

[242] The evidence established, and I have determined, that cracking and delamination of the feature bands around the exterior windows and doors has caused water to penetrate the dwelling.

[243] Mr Robertson contends that the Insulclad Cladding System was a ‘state of the art’ system at the time the owners’ dwelling was constructed. That may be so to a large measure, but the epoxy clad feature bands that PSL marketed and sold to Mr Wells were not ‘state of the art’, they cracked and warped and delaminated from the Insulclad wall cladding to which they were affixed.

[244] I am constrained to the view that PSL owed a duty of care to the Claimants as purchasers of the dwelling to ensure that all of the component materials of the Insulclad Cladding System that it manufactured, marketed, and supplied, were fit for purpose.

[245] In traditional building contracts these terms will be implied as a matter of law unless excluded. (See: Kennedy-Grant on Construction Law in New Zealand, 1999, pp 341-342)

[246] I am satisfied that in this case there was a sufficient relationship of trust, confidence, and proximity between the parties such that it must have been in the reasonable contemplation of PSL, that carelessness on its part in ensuring the components of its cladding system were manufactured in accordance with recognised building standards and tested to ensure compliance with the Building Code, was likely to cause damage to future owners and that it would be liable for any breach of the duty of care.

[247] Accordingly, I find the Fourth respondent, PSL, breached the duty of care that it owed to the Claimants, and accordingly I find PSL liable to the Claimants for damages in the sum of $7,357.50 being the cost of replacing the failed feature bands to prevent water penetration at that juncture.

The liability of the Fifth respondent, Superior Balustrades Whangarei Limited

[248] SBWL is a specialist contractor that designs, manufactures and installs proprietary balustrade systems. SBWL contracted to Mr Allan Tucker to supply and install the aluminium and glass balustrade around the decks on the owners' dwelling.

[249] SBWL was not obliged to manufacture or modify the components of the balustrade system to comply with any other person's design or performance criteria and was not constrained in its role in this case by contractual obligations that served to limit or inhibit its use of its own expertise and knowledge.

[250] In the circumstances therefore, I am constrained to the view that SBWL owed a duty of care to the Claimants as purchasers of the dwelling to

ensure that all of the components of its balustrade system including the fixing methodology that it employed to fasten the balustrade to the dwelling were fit for the purpose for which they were required and the work product complied with the Building Code.

[251] I am satisfied that in this case there was a sufficient relationship of trust, confidence, and proximity between the parties such that it must have been in the reasonable contemplation of SBWL, that carelessness on its part in ensuring the components of its balustrade system dwelling were manufactured and installed in accordance with recognised building standards that would ensure compliance with the Building Code, was likely to cause damage to future owners and that it would be liable for any breach of the duty of care.

[252] I have determined that the balustrade supplied and installed by SBWL has caused or permitted water to penetrate the dwelling (in breach of the Building Code) through the Tek screws used to fasten the base plates of the stanchions to the North Eastern Deck.

[253] Mr Tong submitted that there is no real evidence of any leakage in or around the areas of screw penetration and the existence of a small amount of staining on the ply around one area of screw penetration is not the cause of the extensive leaks which occur in this building. Mr Tong contends that the light staining evident in photograph 9 annexed to Mr Smith's report does not require remediation.

[254] Notwithstanding that SBWL denies liability for any damage resulting from the work it undertook on the owners' dwelling, SBWL has offered to install under each base plate (to each stanchion), a butyl gasket that would provide a better seal than presently exists. SBWL submits that the butyl gaskets are a proprietary product that was not available at the time

the balustrade was installed on the claimants' dwelling and has been developed since.

[255] Mr Tong's submission that the butyl gaskets were not available at the time the balustrade was installed does not serve in any way to abrogate SBWL's obligation to carry out its work in strict compliance with the Building Code or to relieve it from liability for the consequences of any damage from water penetration caused by its works. In short SBWL was obliged to ensure that its work did not cause or contribute to the penetration of the dwelling by water, it failed, and therefore SBWL is liable to the claimants for damages for the cost of removing and reinstalling the balustrade in a proper and watertight manner and making good the damage that has resulted from the water penetration.

[256] No evidence has been presented to prove that the water penetration has caused any consequential damage to the extent that timber wetted by water entering through the Tek screws has decayed and requires replacement and removal. Accordingly, I am satisfied on balance that the remedial work required in relation to the balustrades will involve the removal of the balustrades, repairs to the waterproof membrane below the stanchions, and the re-installation of the balustrade with suitable waterproof seals.

[257] None of the parties to these proceedings has sought to identify the actual cost of removing the balustrade, making good the damage (if any) that has resulted from the water penetration and reinstalling the balustrade upon completion.

[258] Mr Beattie has provided costings for the remedial work required to remedy all of the damage to the North Eastern deck, but clearly that damage has resulted from a number of sources.

[259] In the circumstances I am satisfied that the justice of the matter will be served if I assess the cost of removing and reinstalling the balustrade and making good the damage to the waterproofing membrane under the stanchions at $1,500 being roughly a third of the amount allocated to this work by Mr Beattie after taking into account that no proven consequential damage has resulted from the water penetration.

[260] Accordingly, I find the Fifth respondent, SBWL, breached the duty of care that it owed to the Claimants, and accordingly I find SBWL liable to the Claimants for damages in the sum of $1,500.00.

The liability of the Sixth respondent, Terry Wells

[261] Mr Wells is a specialist contractor who at the time the owners' dwelling was constructed was a PSL Licensed Applicator who supplied and installed Insulclad cladding. Mr Wells contracted to Mr Allan Tucker to supply and install Insulclad cladding, including the feature bands around the exterior windows and doors, on the owners' dwelling.

[262] In the circumstances therefore, I am constrained to the view that Terry Wells owed a duty of care to the Claimants as purchasers of the dwelling to ensure that the Insulclad Cladding system that he supplied and installed was fit for purpose, namely that the Cladding system when properly installed and completed was capable of preventing water penetration of the dwelling and damage to the building and furnishings and that the cladding system complied with the manufacturers recommendations and the Building Code.

[263] I am satisfied that in this case there was a sufficient relationship of trust, confidence, and proximity between the parties such that it must have been in the reasonable contemplation of Terry Wells, that carelessness

on his part in installing the Insulclad Cladding system was likely to cause damage to future owners and that he would be liable for any breach of the duty of care.

[264] The evidence established, and I have determined, that cracking and delamination of the feature bands around the exterior windows and doors has caused water to penetrate the dwelling and the sealant joint formed by Mr Wells between the joists and the Insulclad cladding on the North Western deck was not formed in accordance with good trade practice or the detail recommended by PSL and caused water penetration of the owners' dwelling. I have also determined that the deletion of the PSL recommended flashing above the deck joists contributed to water penetration at that juncture.

[265] Accordingly, Terry Wells is liable to the Claimants for damages for the cost of replacing the failed feature bands to prevent water penetration at that juncture and repairing the failed joint between the deck joists and the Insulclad cladding on the North Eastern deck, including the installation of a metal apron flashing as recommended and detailed by PSL.

[266] I am not persuaded that there has been any consequential damage and that the damage in the rumpus room was caused entirely by the water penetration around the aluminium joinery in the family room above. I am reinforced in reaching that conclusion by Mr Allan Tucker's evidence that he was not required to replace any timber or other materials on the North Western wall of the Rumpus room and that the damage was confined largely to the Northern wall. The deck construction was the same on both walls, but it was in the family room above the Northern wall of the rumpus room that the window with the curved head that allowed water to penetrate the dwelling was located.

[267] As with the remedial work associated with the balustrade none of the parties to these proceedings has sought to identify and isolate the actual cost of providing an effective seal and flashing to the deck joists. No matter how difficult the damages are to assess, I must endeavour to fix them (*Chaplin v Hicks* [1911 2KB 786) and therefore I have endeavoured to come up with an assessment on the evidential materials available to me and I am satisfied the justice of the matter will be satisfied if I use a combination of the costings submitted by Mr Robertson and Mr Beattie for replacement cladding, establishment, insurance and scaffolding, and flashings.

[268] Therefore I find the Sixth respondent, Terry Wells, breached the duty of care that he owed to the Claimants, and accordingly I find Terry Wells liable to the Claimants for damages in the sum of $12,560.00 being the cost of replacing the failed feature bands to prevent water penetration at that juncture being $7,357.00 together with the cost of providing an effective seal and flashing to the deck joists on the North Eastern deck being $5,200.00 that I have assessed on the basis of Mr Beattie's and Mr Robertson's evidence.

The liability of the Seventh respondent, Brian Oliver

[269] I have determined that there is no evidence of any failure of the waterproofing membrane applied by the Seventh respondent, Mr Oliver, and accordingly Mr Oliver has no liability to any other party to these proceedings for the water ingress and damage to the Claimants' dwelling.

CONTRIBUTION

[270] I have found that the First respondent, Allan Tucker, breached the terms of the Agreement for Sale and Purchase dated 15 June 2000 between the Claimants and the First respondent.

[271] I have found that the First respondent, Allan Tucker, breached the duty of care that he owed to the Claimants, and accordingly Allan Tucker is a tortfeasor or wrongdoer and is concurrently liable to the Claimants in contract and tort.

[272] I have also found that the Fourth, Fifth, and Sixth respondents breached the duty of care they owed to the Claimants and accordingly, each of them is a joint tortfeasor with the First respondent in respect of the damage for which I have found each of them liable.

[273] In relation to the feature bands, I have found the Fourth and Sixth respondents each liable in relation to the full extent of that matter. They are joint tortfeasors with the First respondent on the one hand and are jointly liable as between the Fourth and Sixth respondents on the other hand, in respect of the same damage.

[274] Under section 17 of the Law Reform Act 1936 any tortfeasor is entitled to claim a contribution from any other tortfeasor in respect of the amount to which it would otherwise be liable.

[275] The basis of recovery of contribution provided for in s17(1)(c) is as follows:

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

[276] The approach to be taken in assessing a claim for contribution is provided in s17(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.

[277] 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.

[278] I have determined that the Claimants have suffered damage to the extent of $108,100 as a result of the breaches of the First, Fourth, Fifth and Sixth respondents and that Graeme and Glenys Tucker have suffered stress anxiety and inconvenience as a result of those breaches for which I have determined they are entitled to general damages in the amount of $5,000 each. Primacy for that damage rests with the First respondent, Allan Tucker as the builder/developer of the Claimants' dwelling whose responsibility it was, to carry out and/or to arrange for the execution of the building works in accordance with the Building Code, the Agreement for Sale and Purchase, and the Building Consent. The observance of that requirement was the First respondent's primary responsibility.

[279] I have determined that the Fourth, Fifth, and Sixth respondents each contributed to the damage suffered by the Claimants in part and to the following extent:

Fourth respondent, Plaster Systems Ltd	$ 7,357.00
Fifth respondent, Superior Balustrades Whangarei Ltd	$ 1,500.00
Sixth respondent, Terry Wells	$12,560.00

and that in relation to the damage suffered by the Claimants and caused by the Sixth respondent, I find that the Fourth respondent contributed to that damage in part for the failure of the feature bands and is liable to the Sixth respondent to the extent of $7,357.00

[280] I am satisfied in this case that the justice of the matter will be served if the amounts that Graeme and Glenys Tucker are entitled to recover from the respondents as general damages is apportioned between the tortfeasors according to the extent of the damage each caused.

[281] Accordingly, I determine that the First respondent is entitled to a contribution towards the amount of $108,100 that the Claimants would otherwise be entitled to obtain from him in special damages pursuant to this determination, and a contribution towards the amounts Graeme and Glenys Tucker would otherwise be entitled to obtain from him in general damages pursuant to this determination, as follows:

- From the Fourth respondent: $7,357 for special damages together with general damages of $700, a total amount of $8,057; and

- From the Fifth respondent: $1,500 for special damages with general damages of $100, a total amount of $1,600; and

- From the Sixth respondent: $12,560 as special damages with general damages of $1,200 a total amount of $13,760 reduced by any contribution obtained from the Fourth respondent.

The Sixth respondent is entitled to a contribution from the Fourth respondent towards the amount the Claimants or the First respondent

would otherwise be entitled to obtain from him in damages pursuant to this determination in the amount of $8,057.00.

COSTS

[282] The Claimants claim a contribution towards legal costs against the First respondent for the following reasons:

- The Claimants have been substantially successful in respect of their claims.

- The Claimants are entitled to a weather tight home as a matter of contract with the First respondent. His defence is without any merit whatsoever in so far as the Claimants' claim is concerned. He should have settled the Claimants' claim long ago and pursued a claim for contribution against his sub-contractors. In addition, he even charged the Claimants $24,287.54 for fixing up the defective work.

- It is submitted that an appropriate contribution for counsel's preparation and attendance at a three day hearing is $15,000.

[283] The Second respondent claims a contribution toward its costs and expenses in the amount of $10,000 because it is submitted that there has been a series of allegations and objections without substantial merit that have led to the Second respondent having to be part of these proceedings and defend itself unnecessarily. Mr Bowden submits such allegations include:

- Blaming the designer for a lack of step down when the deck was not built to the designed height.

- Suggesting that fall (or lack of it) was an issue in water ingress on the East deck.
- Suggesting the designer's concurrence with the removal of the retaining wall.

- Suggesting that the designer did not detail a flashing and that was the cause of the failure to place a flashing over the joists on the West deck when the evidence disclosed that the First respondent was well aware of the need for a flashing, that there was considerable discussion with the Sixth respondent over the issue and a telephone call to the Fourth respondent regarding the same. This evidence disclosed that the First respondent's counsel in particular had wasted considerable argument on this issue when his own witness' evidence was to be to the effect that he knew about the flashing detail but did not use it.

[284] Mr Bowden submits that there also arises a question of bad faith on the part of the First respondent who, in respect of the East wing, knew in July 2000 that there was a serious problem with leaks in that area and was advised to remove the doors which would have disclosed the problem, but he did not do so. Significantly, the First respondent denied that was the case in a most implausible fashion, and having been put on notice to prove his denial, did not do so. In respect of the West wing, the First respondent has wasted expenditure in fixing an area below the area of water ingress. Furthermore, again the First respondent was aware of the problem at least by December 2000 and was advised of steps that could be taken to ascertain the source of the leak and clearly chose not to do so and is therefore responsible for the on-going leaks and damage in that area and the costs of repairing it.

[285] Mr Bowden further submits that the Claimants and the First respondent opposed the Second respondent's application to be removed from the proceeding, without good ground for doing so.

[286] 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.

[287] 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.

[288] I have carefully considered the Claimants' application which I find compelling and persuasive in the circumstances. The Claimants have been substantially successful and I am driven to conclude that this is a case where the First respondent's defence to the Claimants' claim was largely without any merit whatsoever. The First respondent did not dispute that the owners' dwelling was a leaky building, the First respondent did not dispute that he was the builder/developer and neither did he allege that the owners had caused or contributed to the damage and loss they suffered as a result of the dwelling being a leaky building on account of any acts or omissions on their part. Accordingly, the Claimants had a prima-facie claim against the First respondent builder/developer and the First respondent's defence to that claim is simply without merit in the circumstances.

[289] I agree with Mr Ross that the First respondent should have undertaken the necessary investigation and remedial work to settle the Claimants' claim long ago and then pursued a claim for contribution against his sub-contractors as appropriate. Instead, it would seem that the First respondent adopted a fairly hard nosed approach and charged the Claimants for the remedial work that he did undertake before and until his claims against the subcontractors were determined in these proceedings that were filed by the Claimants to get resolution to the matter. It seems to me that the First respondent's actions in this regard fell well short of his obligations regardless of whether he considered that his subcontractors had any liability to him and I am sure that had the problems arisen before the property settled he would have moved heaven and earth to resolve the problems which from July 2000 have been allowed to drag.

[290] I am satisfied that this is a case where the allegations and objections (the First respondent's defence to the claim) of the First respondent were without any substantial merit, that the ground in s43(1)(b) is made out, and accordingly I determine that the First respondent shall meet the Claimants' costs and expenses in this matter to the extent of $10,000. I have reduced the amount claimed on account of the costs incurred in running the arguments advanced by Mr Beattie in relation to the alleged deficiency of the Insulclad Cladding System which I found to have no merit and which took considerable hearing time to dispose of. The First respondent took a risk that its stance on the matters at issue would be vindicated in this adjudication but in the end it is the Claimants' view that has prevailed almost entirely.

[291] I am not to be taken as suggesting that the First respondent did not genuinely believe that the water penetration and the resultant damage of the owners' dwelling was the responsibility of the specialist

subcontractors that he engaged on the project, only that his legal obligations to the Claimants required him to resolve the problem, not the Claimants.

[292] I have carefully considered the Second respondent's application and whilst I am only too conscious that this has likely been an unpleasant and expensive exercise for the Second respondent, I am not persuaded that the Claimants or the First respondent have necessarily acted in bad faith, or that their respective cases were without substantial merit such that an award of costs against the Claimant or the First respondent would be appropriate in this case. I have reached this conclusion because the extent to which BDL may have been liable to the Claimants or any other respondent was largely a factual dispute and the facts necessary for a considered determination of BDL's liability were not ultimately tested until the hearing. I have no record of an application for removal/strike out filed by the Second respondent at any time during the proceedings. That of course was a matter for the Second respondent to raise at any time if it believed that the allegations made against it were without substantial merit, but I suspect like all other parties to this adjudication, a full appreciation of the factual matrix that constitutes this claim did not fully present itself to the Second respondent until the conclusion of the hearing and the evidence. Even if I am wrong however, I am not persuaded that the threshold for an award of costs to the Second respondent (which would seem to be set deliberately high under the Act) has been met in this case, and the claim fails accordingly.

[293] I therefore find that the costs and expenses incurred by the Claimants in these proceedings shall be reimbursed by the First respondent in the amount of $10,000.

[294] All other parties shall bear their own costs in this matter.

CONCLUSION AND ORDERS

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

[a] The First respondent is in breach of contract and is liable to the Claimants in damages for the loss caused by that breach in the sum of $108,100.00.

[b] The First respondent is in breach of the duty of care owed to the Claimants and is liable to the Claimants in damages for the loss caused by that breach in the sum of $108,100.00.

[c] The Fourth respondent is in breach of the duty of care owed to the Claimants and is liable to the Claimants in damages for the loss caused by that breach in the sum of $7,357.00.

[d] The Fifth respondent is in breach of the duty of care owed to the Claimants and is liable to the Claimants in damages for the loss caused by that breach in the sum of $1,500.00.

[e] The Sixth respondent is in breach of the duty of care owed to the Claimants and is liable to the Claimants in damages for the loss caused by that breach in the sum of $12,560.00.

[f] The First respondent is in breach of contract and is liable to each of Graeme and Glenys Tucker in general damages for the stress, anxiety and inconvenience caused by that breach in the sum of $5,000.00

[g] The First respondent is in breach of the duty of care owed to Graeme and Glenys Tucker and is liable to each of Graeme and Glenys Tucker in general damages for the stress, anxiety and inconvenience caused by that breach in the sum of $5,000.00

[h] The Fourth respondent is in breach of the duty of care owed to Graeme and Glenys Tucker and is liable to each of Graeme and Glenys Tucker in general damages for the stress, anxiety and inconvenience caused by that breach in the sum of $350.00.

[i] The Fifth respondent is in breach of the duty of care owed to Graeme and Glenys Tucker and is liable to each of Graeme and Glenys Tucker in general damages for the stress, anxiety and inconvenience caused by that breach in the sum of $50.00

[j] The Sixth respondent is in breach of the duty of care owed to Graeme and Glenys Tucker and is liable to each of Graeme and Glenys Tucker in general damages for the stress, anxiety and inconvenience caused by that breach in the sum of $600.00

[k] As a result of the breaches referred to in [b], [c], [d], [e], [g], [h], [i] and [j] above, the First respondent on the one hand and the Fourth, Fifth and Sixth respondents on the other, are joint tortfeasors.

[l] As between the First respondent on the one hand and the Fourth, Fifth, and Sixth respondents on the other; the First respondent is entitled to a contribution from the Fourth respondent for the same loss that each has been found liable for, being $8,057.00; the First respondent is entitled to a contribution from the Fifth respondent for the same loss that each has been found liable for, being $1,600.00; and the First respondent is entitled to a contribution from the Sixth respondent for the same loss that each has been found liable for, being $13,760.00.

[m] As a result of the breaches referred to in [c], [e], [h] and [j] above, the Fourth respondent on the one hand and the Sixth respondent on the other, are joint tortfeasors and are jointly and severally liable to the Claimants in the amount of $8,057.00.

[n] As between the Fourth respondent on the one hand and the Sixth respondent on the other, the Sixth respondent is entitled to a contribution from the Fourth respondent for the same loss that each has been found liable for, being $8,057.00.

[o] As a result of the breaches referred to in [a], [b], [c], [d] and [e] above, the gross entitlement of the Claimants is $108,100.00.

[p] As a result of the breaches referred to in [f], [g], [h], [l] and [j] above, the gross entitlement of each of Graeme and Glenys Tucker is $5,000,00

Therefore, I make the following orders:-

(1) The First respondent Allan Tucker is liable to pay the Claimants the sum of $108,100.00.

(s42(1))

(2) The Fourth respondent is liable to pay the Claimants the sum of $7,357.00.

(s42(1))

(3) The Fifth respondent is liable to pay the Claimants the sum of $1,500.00.

(s42(1))

(4) The Sixth respondent is liable to pay the Claimants the sum of $12,560.00.

(s42(1))

(5) In the event that the First respondent, Allan Tucker pays the claimants the sum of $108,100.00 he is entitled to a contribution of $7,357.00 from the Fourth and Sixth respondents, jointly and severally, being the amount in respect of which the First respondent on the one hand and the Fourth and Sixth respondents on the other hand have been found jointly liable, for breach of the duty of care.

(s29(2)(a))

(6) In the event that the First respondent, Allan Tucker pays the claimants the sum of $108,100.00 he is entitled to a contribution of $1,500.00 from the Fifth respondent, being the amount in respect of which the First respondent on the one hand and the Fifth respondent on the other hand have been found jointly liable, for breach of the duty of care.

(s29(2)(a))

(7) In the event that the First respondent, Allan Tucker pays the claimants the sum of $108,100.00 he is entitled to a contribution of $12,560.00 from the Sixth respondent, being the amount in respect of which the First respondent on the one hand and the Sixth respondent on the other hand have been found jointly liable, for breach of the duty of care.

(s29(2)(a))

(8) In the event that the Sixth respondent, pays the claimants the sum of $12,560.00 he is entitled to a contribution of $7,357.00 from the Fourth respondent, being the amount in respect of which the Fourth respondent on the one hand and the Sixth respondent on the other hand have been found jointly liable, for breach of the duty of care.

(s29(2)(a))

(9) In the event that the Sixth respondent, pays the First respondent the sum of $12,560.00 he is entitled to a contribution of $7,357.00 from the Fourth respondent, being the amount in respect of which the Fourth respondent on the one hand and the Sixth respondent on the other hand have been found jointly liable, for breach of the duty of care.

(s29(2)(a))

(10) The First respondent Allan Tucker is liable to pay Graeme and Glenys Tucker the sum of $5,000.00 each.

(s42(1))

(11) The Fourth respondent is liable to pay Graeme and Glenys Tucker the sum of $350.00 each.

(s42(1))

(12) The Fifth respondent is liable to pay Graeme and Glenys Tucker the sum of $50.00 each.

(s42(1))

(13) The Sixth respondent is liable pay Graeme and Glenys Tucker the sum of $600.00 each.

(s42(1))

(14) In the event that the First respondent, Allan Tucker pays Graeme and Glenys Tucker the sum of $5,000.00 each, he is entitled to a contribution of $700.00 from the Fourth and Sixth respondents, jointly and severally, being the amount in respect of which the First respondent on the one hand and the Fourth and Sixth respondents on the other hand have been found jointly liable, for breach of the duty of care.

(s29(2)(a))

(15) In the event that the First respondent, Allan Tucker pays Graeme and Glenys Tucker the sum of $5,000.00 each, he is entitled to a contribution of $100.00 from the Fifth respondent, being the amount in respect of which the First respondent on the one hand and the Fifth respondent on the other hand have been found jointly liable, for breach of the duty of care.

(s29(2)(a))

(16) In the event that the First respondent, Allan Tucker pays Graeme and Glenys Tucker the sum of $5,000.00 each he is entitled to a contribution of $1,200.00 from the Sixth respondent, being the amount in respect of which the First respondent on the one hand and the Sixth respondent on the other hand have been found jointly liable, for breach of the duty of care.

(s29(2)(a))

(17) In the event that the Sixth respondent, pays Graeme and Glenys Tucker the sum of $600.00 each, he is entitled to a contribution of $700.00 from the Fourth respondent, being the amount in respect of which the Fourth respondent on the one hand and the Sixth respondent on the other hand have been found jointly liable, for breach of the duty of care.

(s29(2)(a))

(18) In the event that the Sixth respondent, pays the First respondent the sum of $1,200.00 he is entitled to a contribution of $700.00 from the Fourth respondent, being the amount in respect of which the Fourth respondent on the one hand and the Sixth respondent on the other hand have been found jointly liable, for breach of the duty of care.

(s29(2)(a))

(19) The First respondent shall reimburse the Claimants for their costs and expenses in these proceedings in the amount of $10,000.00.

(s43)

(20) The First, Second, Fourth, Fifth and Sixth respondents shall bear their own costs and expenses in this matter.

(s43)

[296] In summarise the position therefore, if all respondents meet their obligations under this determination, this will result in the following payments being made forthwith:

<u>To the claimants by:</u>

The First respondent, Allan Tucker (includes costs reimbursement of $10,000.00)	$104,040.00

The Fourth respondent, PSL	$ 7,357.00	
The Fifth respondent, SBWL	$ 1,500.00	
The Sixth respondent, Terry Wells	$ 5,203.00	
	$118,100.00	$118,100.00

To Graeme Tucker by:

The First respondent, Allan Tucker	$ 4,350.00	
The Fourth respondent, PSL	$ 350.00	
The Fifth respondent, SBWL	$ 50.00	
The Sixth respondent, Terry Wells	$ 250.00	
	$ 5,000.00	$ 5,000.00

To Glenys Tucker by:

The First respondent, Allan Tucker	$ 4,350.00	
The Fourth respondent, PSL	$ 350.00	
The Fifth respondent, SBWL	$ 50.00	
The Sixth respondent, Terry Wells	$ 250.00	
	$ 5,000.00	$ 5,000.00
Total amount of this determination:		$128,100.00

Dated this 4th day of April 2005

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.