CLAIM NO: 2601

UNDER the Weathertight Homes Resolution Services Act 2002

IN THE MATTER OF an adjudication

BETWEEN	**PAKI LESLIE MANSAI NIKORA** and **PATSY POLLY NIKORA**
	Claimants
AND	**PETER NIGHTINGALE**
	First Respondent
AND	**WHAKATANE DISTRICT COUNCIL**
	Second Respondent
AND	**EASTERN BAY PLUMBING LIMITED (Now struck out)**
	Third Respondent
AND	**PETER NEEDHAM**
	Fourth Respondent
AND	**MIKE BROOKER**
	Fifth Respondent

DETERMINATION OF ADJUDICATOR
(Dated 18 November 2005)

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BACKGROUND

[1] In late June 1995 Paki Leslie Nikora applied to the Whakatane District Council for consent to build a new dwelling at 100 Ocean Road, Ohope. Mr Nikora filled in the "Key Personnel" section of the application citing himself as "builder", P J Nightingale as the "building certifier" and, among others, Grant Andrews as "designer". Mr Nikora signed as applicant, noting his "position" as "Owner". The building consent was issued on 19 July 1995, and construction was completed about February 1996, although it seems that the Nikora family moved into the premises in December 1995 before it was totally finished. The Code Compliance Certificate for the building was issued on 9 January 1998.

[2] From the time Mr Nikora and his family moved in (December 1995) there were leaking problems in the dwelling. A Whakatane District Council officer upon invitation inspected the dwelling in December 2002 and about two

years later Mr Nikora engaged a local contractor to "recommend an action plan" for the premises.

[3] A claim was lodged with the Weathertight Homes Resolution Service ("WHRS"), it being received on 9 August 2004. An assessor Graeme Watt was assigned to prepare a WHRS "assessor's report", this document being completed in October 2004. It concluded that the dwelling met the criteria set out in section 7(2) of the Weathertight Homes Resolution Services Act 2002 ("the Act") and also named "the persons who should be parties to the claim…" as follows:

- Certifier: Whakatane District Council.
- Builder: Peter Nightingale.
- Designer: Grant Andrews.
- Cladding applicator: Mike Booker.
- Roofer: Eastern Bay Plumbing.

[4] For various reasons the matter did not go to mediation and on 12 May 2005 the Service received a "Notice of Adjudication" signed by Mr and Mrs Nikora as Claimants. Based on the estimated cost of repairs provided by the assessor in his report they sought $33,000.00; the parties cited were Mr Nightingale, Whakatane District Council, Eastern Bay Plumbing and Peter Needham. Mr Needham was responsible for the fibreglassing and sealing of the decks and adjoining walls. The designer was presumably not cited because he is now resident in the United States.

[5] An adjudication "Preliminary Conference" was convened on 8 June 2005 "to discuss procedural and timetabling matters in relation to [the] claim". Those taking part by teleconference were Mr Nikora, Mr Nightingale, Mr Needham and counsel for the District Council. Without opposition Eastern Bay Plumbing Limited was removed as a party because it in fact did not undertake the roofing work on the dwelling. It later became known that the

company which did the roofing work has been struck off and the principal of the company is deceased so neither could be included in the proceedings.

[6] Prior to the Preliminary Conference Mr Nightingale sought the joinder of Mr Brooker, the cladding applicator. At the Preliminary Conference his joinder was supported by all respondents (although Mr Nikora "stated that he did not consider the cladding had failed or caused any damage to the dwelling") and so he was joined as the Fifth Respondent. After the Preliminary Conference Mr Nightingale unsuccessfully applied to be removed as a party.

HEARING

[7] The adjudication hearing took place in Whakatane on 3 October 2005. All parties or their representatives (excluding Mr Needham), together with the Adjudicator and the WHRS assessor, made a site inspection at the dwelling just prior to the hearing commencing. Mr Nikora represented the Claimants while Messrs Nightingale and Brooker appeared in person. Mr Robertson appeared as counsel for the Whakatane District Council.

[8] It should be noted that while the Fourth Respondent Mr Needham attended the Preliminary Conference in June and continued to receive all documents filed by and exchanged between the parties, he took no further part in the proceedings, confirming on 1 July to the WHRS case manager that he would not be filing a response. He did not appear at the hearing.

[9] Mr and Mrs Nikora ("the Claimants") provided a bound document headed "Leaky Building Claim" which commented on the WHRS assessor's report and set out the Claimants allegations as to the "cause", "remedy" and "liability" for the damage, broken down into the four affected areas of the dwelling. It included copies of two letters from their contractor Davey Painters Limited and a "Schedule of Repairs" which itemised the work and costs for each of the areas. Much of the document consisted of "before" and "after" photographs of the damaged areas. It was a helpful document, which will be referred to in this determination as the "claim document".

[10] Prior to the hearing it had been clarified that the quantum (amount) of the claim was not the $33,000.00 referred to in the WHRS assessor's report and the Notice of Adjudication, but rather $24,294.00 (inclusive of GST), as set out in the aforementioned "Schedule of Repairs" and referred to in the Davey Painters Limited letter dated 15 June 2005 in the claim document. .

[11] The Claimants also provided legal submissions on the "defence of limitation"; the Council provided a "Response" to the claim and a witness statement by Jeffrey Farrell, the Council's District Inspector. Mr Farrell also produced some documents at the hearing. Both the First Respondent Mr Nightingale and the Fifth Respondent Mr Brooker provided Responses, although not witness statements. Mr Nikora was cross-examined and he called Mr Davey of the aforementioned Davey Painters Limited; both Mr Nightingale and Mr Booker were cross-examined and Mr Farrell for the Second Respondent Council spoke to his statement and was cross-examined. The WHRS assessor Mr Watt was a witness also.

[12] The WHRS adjudication process, in line with the Act's purpose set out in section 3, is clearly intended to be less formal and more flexible than traditional court proceedings so that claimants can comfortably present their claims in person. This means that proceedings and hearings may be very informal, but always on the basis that the fundamental principles of natural justice are followed. This was such a case, and thanks are due to all those taking part for their courtesy and helpfulness.

[13] At the outset of the hearing I obtained the agreement of the parties to a reasonable extension to the timing of the completion of this determination, pursuant to section 40(1)(b) of the Act.

[14] Except for the Whakatane District Council the other parties, including the Claimants, were not legally represented. Accordingly there was no formal identification of the "causes of action" (in the traditional legal sense) and legal principles relied upon by the Claimants. That said, the Council's Response raised the defence of section 4 of the Limitation Act 1950; and, as referred to above, the Claimants provided legally prepared submissions in reply.

Mr Robertson for the Council provided (and spoke to) detailed submissions at the end of the hearing, these covering the limitation issue, the duty of an owner, the duty of the Council, maintenance, liability of other parties and quantum. The other parties were given the option of having time to prepare written submissions in response and/or to make some oral submissions at the conclusion of the evidence. Messrs Nikora, Nightingale and Brooker made some brief comments but declined the invitation to provide written submissions. I have carefully considered the written and oral submissions in reaching my decision but will not refer to them in detail, other than in para's [47] and [48] below.

[15] It would be fair to say that for the parties not represented by counsel the focus of the hearing was on the facts.

[16] Mr Nikora was carefully cross-examined by Mr Robertson, and his witness Mr Davey also provided evidence. Mr Nightingale gave evidence in particular about Area 1, this being the damaged part of the dwelling where it was claimed he was or may have been responsible. He illustrated his evidence by the use of a model he built of the pergola. Mr Brooker gave his testimony, and all these gentlemen made appropriate contributions during each others evidence. I heard from Mr Watt, the assessor (and recalled him briefly before the closing submissions/comments), and the final witness was Mr Farrell for the Council. (The hearing commenced at 10.50am and concluded at 5.39pm, with the usual breaks.)

[17] As referred to above, the detail of the claim was conveniently set out in the claim document under the four affected "areas". Each "area" and the detail of the claim dealing with it was addressed by the appropriate witnesses.

CLAIMS

[18] The remedial work has been completed. The amounts making up the claim are as follows:

Area 1:	$5,128.00
Area 2:	$7,592.00

Area 3: $5,330.00

Area 4: $6,244.00

TOTAL: $24,294.00 (GST incl.)

[19] The claims in fact are being made in contract because Mr Nikora contracted with subcontractors, but alternatively they could be brought in tort. The alleged breach of contract is that the subcontractors failed to carry out the work in a workmanlike manner, and failed to comply with the Building Code.

[20] The claims against the Council are in tort and based on allegations of negligence in that it failed to carry out adequate inspections, and should not have issued the Code of Compliance Certificate.

THE ROLES OF THE PARTIES IN THE CONSTRUCTION PROJECT

[21] Before considering the evidence and reaching conclusions about responsibility for the leaks and damage it is necessary to clarify the role of the parties to these proceedings in the construction project.

[22] The situation regarding the roofer is set out above. Mr Nightingale, the First Respondent, was a "labour only" carpenter employed by the Claimants to carry out certain specific carpentry work. The "builder" in legal terms was Mr Nikora who, as Mr Robertson pointed out, was responsible for undertaking the building work in accordance with the submitted plans and specifications "so as to comply with the provisions of the Building Code". Just as Mr Nightingale was a "labour only" subcontractor, so too Mr Needham and Mr Brooker were subcontractors to the "builder", Mr Nikora.

[23] These legal distinctions become important when examining the liability for the leaks and damage set out in the claim document.

BURDEN OF PROOF

[24] WHRS adjudication proceedings, especially in those claims where there are no or few lawyers involved, tend to be somewhat informal. Nonetheless it needs to be recorded and confirmed that they are "civil" proceedings which

comply with the principles of natural justice in which claimants must prove their claims to the "civil standard" of "the balance of probabilities" – what is more probable than not? The relevant contractual and/or tortious legal principles will be applied to the preferred evidence.

AREA 1

[25] Area 1 deals with the damage suffered by "bedroom 2", downstairs at the front of the house, when water penetrated the room via the top of the pergola posts immediately above it. The pergola had clear sheeting fixed onto the wooden frame. Photographs 5, 6, 7 and 8 show the damage in the room, while photographs 17 and 18 show the cracking on the pergola posts (WHRS assessor's "Appendix 1"). The Claimants' photographs show the top of the pergola framing with the clear sheeting removed, relevant moisture meter readings, and after the repairs had been completed.

[26] The detail in the Claimants' document under "Area 1" sets out the work that was required to remedy the situation, and alleges that the liability was either Mr Nightingale's or Mr Brooker's; one of them had failed to seal the clear sheeting, allegedly with the result that water entered the structure and came down through the framing into the bedroom below.

[27] It is clear that there was water penetration from the pergola structure down into the bedroom and its probable cause was the lack of sealing of the clear sheeting. Mr Davey was strongly of the view that the water penetration was caused by the top of the pergola posts not being sealed before the clear sheeting was fitted. Mr Watt agreed.

[28] Mr Nightingale as the "labour only" carpenter was required to build the pergola framing. It is on the plans for the dwelling, but the clear sheeting is not. Apparently it was added for shelter at Mr Nikora's instruction during the construction process. Mr Nightingale says that when the clear sheeting arrived he placed it on the frame and screwed it down. "This had to be done because the flashing had to be in place against the roof and the wall of the house to waterproof the wall. This was crucial to waterproofing the wall and

had to be completed ready for the Insulclad to go on the wall" (Mr Nightingale's statement). In short he says he fitted the clear sheeting before the Insulclad was applied, which was some weeks later when Mr Brooker came to the job.

[29] However Mr Brooker is adamant that Mr Nightingale put the clear sheeting on the frame after he completed the application of the cladding.

[30] This took place nearly 10 years ago. If I understood the evidence correctly neither subcontractor was alerted to the leaking problems (except Mr Nightingale helping out after the "first flood" from the roof while the cladding was still being applied) until they were served with notice of these proceedings some five months ago. Memories dim, and accurate recollection is difficult.

[31] But the "bottom line" is that Mr Nikora took on the responsibility for managing the construction process. He was the main contractor, the person responsible for engaging the subcontractor Mr Nightingale on a "labour only" basis to do the carpentry, and the other subcontractors to carry out their various tasks. He was the "builder". Therefore it fell on Mr Nikora's shoulders to organise, supervise and check the work product of his subcontractors.

[32] It would seem that he did not do so, to the extent that there appears to be confusion even now, 10 years on, between the cladding applicator and the carpenter as to who was to be responsible for weatherproofing the clear sheeting, the cladding, the pergola structure, and all of their junctions.

[33] It seems that Mr Nikora as the builder and main contractor did not discharge those obligations as well as he might, evidenced by the fact that even now Mr Nightingale and Mr Brooker are uncertain as to who was to be responsible for the weatherproofing.

[34] It is the law that Mr Nikora as the builder owes a non-delegable duty of care to the owners and indeed future owners of the dwelling. In this case the owners are himself and his wife but the legal principle (and duty) still applies.

[35] To the extent that the two subcontractors may have owed Mr Nikora a duty of care in carrying out their tasks I am unable to determine on the evidence produced that either Mr Nightingale or Mr Brooker breached that duty. There was no clear delineation of their respective responsibilities; it was not made clear to them whose responsibility it was to complete and waterproof the work. It seems that Mr Nikora failed to check and ensure the work had been properly completed. Accordingly the claim against either subcontractor must fail.

[36] Because this is a clear case of a builder causing damage by his own negligence Mr Nikora also cannot succeed in a claim against the Council for the Area 1 damage. In the *Three Meade Street* case at para [54] it was confirmed that "a council owes no duty of care to a builder whose own defective workmanship was a cause of the damage".

AREA 2

[37] Area 2 is the rumpus room, master bedroom and nearby deck. The assessor's photographs 9 -13 and the Claimants' Area 2 photographs graphically illustrate the damage caused and the extensive remediation required, resulting from water penetration in the immediate vicinity of the junction between the balustrade and the main house wall, near the bedroom door. The damage also relates to the failure of Mr Needham's fibreglassing and sealing of the decks, in particular the failure to have the fibre glass as high up the wall as the manufacturer's instructions required.

[38] There is no doubt that this leak was caused by poor workmanship, especially on the part of the decking contractor, but with this particular claim Mr Nikora faces a serious difficulty. He frankly acknowledges in the claim document (at p. 1) that "ever since" the family moved into the dwelling (in December 1995) they "(had) endeavoured to rectify two historical leaks which contributed to the majority of (their) problems…". Under cross-examination by Mr Robertson Mr Nikora frankly acknowledged that the "two historic leaks" were the leak affecting the rumpus room and the leak in the dining room/lounge area. He went on to explain that it depended on the rain and

sometimes there was only a leak once a year; he would try to overcome the problem and then some months later there would be a repeat, showing that his “repairs” were not working.

[39] The Council argued that this claim was “statute barred” pursuant to section 4 of the Limitation Act 1950. This states that claims based on contract or tort cannot be brought “after the expiration of six years from the date on which the cause of action accrued”. This means that a person cannot bring a claim in contract more than six years after the work was carried out. However for a claim in tort the six years does not start to run until the defect is discovered, or “ought reasonably to have been discovered”.

[40] Mr Nikora was aware of the leaking problem with the rumpus room/master bedroom area; he has known about the problem since 1995/1996 so any claim had to have been brought within six years of then. This claim was filed in August 2004, being more than six years after the leaking problem was discovered and therefore it is “statute barred” and cannot succeed against any respondent.

AREA 3

[41] Unfortunately for the Claimants the same fundamental problem exists with this claim also. It relates to leak damage to the dining and living room area arising from clear breaches of duty to the Claimants by the roofer and potentially the Council. However it also is a “historic leak” which goes back beyond six years from August 2004 and accordingly this claim is also “statute barred”, and therefore must fail.

AREA 4

[42] Close reading of the detail for Area 4 in the claim document and also the “Schedule of Repairs” indicates that some of the damage claimed under this heading actually relates to the Area 2 rumpus room/master bedroom/deck “historic leak” referred to above. I refer to the “Schedule of Repairs” detail for this area which includes rebuilding the “master bedroom end of [the] balustrade and wall” and the “Insulclad[ing] master bedroom end of [the]

balustrade and wall". Photographs in the Claimants' photographs of Area 4 include a photograph of the "repaired end of balustrade and handrail" and "wall fixing area", which show the rebuilt balustrade (approximately 2 metres), the repaired wall above, and the deck repairs in front of the master bedroom door.

[43] Clearly this damage and remediation, conveniently placed in "Area 4", is part of the rumpus room/master bedroom/deck "historic leak" and therefore is also "statute barred" by section 4 of the Limitation Act.

[44] However the remaining Area 4 damage and remediation relating to the handrails and balustrade beneath the handrails is not so excluded because there is no evidence to suggest that this leaking was discovered, or could have been discovered, more than six years before the application to WHRS. Therefore no "limitation" defence can succeed for this part of the claim.

[45] As detailed in the claim document under the "Area 4" heading, the handrailing was removed and the top plate of the balustrade inspected. It was described as "generally damp" but the major damage which included severe timber decay was, as referred to above, at the master bedroom end of the balustrade. The lower sections of the balustrade were also cut to inspect the framing, which was found to be in reasonable condition. It appears the balustrade was opened up for a period for natural drying, with the appropriate repairs being carried out to the top of the balustrade (fibreglassing, retexturing and repainting) and the handrailing being remounted.

[46] Mr Brooker was contracted by Mr Nikora to supply and fix the Insulclad cladding system. Therefore he was responsible for ensuring that any penetration in that cladding was properly and appropriately waterproofed. The evidence discloses that water has penetrated the dwelling in and around the handrail supports so I am satisfied that responsibility for that water penetration rests with Mr Brooker, the cladding applicator.

[47] In his Response dated 7 September 2005 (at para.9) Mr Brooker through counsel, while acknowledging that "the photographic evidence shows the cracking on the balustrade appears to only have occurred where the

standards for the metal rail enter the balustrade", submits that "this is a design fault in that the length of the upright causes flex in the handrail which over time, with people leaning on the handrail, causes cracks in the plaster around the base of the upright". Then in para.11 he asserts that "the cracks in the plaster balustrade are not the result of the application of the Insulclad and plaster coating. Sealant was applied to the area between the handrail upright and the Insulclad".

[48] However there is no evidence that Mr Brooker advised the head contractor and builder Mr Nikora that he Mr Brooker would be unable to make a weatherproof joint at the base of the handrail support. I reject the aforementioned submission; it was his duty to ensure that where the handrail standards enter the balustrade were weathertight, and this remains the case even if the handrail moved.

[49] It needs to be clarified that Mr Nikora was responsible for the supply and installation of the handrail itself and therefore any costs associated with its alteration or replacement, and the cost of its removal and remounting are his.

[50] Mr Brooker was responsible for installing the cladding and waterproofing the penetrations but not the affixing of the handrail. As a result of his failure to properly weatherproof those penetrations damage has occurred to the balustrade framing, the repair of which has involved the removal and replacement of some cladding to the balustrade, and the waterproofing and repainting of its top.

[51] Mr Brooker bears the responsibility set out above, but not for the total cost set out for Area 4. That total of $6,244.00 is broken down into $768.00 (carpentry labour), $3,680.00 (painter's labour), $1,516.00 (Sisson Engineering) and $280.00 (scaffold hire).

[52] I have already determined that any costs associated with the modification of the handrail including its re-mounting are properly met by Mr Nikora. Also that the cost of carpentry and painting and scaffold hire that relate to the remedial work carried out to the master bedroom end of the balustrade and the wall near the master bedroom is "statute barred" and so cannot be

recovered. Therefore I am satisfied that in the absence of any further breakdown of the amounts claimed the justice of the matter will be served if I determine that 20% of carpentry labour and 50% of the painter's labour plus 50% of the scaffold hire should be met by Mr Brooker, as follows.

• Carpentry labour: 20% of $768.00	$153.60
• Painter's labour: 50% of $3,680.00	$1,840.00
• Scaffold hire: 50% of $280.00	$140.00
TOTAL	$2,133.60

[53] Accordingly Mike Brooker is liable to pay Paki Leslie Mansai Nikora and Patsy Polly Nikora this sum of $2,133.60. (See order below)

[54] I am persuaded that in this particular case the Council was not negligent in passing the handrail detail as it would have been assumed at the time that the tradesman would have weatherproofed it in a proper and effective way.

ORDERS

(1) Mike Brooker is ordered to pay Paki Leslie Mansai Nikora and Patsy Polly Nikora the sum of $2,133.60 within 21 days of the date of this determination. (ss 29(1)(a), 42(1))

(2) All other claims are hereby dismissed. (s 36(1)(i))

(3) The parties shall bear their own costs in this matter. (s 43)

DATED the 18th day of November 2005

P D SKINNER
Chief 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.