Claim No: 0061

Under	the Weathertight Homes Resolution Services Act 2002
In the matter of	An adjudication claim
Between	**The Residential Trust** (Trustees: Frank Douglas Bryson Thompson, Stephanie Mary Thompson and Brian Robert Leighs) Claimants
And	**Manson Developments Limited** Respondent

Determination
31 March 2005

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1. Summary

1.1 The respondent is found to have owed a duty of care to the claimants as purchasers of the subject dwelling at 11B Cullwick Road, Mission Bay

constructed during 1993/94 and purchased by the claimants from the respondent by contract dated 11 September 1993.

1.2 A defence to the claim raised by the respondent that all claims by the claimants were settled by a payment tendered on 2 April 2002 "in full and final settlement of matters between us" is rejected on the grounds that the acceptance of that payment by the claimants was expressly in respect of two matters to which correspondence had referred, namely damage to the carpet and additional costs.

1.3 The respondent is liable to the claimants for the whole of remedial work costs already carried out to the dwellinghouse amounting to **$34,628.05**.

1.4 In respect of allegations of subsequent areas of water penetration and damage the respondent has a duty of care to the claimants.

1.5 In respect of a claim relating to the scope of that duty under clause E2.3.2 of the Building Code, the requirement of that clause that roofs and exterior walls prevent penetration of water that could cause **undue** dampness, or damage to building elements does require a qualitative assessment of alleged dampness to determine whether this is regarded as "undue" and therefore whether the duty of care owed by the respondent to the claimants has been breached.

1.6 In respect of various alleged areas of water penetration and damage the only evidence is of undue dampness and/or damage to building elements in respect of the dining room/family room north-west walls corner and kitchen external wall left hand side wallplate and the laundry door area; and the respondent is liable to the claimants in sums totalling **$3,800.00** for these items.

1.7 There is no evidence of undue dampness and/or damage in respect of the pergola area where the pergola penetrates the outer plaster or the areas

where the plaster penetrates or abuts the ground or landscaping and any claims in respect of those are rejected; and there is no other evidence of water penetration that could cause undue dampness or damage to the building elements sufficient to found any other claim against the respondent.

1.8 The claimants have settled with other parties and the net amount due from the respondent to the claimants in respect of liability found for repairs already carried out and prospective repairs where there is acceptable evidence of water penetration and damage is **$6,628.05**.

1.9 The respondent is to forthwith reinstate **all** destructive testing work that it has done at the subject site and, if that work is not done by **29 April 2005,** the respondent is ordered pursuant to s42(2) of the Act to pay the claimants the sum of **$3,000.00**.

1.10 There is no ground for ordering costs against the respondent in favour of the claimants.

2. Preliminary

2.1 The claimants are owners of a dwellinghouse at 11B Cullwick Road, Mission Bay. They made application under s9(1) of the Weathertight Homes Resolution Services Act 2002 (**the Act**) to have an Assessor's Report prepared in relation to their claim that they believed the dwellinghouse was a leaky building and had suffered damage as a consequence. In due course an Assessor's Report was prepared pursuant to s10 of the Act and the claim was evaluated as meeting the criteria set out in s7(2) of the Act.

2.2 The claimants gave Notice of Adjudication under s26 of the Act naming three respondents including the abovenamed respondent, Manson Developments Limited (**Manson**). I was assigned as adjudicator to this claim.

2.3 I have convened several conferences pursuant to s36(1)(f) of the Act at which certain issues have been articulated. In the course of this adjudication

I have ordered pursuant to s34 of the Act the removal of two other named respondents being told first that a settlement had been reached with those respondents in respect of the matters the subject of the claim and secondly, that were I to be asked to determine pursuant to s29(2) of the Act the liability of either or both of those respondents to Manson, that liability would be indemnified by the claimants. The end result was that the claimants' claims are now against only Manson and are for the amounts claimed less the sum received from other respondents. That claim was described to me at the hearing as being for:

Certain repairs already carried out by the claimants	$36,680.21
Assessed cost of further repairs claimed	93,034.13
Inflationary additions to those assessed costs for 12 months – 10%	9,303.41
Estimated costs for repairs to the chimney - $3,000.00 - $4,000.00 plus GST – say	5,000.00
Total	$144,017.75
Less payment on account received	31,800.00
Balance	$112,217.75

2.4 I held a hearing of the claim on 7 and 8 March 2005 attended by:

2.4.1 Mr Robert Hucker, counsel for the claimants, who called evidence from Mr Thompson, Mr Smyth and Mr Brading;

2.4.2 Mr Glen Heath, the employed solicitor for the respondent, who called evidence from Mr Newland, Mr Young and Mr McGunnigle;

2.4.3 the Weathertight Homes Resolution Service (**WHRS**) Assessor, Mr Allen Miller, who was examined by both counsel.

In addition to evidence from those witnesses, there was produced to the hearing a bundle of agreed documents on the basis that each document would be treated as being what it purported to be and, in the case of correspondence and the like, as being sent from the author to the addressee about the date of the same and that I could take the documents as being what they appeared to be unless there was objection – and there was no

such objection. Miscellaneous pages were added to the bundle during the course of the hearing on the same basis.

2.5 During the course of that hearing I made an inspection of the dwellinghouse and site accompanied by Messrs McGunnigle, Heath, Brading and Miller.

3. **The Dwellinghouse**

3.1 The dwellinghouse at 11B Cullwick Place, Mission Bay, was built during 1993/94 with the building consent issued 11 August 1993, completion about 31 March 1994 and a Code Compliance Certificate issued 14 October 1994.

3.2 The claimants are trustees of the Residential Trust and purchased the dwellinghouse "off the plans" from the respondent by agreement dated 11 September 1993 which included clause 14 that the agreement was conditional upon the approval of plans and specifications and, as clause 15, Manson's undertaking that it would:

> "Proceed with all due speed in a proper and workmanlike manner to complete construction of the unit in accordance with the plans and specification as approved by [the claimants]."

3.3 After construction was completed occupancy of the dwellinghouse was taken on 31 March 1994.

3.4 There have been ongoing concerns about leaking to the dwellinghouse over the intervening years. The first event appears to have been during 1994 when Mr Thompson contacted Manson and certain repair work was done. I was not given any real detail of that described in Mr Thompson's letter of 27 April 1995 as:

> "During 1994 your staff had several attempts at correcting water leaking problems at the above address"

and acknowledged by Mr Newland of Manson in a letter dated 23 July 1996 as "maintenance .... undertaken August/September 1994".

3.5 There was further concern on Mr Thompson's behalf in April 1995 when he raised roof leaking and damage concerns with Manson and there were exchanges about that to which I shall refer in due course.

3.6 In 1996 there were exchanges between Mr Thompson and Manson and also the manufacturer or supplier of Monier tiles. Monier Brickmakers Limited (**Monier**) apparently supplied a report dated 9 June 1996 but I was not given that. On 26 August 1996 Monier advised Manson that the property required re-roofing and apparently certain re-roofing work was carried out but again I was not given detail except for an extract from Mr Thompson's letter of 30 October 2001:

> "In 1996 the roof was replaced by Monier under warranty. Other work included replacement of Butenol around the on-suite [sic], repair of external cracking in the wall cladding, measures to waterproof the north-eastern corner of the house including windows and flashing the roof vent by the chimney."

3.7 In October 2001 Mr Thompson again complained to Manson about significant leaking around the external wall to the ensuite and water through the wall cavities in the lounge/family room area on the ground floor. He arranged an inspection from Parris Plumbers Limited (**Parris**) and listed 9 items that Parris had brought to his attention.

3.8 In June 2002 Mr Thompson met with Mr Webb of Monier expressing concern about ongoing leaks and his view of Monier's liability. (There had in the meantime been an exchange between Mr Thompson and Manson concerning an offer for settlement to which I shall later refer).

3.9 In June 2002 Mr Thompson commissioned a report from Mr W W Brown (since deceased) and he provided that report dated 14 June 2002 referring to various works required to be done and proposing rectification estimating the cost at $29,369.25 including GST. Following Mr Brown's untimely death Mr Thompson consulted Mr Brading, then of Harrison & Grierson Consultants Limited, who reported to him dated 13 February 2003 and again on 5 March

2003. Mr Brading in his evidence at the hearing said that primarily his role was to oversee the implementation of the recommendations made by Mr Brown.

3.10 The repair work was carried out. I was not given significant detail of this work but a schedule produced at the hearing showed expenses totalling $36,680.21. This included legal expenses totalling $2,052.16, leaving a balance of $34,628.05 which is approximately the same amount as is mentioned by the Assessor in his report. I think legal costs are appropriately considered as costs of the claim to be dealt with under s43 of the Act.

3.11 In final submissions counsel for the respondent referred to the sum of $35,086.55. This is more than the amount mentioned in the Assessor's report as having been already expended, $34,604 95, but less than the amount which I was advised at the beginning of the hearing as being due, $36,680.21. I think the most accurate figure for me to take is that mentioned in paragraph 3.10 above $34,628.05. In an Attachment no 1 to the Assessor's report apparently written by Mr Thompson, he describes the costs as totalling $34,604.95. The amount that I allow for that work is $34,628.05.

3.12 The claimants made application under the Act on 1 March 2003. The Assessor, Mr Allen Miller, completed his report on 31 July 2003 and referred to further repair work which in his view was required to be done. Evidence was given to me at the hearing about that and I shall refer to it below. As I understood the respondent's position, it accepted that the quantification of the work already carried out was correct quantification for that work (and indeed those costs have in fact been incurred) and that so far as the estimate of the cost of work to be done is concerned, the quote from Smyth Construction Limited to the claimants dated 2 February 2004 can be taken as correct quantification of the cost of the work described in that quote. As to the cost of remedial work to the chimney, this has not been accurately assessed by any of the parties or experts – it was indeed a matter which

arose relatively late on in the adjudication process when a form of brief of evidence from Mr Brading was supplied about 13 February 2005.

4. **Defence: Accord and Satisfaction**

4.1 It is one of the defences by the respondent to all claims in this matter that there has been accord and satisfaction thereof and it has no further liability.

4.2 The essential facts on which the respondent relies in this defence are these:

4.2.1 On 14 April 1997 following the repairs that had by then been completed, Mr Thompson in a letter referred to:

> "... The only remaining matters to be resolved are the damage to the carpet and additional costs incurred by myself in respect of legal and consultancy fees and drycleaning costs to drapes."

4.2.2 In a reply dated 29 April 1997 Manson opined that it believed:

> "... Our only obligation extends to putting you as nearly as is possible, in the position that you were prior to the damage occurred. Where this cannot be done by replacing carpet it can only be done by money equivalent"

There is then reference to quantification of the cost of supplying and laying carpet to the existing underlay in the lounge/family room, $2,400.00 including GST, and the monetary equivalent for relaying undamaged carpet, $370.00 including GST.

4.2.3 By letter dated 8 May 1997 to Manson Mr Thompson advised that the offer was not acceptable that he "[believed] the matter [could] be resolved by negotiation".

4.2.4 A letter dated 21 March 2002 (5 years later!) from Mr Thompson to Manson referring to the 29 April 1997 letter and accepting $2,400.00 plus $370.00 and asking for a cheque for $2,770.00 "to enable this matter to be finalised".

4.2.5 A letter dated 2 April 2002 from Manson to Mr Thompson reading:

> "**11B Cullwick Road Mission Bay**
> Further to your letter of March 21 2002 we enclose our cheque for $2,770 in full and final settlement of matters between us."

4.2.6 The banking of that cheque was on 3 April 2002.

4.2.7 It was not until 9 August 2002, in response to a letter from Manson, that Mr Thompson said that the settlement offer and payment were:

> "... specifically in settlement of the damage to carpet ... accepted in our letter of 21 March 2002"

and denying that the claimants had agreed that that was in "full and final settlement of matters between us".

4.3 I was referred to various legal authorities by both counsel who relied primarily on *Magnum Photo Supplies Ltd v Viko New Zealand Ltd* [1999] 1 NZLR 395 and the statements of principle contained there. These include that the onus is on the defendant to prove this affirmative defence and that the defence is a question of fact objectively assessed. The question is the basis on which the payment sent is retained and the statement is made that:

> "Where an offeree presents the offeror's cheque, draws the funds and appropriates them without promptly notifying any demur from the terms on which it is offered, he or she is unlikely to be heard to claim any different intention than that logically to be inferred Even in a case such as that, however, the lapse of time would be only a factor to be assessed in determining whether agreement is to be inferred." (p401)

4.4 Significant reliance was placed by the respondent on the emphases in that citation and other cases on the passage of time between the tender and acceptance of the payment said to be in full settlement and the demur or objection to its having been paid and/or received on that basis. The respondent relies on the passage of time between the payment and banking in April 2002 and the demur by the claimants in August 2002.

4.5 The claimants have encouraged me to look at the broader context of the exchanges that occurred between the parties. They say that the acceptance by them on 21 March 2002 of the offer contained in the letter dated 29 April 1997 constituted settlement of only the matters to which those letters referred and specific reference was made to the exact figures. They say that when the payment for that exact sum was made on 2 April 2002 they took that to be a settlement only of the damaged carpet issue and they accepted on that basis and deposited the cheque. They say it was not until August 2002 that they realised that Manson was claiming that the payment was a settlement of broader issues that they demurred and wrote their letter of 9 August 2002.

4.6 For this defence to succeed in my view the first question is whether there had been a contract constituted by the letter of 29 April 1997 and its purported acceptance (despite earlier rejection) by the claimants' letter of 21 March 2002. The immediate response from Mr Thompson to the 29 April 1997 letter of offer from Manson was to reject that offer which he did in his letter of 8 May 1997. That effectively disposes of any suggestion that the offer was still open and capable of acceptance 5 years later on 21 March 2002 – and indeed despite rejection of the offer it could well be said to have lapsed by then in any event. The primary question is the extent of and content of the separate and discreet contract constituted by the 2 April 2002 letter offering a cheque "in full and final settlement of matters between us" and acceptance of that offer by the negotiation of the cheque.

4.7 I am mindful of the significant background to these exchanges and the time that had passed. There had been the repair work done initially. There was the re-roofing work done by Monier. There were claims made by the claimants and by solicitors on their behalf which referred to leaks. There were ongoing complaints about leaks. By 14 April 1997 when Mr Thompson wrote to Manson he identified the damage to the carpet and the additional costs as "the **only** remaining matters" (emphasis added).

4.8 I am mindful that between the 29 April 1997 offer (and the 8 May 1997 rejection) there were the further complaints about leaks in September 1997 and a letter dated 30 October 2001.

4.9 It was submitted to me, and indeed the evidence of Mr Newland, the General Manager of Manson, was that the tender of the 2 April 2002 cheque and letter followed a significant period of exchanges about claims and complaints.

4.10 It was submitted for the claimants that it is "simply not credible" to suggest that $2,770.00 would have been accepted in full and final settlement "of a $90,000.00 claim". I am by no means convinced that Manson was at all aware of the magnitude of the claim that it may have been facing at the time the cheque was tendered on 2 April 2002 but also I do not think it necessarily follows that the level of compromise in receiving a reduced sum is of too great significance. There may well in any settlement negotiation be a significant consideration of risk factors which encourage acceptance of a significantly reduced sum.

4.11 What is, to my mind, very significant is that the sum offered, $2,770.00, was exactly the same sum as had been mentioned in the 21 March 2002 letter from Mr Thompson which in turn showed the breakdown between the two constituent parts, $2,400.00 and $370.00, which in turn had been mentioned in the 29 April 1997 letter. That aspect distinguishes this case from *Haines House Haulage Co Ltd v Gamble* [1989] 3 NZLR 221 where the defendant debtor in putting forward the payment offered in full and final settlement gave a detailed account of how it was made up and it was held that acceptance of that sum by a director of the plaintiff creditor without demur for 10 days established the defence.

Likewise, I am mindful that in *Dunrae Manufacturing Ltd v C L North Co Ltd* [1988] 2 NZLR 602, 605 Smellie J said:

> "The final cheque of $6,158.98 happens to be the exact amount of one of the four invoices rendered by the respondent. The work in that particular invoice was not in dispute and on that basis [the District Court Judge who heard the claim] impliedly regarded the situation as covered by the rule in *Foakes v Beer* (1884) 9 App Cas 605 and expressly stated in his judgment:
>
> > 'It should therefore be regarded as a payment in the context of an undisputed liquidated debt, which takes it out of the *Homeguard Products* category.' "

4.12 On balance it is my view that, despite the use of the word "matters" in its 2 April 2002 letter, in the context in which that letter was written and the payment that accompanied it, it cannot be said that that payment was clearly and unambiguously tendered in full settlement of all claims relating to building nor that that payment was accepted by the claimants on that basis and that therefore the defence is not available to the respondent.

4.13 Accordingly in my view on the facts that defence fails.

5. **Repairs – First Set**

5.1 There were repairs to the dwellinghouse carried out by the claimants at the cost of $34,628.05 including GST (see para 3.11 above).

5.2 That work was done in 2002/2003 on the basis of the recommendations of Mr W W Brown, now deceased, who estimated the cost to be $29,369.25 including GST. Supervision of the completion of that work was done by Mr Brading following the death of Mr Brown.

5.3 There is no dispute by the respondent as to the quantification of the cost of those repairs.

5.4 For reasons I shall give below I find that the respondent owed a duty of care to the claimants. No limitation issue is raised by the respondent in respect of any breach of duty of care.

5.5 I have dealt with the defence of accord and satisfaction above.

5.6 In closing submissions counsel for the respondent claimed that the sum of $2,770.00 should be deducted from the cost of the completed works, this having been the sum paid by the respondent to the claimant in the circumstances referred to in the passage above concerning the accord and satisfaction defence. I do not think that can be the case. That payment was made in full and final settlement of the matters to which the contemporaneous correspondence referred, namely the carpet and floor covering issues referred to in the 29 April 1997 letter from the respondent to the claimant (and possibly the "additional costs" matter referred to in Mr Thompson's letter to the respondent of 14 April 1997). The completed works cost of $34,628.05 does not, as I understand it, include anything for carpet or floor coverings. Indeed my inspection of the dwellinghouse indicated that those floor coverings had not yet been replaced. Accordingly I do not consider that that deduction can be made.

5.7 The end result is that, subject to accounting adjustments in respect of monies received in settlement from parties earlier named as respondents, I find that the respondent is liable to pay to the claimants the sum of **$34,628.05**.

6. Subsequent Alleged Damage – Duty of Care

6.1 The claimants claim that the respondent owed them a duty of care, it being the builder and developer of the dwellinghouse which they are now the owners of (quite apart from any contractual liability arising from the agreement for sale and purchase when they purchased the property from the respondent). The claimants rely on such cases as *Lester v White* [1992] 2 NZLR 483, *Bowen v Paramount Builders (Hamilton) Ltd* [1997] 1 NZLR 394, *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234, *Brown v Heathcote County Council* [1986] 1 NZLR 84 and *Chase v de Groot* [1994] 1 NZLR 613. Those authorities, and others that are often cited, are clear authority for the existence of the duty of care and indeed I have taken it that the respondent is really not denying that there is a duty of care – indeed in a

memorandum dated 27 April 2004 it acknowledged a duty of care in respect of the completed works claim.

6.2 Perhaps more relevant is the scope of the duty of care and the respondent argues that that is as articulated in *Chase v de Groot* at p619:

> "I look first at [the builder's] position. In this respect the law can be stated as follows:
> 1. The builder of a house owes a duty of care to future owners.
> 2. For present purposes that duty is to take reasonable care to build the house in accordance with the building permit and the relevant building code and bylaw.
> 3. The position is no different when the builder is also the owner. An owner/builder owes a like duty of care in tort to future owners ..."

6.3 The respondent acknowledged that clause E2.3.2 of the relevant provision of the Building Code at the time of construction of the dwellinghouse in 1993/1994 was relevant, it having provided that:

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

6.4 There was debate at the hearing both in the evidence and from submissions as to the meaning in that extract of the word "undue". Counsel for the claimants submitted that that word was effectively redundant and that the obligation in that clause of the then Building Code was for construction of roofs and exterior walls to prevent penetration that could cause **any** dampness or damage to building elements. For his part, counsel for the respondent submitted that the word must have some meaning or it would not otherwise be there and he emphasised that the word "undue" incorporated a measure of quantitative assessment, perhaps indicating that some dampness was permissible but only to some degree which could be categorised as becoming "undue". I interpret the clause in the way that the word "undue" qualifies **only** the word dampness and not the expression "damage to building elements" because of the presence of the comma after the word "dampness".

6.5 I prefer the submission from counsel for the respondent. I cannot see that the Building Code (at least as it then was) would use the word "undue" meaninglessly and I have considered the context in which clause E2.3.2 appears. The whole purpose of the Code is to establish certain standards. Clearly they are standards which are intended to be practical and provide appropriate levels of health and safety protection on the one hand and building construction standards on the other. It is not intended that every building should be a model of perfection in construction but that it should reach a certain standard which achieves the objectives of the Code In the case of clause E2 the objective is "to safeguard people from illness or injury which could result from external moisture entering the bulding". The performance criteria in Clause E2.3.2 is the prevention of penetration of water but it is not the prevention of penetration of **all** water (in which case it could simply have said so) but penetration that could cause dampness or damage – and it is not penetration causing **any** dampness (and again if that was intended it could have said so) but penetration which could cause **undue** dampness (or alternatively damage to the building elements). In each case in my view an assessment must be made as to whether there is penetration of water through a roof or an exterior wall and, if so, whether this could cause dampness or damage to building elements (and I regard those as disjunctive, that is dampness on the one hand or damage to building elements on the other); then to determine whether, if that is the case, that potential dampness is undue or within acceptable levels (or could cause potential damage to building elements). That is, in my view, how clause E2.3.2 should be construed and how any inquiry into compliance with it should be conducted.

6.6 I am reinforced in that by the Functional Requirement of clause E2.2 of the Building Code:

> "Buildings shall be constructed to provide adequate resistance to penetration by, and the accumulation of, moisture from the outside"

and the limit on the application of that Functional Requirement:

> "Requirement E2.2 shall not apply to buildings in which moisture from outside would result in effects which are no more harmful than those likely to arise indoors during normal use".

That clearly anticipates that there may be some dampness and/or entry of moisture from the outside but that the qualitative assessment mentioned earlier is required to determine whether the harmful effects are no greater than those from moisture likely to arise indoors during normal use.

6.7 Emphasis was also placed by counsel for the claimants on the word "could" in the passage from clause E2.3.2 mentioned. He submitted that proof of damage itself was not essential to establish a breach of the Code. Clearly that expression must be interpreted in conjunction with the remaining words of the Clause, that is the water that must be prevented is water that "could cause undue dampness or damage to building elements" and the test must be whether there is evidence that water has penetrated that could cause that outcome. It is not, in my opinion, as submitted by counsel for the claimants, a question of whether the building has been constructed "so as to prevent water ingress" but rather the more refined question concentrating on the potential for undue dampness or damage to building elements.

6.8 That is the case with any claim in any Court, arbitration, adjudication or other proceeding where compliance with that clause of the Building Code is an issue.

6.9 It is particularly so in the context of the use of the resources provided under the Weathertight Homes Resolution Services Act 2002. The purpose of the Act is described in section 3 as:

> " ... to provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible, and cost-effective **procedures** for assessment and resolution of claims relating to those buildings." (emphasis added)

The definition of a claim is:

> "**claim** means a claim by the owner of a dwellinghouse that the owner believes –
> (a) is a leaky building; **and**
> (b) has suffered damage as a consequence of it being a leaky building" (emphasis added)

The definition of a leaky building is:

> "**leaky building** means a dwellinghouse into which water has penetrated as a result of any aspect of the design, construction, or alteration of the dwellinghouse, or materials used in its construction or alteration".

6.10 The Act does not change the substantive law. What it does do is provide a procedure for the resolution of claims that qualify under the Act. To determine whether a claim qualifies an Assessor's report is obtained on application under s9. That report is evaluated by the Evaluation Panel under s12. If the outcome of that is that the claim meets the criteria in s7(2) then the claim can proceed with use of the resources that the Act provides for. Those resources are mediation (s14) and/or adjudication (s26).

6.11 In my view for a claimant under the Act to have a successful outcome at adjudication the claimant needs first to qualify to use the resources that the Act provides, but secondly to establish that, according to the principles of law (s42), the claimant is entitled to some remedy or relief against the respondent(s).

6.12 In the case of a claim that there has been a breach of clause E2.3.2 of the then Building Code as set out above, the claimant would need, in order to maintain a claim under the Act, to establish:

6.12.1 that the owner claimed he or she believed that the dwellinghouse was a leaky building (as defined above); **and**

6.12.2 that the owner claimed that he or she had suffered damage as a consequence of its being a leaky building (refer definition of "claim" above); **and**

6.12.3 that there was penetration of water through the roof and/or exterior walls;

6.12.4 that that penetration of water could cause undue dampness and/or could cause damage to building elements; **and**

6.12.5 that the respondent(s) have a legal liability to compensate the claimants for damage as a consequence of the dwellinghouse being a leaky building and because of the proven breach(es) of clause E2.3.2.

6.13 It is in that context that the respondent submits that the extent of the duty of care that it owes or owed to the claimants must be found to be breached only if there is evidence that there has been penetration of water which could cause **undue** dampness, or damage to building elements.

6.14 In respect of the work already done, I have found that the duty of care that the respondent owed to the claimants has been breached and there has been negligence necessitating the repairs which have cost the sum of $34,628.05 and I am to order that that sum be paid by the respondent to the claimants (subject to the adjustments still to be made in respect of monies received in settlement).

6.15 I now turn to consider the claim that there is further damage which requires remedial work and cost.

7. Further Damage

7.1 Following the report from the late Mr Brown dated 14 June 2002 and commencement of work pursuant to the recommendations there, Mr Brading, then at Harrison Grierson Consultants Limited, undertook inspection and supervision of completion of the work and completed his reports dated 15 February 2003 and 5 March 2003.

7.2 Meantime the claimants had made application under s9(1) of the Act on 1 March 2003.

7.3 That claim was processed according to the procedures in the Act which included completion of a report by the Assessor under s9 of the Act on 31 July 2003.

7.4 By Notice dated 30 March 2004 the claimants gave Notice of Adjudication under s26 of the Act naming the respondent as a respondent but also two other parties as further respondents. In that Notice of Adjudication there was reference to the remedial work that had been undertaken but also to ongoing damage where the compensation sought totalled $132,448.45 "and all were considered to be necessary in the engineering reports obtained (supported by updated quotations)".

7.5 In his report the Assessor had estimated that the total cost including work already done was $68,693.95. The Assessor referred to the investigation he had done which included a visual inspection, some testing with a Protimeter moisture meter, drill test, internal readings using electronic probes and destructive testing in a section of the plaster adjacent to the dining room window (also known as the family room).

7.6 He expressed the view that there was still high risk where the pagoda beams penetrated the plaster, that the ground clearance on the north and west elevations did not comply with the requirements of NZS3604:1990 Appendix E, that moisture was still able to penetrate the cladding via the head flashings despite additional flashings having been installed in the remedial work done earlier and that the junction between the fascia and plaster wall had not been adequately sealed.

7.7 He opined that the cause of water entering the dwelling was "poor architectural detailing and poor or ineffective roof, wall and joinery flashings";

and further moisture entry through an incorrectly installed head flashing over the dining room window (family room) on the western elevation.

7.8 He also expressed the opinion that the nature and extent of damage was:

7.8.1 "due to inadequate architectural detailing, faulty and incorrect window installation, faulty and ineffective roof flashings, inadequate ceiling to roof, fascias and wall junctions and inadequate ground clearance" with moisture having entered the wall cavities on numerous occasions since completion causing extensive fungal and timber decay;

7.8.2 "due to poor detailing to the head flashing over the dining room window on the west elevation, moisture [had] entered the wall cavities and, although no visual damage [had] occurred at [that] stage, if not rectified decay [would] occur".

7.9 He did say that "much of the work required to make the dwellinghouse watertight [had] already been completed but that further repairs were required to ensure the dwelling "**remains** watertight" (emphasis added). That suggests to me that his view was that the previous work had made the dwelling watertight but there were the further repairs he mentions in his report needed to maintain that position.

7.10 The further repairs he mentioned were flashings to remaining aluminium windows not already the subject of repair and other flashing detail; sealing of timber fascias and barges; removal of pagoda penetrations through the cladding and independent support; filling of exterior hairline cracking; rectification of the section where destructive testing had been carried out; raking out and sealing of all penetrations through the cladding; installation of a drainage channel where the cladding did not meet the minimum ground clearance (and at the hearing he changed this to a recommendation that the

cladding be cut back to provide appropriate ground clearance); reinstatement of internal rectification and recarpeting of affected rooms.

7.11 His estimate of the cost of that was, as I have said, $68,693.95. At the hearing he explained that that included $7,300.00 for remedial work to all of the 24 windows (which I calculate to be approximately $304.00 each). The estimate includes $2,700.00 for carpet and, as I have said also, carpet has already been compensated for in the earlier settlement and payment.

7.12 In preparation for this adjudication claim the claimants commissioned Mr Brading to return to the site which he did twice, first on 17 September 2004 and secondly on 11 November 2004.

7.13 On 17 September 2004 Mr Brading carried out certain Carel & Carel moisture meter testing. Those tests totalled 19, 10 of which were in the dining/family room, 4 in the lounge and 5 in the laundry. The highest reading was 32 on the dining room west wall wall-plate kitchen side (and I cannot quite understand that because Mr Brading's evidence includes that "Where the reading referred to indicates that the reading is off-scale this means the reading is so high it is in excess of 25%").

There are other readings described as "off scale". Then there are adjustments to the Carel & Carel moisture meter readings which Mr Brading described as being alternatively if the timber was untreated or if it was Boron treated. I am satisfied from evidence to which I shall refer that in fact the timber used in this construction was Boron treated (the Primaxa report of 26 February 2005 expressly referring to the presence of Boron and this having being confirmed in the evidence at the hearing that that meant the timber was treated). I therefore take the Boron treated moisture levels which indicated from those readings that there was some in excess of 21% ranging down to the lowest reading which was 13%.

7.14 Mr Brading carried out further tests on 11 November 2004 after he had received a report from another witness, Mr McGunnigle. These tests were both internal and external using meter probes through holes drilled for the purpose and the report of 23 December 2004 refers to the testing equipment as being a "C & C timber Moisture Meter Model C102". This time there were greater areas tested than just the family/dining room, lounge and laundry but on the basis that adjustments were made for treated timber, the greatest readings were "off scale", that is in excess of 21% and the lowest at 11%.

7.15 The conclusion that Mr Brading reached was that there had been water ingress which "could be" through flashings issues, plaster cracking, windows, window componentry and interface with the walls or "wicking up", and "could be from one or a combination of any of these causes". Primarily he was of the view that water was entering the wall framing through the window/wall interface at the head, side and sill locations. He referred to an "**apparent** lack of side flashings and sill flashings or sill tray" (emphasis added). He referred to work of an inadequate standard on the part of the respondent in relation to incorrect treatment to head flashings, lack of jamb and sill flashings, omission of a sill tray, incorrect treatment of base of plaster at ground interface and "inadequate steps from inside to outside of the house".

7.16 As to moisture content his view was that the level "is most locations is well in excess of acceptable levels" but he did say that "no signs of visual timber decay were noted" but that this "does not suggest that the performance of the external envelope is at an acceptable level" and damage would continue to occur from ongoing water ingress and "it is probable" that over time decay and fungal growth would initiate.

7.17 As to fungal growth, his view was that this would only occur where moisture readings exceeded 27% on the converted scale and he said there was no evidence of fungal growth from his two "limited" investigations. He said that the absence of fungal growth did not mean that there was no damage and

that once fungal growth appeared it was too late in most instances for any adequate step to be taken other than replacement of the timber.

7.18 As to remedial work, he said that:

> "Unless the window frames are actually removed the extent of the ingress [of water] will not be known and the repairs can not be guaranteed."

His conclusion was that there had been water ingress which had caused damage and that works proposed by Mr R C Smythe were necessary to ensure the building was watertight.

7.19 The evidence from Mr Smythe was first to produce a quotation he had given the claimants dated 2 February 2004 for carrying out certain further work at the dwellinghouse at a cost of $93,034.13. It was accepted for the respondent that the **quantification** of items in that quote were reasonable and that there could reasonably be added a further 10%, $9,303.41, for increased costs since February 2004; but that was on the basis that the respondent did not accept any liability for that work or indeed that any of the work was required to be done, at least so far as its liability is concerned.

7.20 Mr Smythe had carried out the previous repair work at the dwellinghouse. He expressed the view that:

> "As an experienced builder I consider it was poor workmanship and application by the original developer/builder. Upon carrying out the initial work and inspecting the property it was clear that the fascias had end grain packers which were split when milled through. It also seemed that there had been an attempt to push the plaster up to cover gaps. No hand flashing on one window when worked on and solid plaster barely covering wire netting around windows."

7.21 Those comments in my view appear to relate to the remedial work that he had already carried out and not necessarily to any proposed remedial work for which his 2 February 2004 quote applied. That quote is addressed to Mr & Mrs Thompson and is "as requested in [their] letter of 19 January". I was not given that letter and so I do not know what they asked Mr Smythe to

quote for or whether there was any brief for him to consider damage to the dwellinghouse or any of its components from the entry of water. I was given no clear explanation as to the extent to which the work for which Mr Smythe was requested to quote related to those aspects which Mr Brading describes as "necessary to ensure the building is watertight" and those aspects to ensure "that the standards for construction of buildings at the time the house was built".

7.22 Regrettably there are many areas of uncertainty in Mr Brading's evidence and that is partly, in my view, because of the testing process that has occurred to which I shall refer. I was unfortunately not left with a clear picture from Mr Brading's evidence of what he thought was in fact the cause of water ingress which he described as the variety of factors I have mentioned that it "could be". It makes it difficult for me as the adjudicator to decide what remedial work for any damage caused from water ingress may be the liability of the respondent if I do not have a clear picture of specific areas of inadequacy which has led to that water ingress. If, for example, the water ingress is solely through inadequate or non-existent flashings then consideration of the windows, their componentry and the interface with walls is irrelevant.

7.23 Likewise I was not significantly helped by the Carel & Carel moisture testings results of which Mr Brading gave evidence. As I have said, the worst reading on an adjusted basis appears to have been "in excess of" 21% in three areas on the second (and apparently more specific – involving destructive penetration) testing, namely right hand side under window of laundry external wall; corner at wall plate to family room external wall – west side; and corner north wall – chimney – external. The range of adjusted readings for Boron treated timber was otherwise in many locations below 18%. Indeed the only other places where that level was 18% or higher were the base of door left and right hand sides to laundry external wall, the left hand side at wall plate to the kitchen external wall and the right hand side corner at window top at lintel at family room external wall – north side.

8. **Evidence – Respondent – Damage from Water Penetration**

8.1 The respondent commissioned a report from Mr Ken McGunnigle of Prendos which was supplied dated 18 August 2004. Mr McGunnigle gave evidence at the hearing.

8.2 Mr McGunnigle inspected the property on 11 August 2004 for a preliminary visit and prepared a report dated 18 August 2004 which was supplied to the claimants by the WHRS as part of the adjudication process.

8.3 There then followed exchanges to which I shall refer concerning further inspection and testing and Mr McGunnigle returned to the dwellinghouse on 16 February 2005 to take further samples. He says he wished to take these from the garage wall and from the dining room area but that Mr Thompson, who was present, refused permission to take a sample from the dining room area insisting that he take a sample from the laundry, which he did. That exchange was denied by Mr Thompson who said that he agreed to the sample being taken from the garage but resisted the taking of a sample from the dining room because of the mess that that would create and indicated a preference for a sample from the laundry which Mr McGunnigle, he says, agreed to. Mr Thompson said that if he had been told that the laundry was an unsatisfactory site or that the tests might be compromised he would have agreed to the testing sample from the dining room/family room. Mr Thompson also said that Mr McGunnigle said the samples were for moisture testing. He finally said that if Mr McGunnigle required to take samples from anywhere else now that would be no problem but he requested that he clean up afterwards.

8.4 The end result of that was that the two samples were from the garage and laundry respectively although Mr McGunnigle says that the laundry was not an ideal location because of its:

"…. unique combination of features not shared by other rooms of the house such as; it generates a high level of condensation through use of the clothes dryer; it did not have a vent extracting that condensation from the room; it is a wet room through the use of the washing machine and associated tub; the laundry tub is adjacent to the sample position; the laundry room was demonstrated to have a water ingress problem associated with the lack of weatherstrip and poor maintenance of the drain holes in the door tracking; it is located on the south-western side of the dwelling, which would be the dampest elevation".

8.5 I take it from all that that Mr McGunnigle is implying that the moisture reading from that sample might be **higher** than might be expected elsewhere. In fact he submitted the two samples to Primaxa Limited which reported to him on 26 February 2005 including that the laundry sample had a moisture content of 13.6%, that the timber was treated having a Boric acid equivalent of 0.17%, and that there were pockets of early brown rot in the outer 1 - 2mm and incipient brown rot in the outer 1 - 5mm.

8.6 As to the garage sample, Mr McGunnigle outlined the outcome of the Primaxa tests that the moisture content there was 14%, that the timber was treated having a Boric acid equivalent of 0.27% and that there were occasional fungal hyphae in the outer 5mm but no fungal decay.

8.7 Mr McGunnigle's conclusions from those tests were that:

8.7.1 As to the garage sample, there was no undue damage and no decay initiated; that the existence of the fungal hyphae did not affect the structural integrity of the wood but was merely a pre-cursor to the development of decay but, because the timber is treated, if moisture levels remain within acceptable levels fungal decay would not be established; that the moisture content of 14% was well within acceptable levels; and that the most likely explanation was that areas in the upper level of the dwelling immediately above the garage wall from which the sample was taken were the subject of remedial work carried out in 2002 and that water was reaching the lower part prior to that remedial work. He opined that the testing of

that sample demonstrated that the wood in the garage wall was not damaged and was within the acceptable range of moisture content.

8.7.2 As to the laundry sample, although it contained superficial decay this was not enough to affect the structural integrity of the wood and that if the moisture level remained under 18% the wood would not deteriorate further; that the likely cause of the current moisture level of 13.6% was the use of the laundry tub, condensation and absence of an electrical vent to extract moist air. He opined that the results of that sample provided guidance as to the condition of timber framing elsewhere.

8.8 In his earlier, 18 August 2004, report Mr McGunnigle had concluded that the moisture levels around all of the windows of the dwelling were within acceptable levels and showed no signs of water ingress causing undue dampness or damage, that there were only four areas where elevated moisture readings were experienced, that there were four areas where there was visible sign of damage potentially due to water ingress and that there were "relatively few" cracks apparent to the external cladding but none of a nature consistent with a general defect in the cladding system. He opined that:

8.8.1 The jamb liner to the ranch slider in the kitchen area which had a 25% moisture reading on his Humitest MC-50 moisture meter (which was criticised by Mr Brading as an inadequate moisture testing device) could have dampness due to condensation and wicking.

8.8.2 The laundry doorway threshold, of which the readings were 22% and 29% on the Humitest MC-50 moisture meter, were not consistent with water ingress coming from above; and that there was no weatherstrip attached to the base of the door and that this and the failure to maintain the drainholes in the bottom track of the door were the likely causes of paint cracking and mould.

8.8.3 The left-hand jamb of the window which had "a high reading" (and he did not state what) warranted "further investigation".

8.8.4 That the timber lining to the front door, a reading of 20%, could be attributed to the absence of a weatherstrip.

8.8.5 Any damage to the windows in the bedroom in the north-east corner was "probably due to lack of ventilation".

8.9 Mr McGunnigle also spoke of the chimney and the corrected reading of in excess of 21% for treated timber in Mr Brading's water meter testing evidence and said that "further tests ... need to be done to determine the extent of any damage and the actual cause of the water ingress".

8.10 In summary Mr McGunnigle expressed these opinions:

8.10.1 There was no evidence that the pergola penetration into the plaster was causing moisture levels in excess of acceptable levels.

8.10.2 There was no evidence that the penetration of the plaster into the ground was causing moisture levels in excess of acceptable levels and no evidence of fungal growth.

8.10.3 Each window had been moisture tested and the levels were within acceptable levels; there was no evidence of moisture levels sufficient to initiate fungal growth, or a fungal growth itself, or of any other damage attributable to water ingress; that the only area in the proximity of the window with signs of damage by water is in the laundry but that in his opinion was because of the specific location and condensation factors mentioned; and that there was simply insufficient evidence of a general failure of the junctions between

each window and the cladding to justify the installation of jamb and sill flashings in every window as recommended by Mr Brading.

8.10.4 Further investigations were required in respect of the chimney to establish the extent and nature of any damage.

8.11 He concluded that the only recommended remedial work required for demonstrated damage was to the laundry doorway threshold, the left hand jamb of the window in the bedroom adjacent to the laundry, the jamb liner to the ranchslider in the kitchen and the timber lining to the front entry door. He estimated the costs for some of these.

8.12 The respondent sought to rely also on the evidence of Mr G W Young that he attended the dwellinghouse on 8 June 2004 when Mr Thompson said, in reply to a question raised by Mr Heath who was with him, that "since the repair work had been completed there were no leaks and so no damage could be inspected"; that "his understanding was that the windows were identified as a 'risk' area and the recommendation to do the further work was on that basis"; that there were "[no] leaks from the pergola penetrating the plaster"; and finally that "there was no damage from [the plaster going down into the ground]".

8.13 I have disregarded that evidence which I do not think amounts to any significant concession on the part of the claimants. The more reliable evidence is that of the experts and, to the extent relevant, my own inspection.

9. Adequacy of Tests

9.1 Regrettably there was much in the evidence I was given that was inadequate for me to reach appropriate conclusions.

9.2 I have already referred to the speculative nature of much of Mr Brading's evidence and, although I do not criticise him for that, the simple fact is that

there was little that was definitive for me to be sure of cause and effect on the one hand, cost on the second and liability on the third.

9.3 The tests that Mr McGunnigle wished to carry out in his second visit were somewhat frustrated by the exchanges he had with Mr Thompson and the end result was that tests to an area which I perceive to be significantly important, the dining room/family room (particularly west wall), were not carried out. There had been holes cut into a number of areas and there had been the respective water meter testing devices used, particularly the Carel & Carel meter on which Mr McGunnigle relied. Unfortunately that meter does not give readings in excess of 25% which, when corrected for Boron treated timber (as in the case here), reduce to 21% which is not significantly higher than the 18% which I understand to be the threshold for concern.

9.4 The two areas where adequate sampling and testing was carried out using the resources of Primaxa Limited both indicated moisture content well below the 18% threshold and furthermore indicated the presence of Boric acid equivalent to satisfy the experts and me that this was in fact treated, not untreated, timber (although the report does say that "conclusive verification" requires "multiple samples of total framing cross-sections .... from a representative diversity of locations within the building"). The discussion and conclusions from the Primaxa report were first that the garage sample contained no fungal decay and could be left in situ provided it was permanently dried; secondly, that sample 2 contained "superficial early decay" but was "very unlikely to have lost significant structural integrity" and could be left in situ provided it was permanently dried; thirdly, that had untreated timber been exposed to similar moisture elevation conditions as the laundry sample it was likely to have sustained severe decay; fourthly, that there is considerably more latitude where the framing is treated to 0.4% which was not the case in respect of either the garage or the laundry sample, but when framing contains very low Boron retentions – less than 0.1% - which is not the case in either sample – the timber should be considered as untreated "once decay had become well established"; but fifthly, as a general

rule of thumb installation of an appropriate drainage and ventilation cavity is likely to be more critical if framing contains less than 0.4% w/w BAE.

9.5 The Primaxa report from Dr Robin Wakeling contained an appendix on which counsel for the claimants relied somewhat extensively in closing submissions. I regret that I did not find that significantly helpful in the particular case because of the general nature of the comments made. I have relied more on the specific discussion and conclusions that Dr Wakeling came to in that Primaxa report which I have summarised above. Dr Wakeling did not give evidence and was not called on for cross-examination on the report.

9.6 It was urged on me by counsel for the claimants that I should take some step to initiate some further testing to answer questions that may still pertain. He said that the scheme of the Act was to assist claimants who qualify to use the service to bring their claims and to establish them where that is possible. He encouraged the use of the Assessor for the purpose of carrying out any further inquiry that was needed. He drew attention to the inquisitorial powers that an Adjudicator has under s36.

9.7 I repeat the purpose of the Act as contained in s3:

> "The purpose of this Act is to provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible, and cost-effective procedures for assessment and resolution of claims relating to those buildings."

9.8 The primary role of an Assessor is to consider an application to use the WHRS and to provide a report on whether the claim qualifies for use of that service. It has been the case that Assessors have attended adjudication hearings and have been available for examination on their reports.

9.9 The primary function of an Adjudicator is to adjudicate on the claim as presented. The fact that there are very strict and **very** short time limits for that process (s40(1)(a) requiring that a determination be made within 35

working days of the date for service of any Response – a time limit which allows only for the very basic timetabling of preparation of evidence, conclusion of a hearing and writing the Determination – unless all parties otherwise agree to an extension of time) only serves to underline that an Adjudicator is not intended to have time or resources to pursue a lengthy inquisitorial process into the claim that is made.

9.10 In my view nothing has changed from the primary consideration that the onus of establishing a claim lies with the claimant. There is a resource provided by the Act of which qualifying claims and claimants can avail themselves to use the mediation and/or adjudication resources prescribed. The claimant must still establish that a respondent or several respondents have a liability to the claimant. Nothing has changed from that principle by the provision of the Weathertight Homes Resolution Service.

9.11 In this case there has been quite extensive exchange between the parties and/or their experts about appropriate testing and indeed the strict time limits under the Act were agreed to be extended to allow for testing issues. A hearing had been fixed for 19 August 2004 and in a memorandum from counsel for the respondent dated 27 August 2004 the issues were articulated to include questions of whether there had been water ingress and whether there had been damage caused by that. A change to the hearing date was then made to commence on 23 September 2004 and as Adjudicator I was asked by the claimants, once Mr McGunnigle's report had been received, to put 18 questions to the Assessor for answer. I declined to do so on 13 September 2004 highlighting that that was not the primary function of the Assessor who would be available for examination at the hearing. One of the questions was "should we arrange for additional tests?" but I declined, as I say, to allow those questions to be put to the Assessor. It is clear that further testing was an issue to be addressed at that stage.

9.12 In a memorandum to me dated 20 September 2004 the parties through counsel agreed that both experts considered that further testing would be

desirable and it was proposed that the two experts would confer on the extent of testing required and try to reach agreement. An adjournment was sought by consent. I ordered the adjournment and recorded, in a Procedural Order dated 21 September 2004, that:

> "There may be further testing required and there may be disagreement between those experts as to the extent of that testing and other matters pertaining to their expert advice. They are to seek to resolve any such disagreement and, if they can, then proceed to make arrangements for appropriate testing as agreed between them. In the event that they cannot agree it is proposed that I be asked to exercise a power under s36 of the Act."

9.13 I requested that that occur by 5.00pm on 1 October 2004.

9.14 On that day the claimants' expert provided a "Schedule of Investigations/Destructive Testing to be Undertaken" and the expert for the respondent replied that day with proposals. There were then letters dated 19 and 23 October 2004 from the respondent setting out detailed proposals for testing.

9.15 I felt constrained to conduct another telephone conference which occurred on 29 October 2004 and recorded again questions concerning testing including that the respondent may have wished to include destructive testing.

9.16 The hearing date that had then been fixed, 14 February 2005, required another adjournment and the reason for this was because of the new evidence from Mr Brading about possible damage to the chimney area and I also recorded that there was "apparently still disagreement between the experts as to the type of testing properly required to determine the leaks, their causes and the extent of damage and therefore remedial costs required".

9.17 Mr McGunnigle's evidence set out his version of the disagreement about testing and, as I have said, he attended on 16 February 2005 endeavouring to carry out testing which he felt was appropriate as I have outlined.

9.18 Mr Brading's evidence also in relation to his own "Schedule of Investigations/Destructive Testing to be Undertaken" was that much of what even he had suggested had not been done.

9.19 All that means, in my view, that the question of testing and the issues surrounding that have been before the parties for some time. The onus is on each party to obtain such evidence as it is going to rely on at the hearing. The evidence for the claimants includes two tests carried out by Mr Brading on 17 September 2004 and 11 November 2004 to which I have referred and I have considered the issues arising in this adjudication from the evidence that I have been given to which I have referred.

9.20 Even if there were occasions when an Adjudicator may think it appropriate that further inquiry should be made or testing carried out and seek the consent of the parties to appropriate extensions of time for that to be done, I do not think this is one of those cases. Certainly the respondent indicated that it would not be agreeing to any further extensions of time for that purpose.

9.21 I have reached my determination in this adjudication claim on the basis of the evidence that I have.

10. General Evidence on Damage

10.1 I have evidence from Mr McGunnigle who produced the Primaxa Limited report and from Mr Brading.

10.2 The following has emerged from that evidence:

10.2.1 The timber used in the subject dwellinghouse **was** treated. That is clear from the report from Primaxa Limited of the two samples taken by Mr McGunnigle from the ground floor garage timber nog and the ground floor laundry timber nog. It was confirmed at the hearing that

I could take it that the presence of treatment in those two samples would fairly indicate treatment of all exterior timber to the subject dwelling.

10.2.2 Fungal growth only occurs in timber where moisture levels reach 27% (Mr Brading) or 28% in the case of treated timber (Mr McGunnigle).

10.2.3 If moisture content is below 18% there is no real risk of fungal growth. Mr Brading referred to NZS3602:1995 which provides:

> "Radiata pine framing members that have been kiln dried at 74ºC or above to 18% moisture content or less and have been planer gauged do not require preservative treatment provided they are not exposed to ground atmosphere or in any position where timber moisture content will exceed 18%"

and Mr Brading expressed the view that a "maximum moisture content of 18%mc is required to meet Building Code Clause E2.3.2 where untreated or treated timber is used". I have referred to my interpretation of the requirements of clause E2.3.2 above. My view on the evidence I was given is that a different standard may be applied to treated timber from untreated timber but in either event a moisture content of less than 18% removes significant risk of fungal growth and/or decay.

10.2.4 If the timber treatment level is 0.4% Boric acid equivalent (which is apparently a standard now for H1.2 timber) it creates a situation of significantly less concern.

10.2.5 Although the two samples taken in this case had less Boric acid equivalent treatment than 0.4% (0.27% in the case of the garage sampled, and 0.17% in the case of the laundry sample) the presence of any treatment increases the protection of the timber and reduces the risk of moisture damage although if the Boric acid equivalent

treatment level reaches 0.1% or below then there is increased cause for concern.

11. Specific Alleged Water Entry Damage

11.1 I now turn to the specific and separate areas where there was evidence given to me to support the claimants' claims.

Dining Room/Family Room North-west Walls Corner

11.2 From the evidence given I have determined that there has been water entry and damage at the family room/dining room external wall west side.

11.3 The Carel & Carel readings taken by Mr Brading on 11 November 2004 after correction for treated timber show this as in excess of 21%. His readings on 17 September 2004 had identified readings in excess of 21% (after adjustment for treated timber) for the dining room – north wall centre plate at north east corner.

The evidence for Mr Brading was that readings in excess of 18% are consistent with water ingress occurring. I weigh this against the evidence of Mr McGunnigle that it is only where moisture levels are 28% or more that this will initiate the growth of fungal decay and that if the reading is "well below 28%" then there is less risk of fungal growth and decay and therefore "little risk of damage to the framing from water ingress". Mr McGunnigle had found elevated moisture readings of 25% in this area using his Humitest MC-50 meter.

11.4 Although Mr McGunnigle sought to dismiss this water level as due to condensation or wicking, I am not prepared to accept that in this particular case. Water level of this magnitude does constitute an unacceptable level and it is more likely in my opinion that there are causes other than wicking or condensation in relation to this site

11.5 There was no other testing done of the dining room/family room walls in the vicinity of the north-west corner.

11.6 In the Assessor's report the remedial work suggested is to "cut out window openings and install jamb and sill flashings, turn up ends of head flashings, seal and make good" and he estimated the cost of this was $7,300.00 which he explained at the hearing was for all 24 windows, that is at a cost of about $304.00 each. There is the usual preliminary and general factor and internal and any external decorating such as painting consequent upon the remedial work.

11.7 In his evidence Mr Brading did not quantify repairs other than to affirm that the works set out in the evidence of Mr Smythe are necessary. Mr Smythe's quote for work to be done which, as I have said, is accepted by the respondent as to quantification, allowed $30,580.00:

> "To cut around solid plaster work on all exterior windows forming a margin approximately 60 – 100mm, remove the plaster work and fold back the wire. To refix wire and replaster the reveals with 3 coats of plaster all cured as required after flashings have been installed. To fill any exterior cracks as required and repair test holes and pergola penetrations."

There were also allowances for scaffold, internal decorating and the like.

11.8 My view is, having considered all the evidence, that for necessary repair work for the water entry to the north-west wall of the family/dining room of the nature suggested by Mr Smythe and using the cost guides provided by his quote (accepted by the respondent) there should be an allowance of **$1,800.00**.

Laundry Door Area

11.9 In his September 2004 inspection results sheet Mr Brading identified water moisture levels for Boron treated timber in excess of 18% in the jamb left hand door and wall plate – left hand door of the laundry south wall where the reading was in excess of 21%. In his readings following the November 2004

inspection the only moisture levels above 18% were in the right hand side under window and base of door right hand side in the laundry external wall when the readings were in excess of 21% and 21% respectively.

11.10 The laundry wall was one of the two areas where Mr McGunnigle had had the testing samples by Primaxa Limited and the moisture level was found to be 13.6% with a Boric acid equivalent of 0.17%.

11.11 I inspected the laundry wall and door areas on my inspection of the dwellinghouse on 8 March 2005.

11.12 In his evidence expressly on the laundry doorway area, Mr McGunnigle identified this as being an elevated moisture area with readings of 22% and 29% using his Humitest MC-50 meter. He referred to there having been no weatherstrip attached to the base of the door which would allow water to be blown into the doorway; the clogged drainholes preventing drainage; and the use of the laundry for moisture creating activities without adequate ventilation (a matter alluded to also by Primaxa Limited in its report).

11.13 Mr McGunnigle concluded that if the moisture level remained under 18% then the wood would not deteriorate further and could remain in situ. The Primaxa Limited report referred also to the sample as indicating "superficial early decay but .... very unlikely to have lost significant structural integrity across the framing thickness due to fungal decay"; and recommended that the wood could be left in situ provided it was permanently dried to below 18% moisture content.

11.14 Bearing all these facts in mind I formed the view that there was some damage to the laundry area which had been occasioned by the entry of water from outside for matters on which the respondent had a responsibility. There is more to it in my opinion than the absence of a weather sill, failure to maintain the drainage holes or dampness in the air from clothes drying and other laundry activities. I am mindful, however, of the relatively low levels of

moisture and the conclusions reached by Primaxa Limited on the sample in fact taken.

11.15 I have decided that it is appropriate that I should make an allowance to the claimants towards some remedial work in this area if they wish and have fixed for that the sum of **$1,200.00**.

Pergola Penetrations

11.16 The evidence was that the pergola was inappropriately penetrating the cladding of the dwelling and that that should not have occurred in accordance with good building practise.

11.17 Conversely there was no evidence of there having been water penetration nor any damage having been done. Mr Brading's November 2004 readings were only 15% moisture level for Boron treated timber. Although the Assessor referred to the seals as "beginning to fail" and this being "a high risk area", the recommendations made were "to **maintain** water tightness" in this area by removal of the penetrations and independent support. Although that may be wise counsel, my jurisdiction is limited to relief where there is areas of water penetration causing damage and I am not satisfied that that is the case in respect of the pergola.

Wicking

11.18 One of the readings from Mr Brading's November 2004 testing was the left hand side of the wall plate at the kitchen external wall where the reading was 21% for Boron treated timber. He had not tested that area in the September 2004 visit.

11.19 It is recognised that wicking can be a risk for weathertightness where plaster is taken down to the ground level or below or landscaping is brought up to the bottom of the plaster such that there is not adequate ventilation below the plaster before the ground level or landscaping.

11.20 My understanding is that the area in question is in the vicinity of the dining room – north wall – wall plate referred to in paragraph 11.2 above. Indeed as I understood the evidence, a considered cause of the moisture level in that vicinity included wicking.

11.21 I have accordingly included in the allowance I have made in paragraph 11.15 the cost of repairs to this area.

11.22 It is said that there is a future risk of water penetration and damage from wicking causes at other parts around the dwelling base where the plaster abuts or is underneath the adjoining ground level or landscaping. I have formed the view that as there is no present evidence of water penetration in that area nor any evidence of any damage from water penetration, it is not appropriate that there should be any adjudication relief under the Act against the respondent in respect of that plaster abutment or penetration. The Act is addressed to claims in respect of leaky buildings as mentioned above. As I said in claim no 3 (Walton/Badcock v Holden & Ors; 27/2/04) at para 8.4.16:

> "My view is that in exercising the jurisdiction conferred by s29 on an adjudicator, the determination must relate to the liability of parties to the **claimant** in that person's capacity as the owner of a **leaky building** and in relation to **claims** made in respect of a leaky building. This jurisdiction is not a general 'Building Disputes Court'. Its jurisdiction is limited to leaky building claims and damage as a consequence of leaks. The definition of **claim** and the eligibility criteria clearly require with the conjunctive **and** that there must be a **leaky building** but also that there must be damage suffered as a consequence of its being a leaky building."

11.23 Adjudicator Mr Dean in claim 765 (Miller-Hard v Stewart & Ors; 26/4/04) at para 4.7.10 expressed the same view:

> "However, I do accept that the [Weathertight Homes Resolution Service] does not provide a service for the resolution of general building disputes, and usually can only properly consider claims that relate to 'leaky buildings'."

He articulated the questions to be answered as (para 3.14):

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

a test he had also articulated in claim 210 (Baldock & Ors v Hutt City Council & Anor; 11/5/04) at para 4.2 and which Adjudicator Mr Douglas had articulated in claim 435 (Mulcock v Williams; 14/5/04) at para 3.9.

11.24 As there is no evidence of leaking to the dwelling from wicking causes at any place other than the kitchen external wall left hand side wall plate and possibly the dining room/family room wall plate mentioned above I do not consider that the claimants have any claim under the Act against the respondent in respect of this issue.

Chimney

11.25 The question of possible water entry and damage in the chimney area only arose relatively late in the piece when, following his 11 November 2004 testing, Mr Brading ascertained a reading in excess of 21% for moisture level Boron treated timber in the chimney – external area. (Again I could not quite understand his report which referred to a reading of 40 on the Carel & Carel meter which he had said does not read beyond 25). Mr McGunnigle had by then already completed his inspection and his report of 18 August 2004 to the respondent. He said in evidence that when he attended on 16 February 2005 he wanted to "look at the chimney". There were the other exchanges concerning samples to which I have referred. In his evidence Mr McGunnigle (para 50) referred to apparent cracking and that "further tests ... need to be done to determine the extent of any damage and the actual cause of the water ingress". He expressed the preliminary view that the causes of the elevated moisture level are likely to be the apron flashing to the chimney not feeding into the gutter and/or the end of the gutter being embedded in the plaster with a sealant having been applied.

11.26 Again the level of evidence was significantly wanting in this area. Mr Brading had not addressed this expressly except in reference to cracks identified with it being "feasible" that some "minor water ingress" may have occurred. The use of that language does not encourage me that he was confident that he had identified the cause of water entry into the chimney area or any damage to it.

11.27 On balance I have formed the view that there is some evidence of undue moisture in the chimney area but there is no evidence of damage from that. I do, however, think an allowance should be made in respect of the matters identified as possible causes by Mr McGunnigle and in that regard I would allow **$800.00**.

Other Areas

11.28 In respect of all other readings on the moisture meter by Mr Brading at both visits, these are below the 18% threshold required for Boron treated timber and there is no evidence of damage. In fact there has been already the repair work carried out in the north and east walls mentioned. The garage sample taken by Mr McGunnigle in that vicinity showed no ongoing cause for concern or water penetration or damage. I inspected the various inspection holes that were still on site and, to the extent my own inspection carries weight, I could see no evidence whatever of water penetration or damage.

11.29 Taking all those factors into account I do not consider there is sufficient, or indeed any, evidence that water is penetrating other areas of the dwelling sufficiently to cause undue dampness or damage to building elements.

11.30 Although Mr Brading spoke of the moisture content readings being in excess of acceptable levels (para 33), he did also state that "no signs of visual timber decay were noted in any locations opened up on internal faces". He said that this did not of itself suggest that the performance of the external envelope was at an acceptable level and gave general opinion evidence that there were possible causes of water ingress such as absence of flashing and

cracks to the plaster. I have weighed that evidence up against the evidence of Mr McGunnigle supported by the Primaxa report and have formed the view that there is insufficient evidence of water penetration causing undue dampness or damage to other areas of the dwellinghouse to sustain a claim against the respondent under the Act.

12. Limitation Questions

12.1 Limitation issues were raised by the respondent in very limited parameters, namely in respect of any claim against it based on contract in respect of patent or apparent defects. In a memorandum dated 2 September 2004 counsel for the respondent said:

> "The first point to clarify is that the [respondent's] abandonment of the limitation defence is in respect of the Claimants' claim for breach of duty of care only. The [respondent] will rely on the Limitation Act 1950 in respect of any claim based on contract, which accrued on settlement of the Claimants' purchase of the property in 1994."

12.2 The submissions related to the plaster penetration into the ground (wicking) and the penetration of the pergola into the plaster.

12.3 In view of the finding that I have reached that there is no liability in respect of either of those matters I have not needed to consider that question further.

12.4 Even if I had found that there was some liability in respect of either or both of these categories that would have been in respect of the breach of duty of care and the respondent had abandoned any limitation defence on that cause of action relying only on limitation questions in respect of a claim based on breach of contract.

13. Result

13.1 I determine that the respondent has a duty of care to the claimants and has breached that duty of care.

13.2 The first set of repairs for which the claim was $34,628.05 were fairly carried out by the claimants and the cost of that is correctly fixed at **$34,628.05** for which I find the respondent liable to the claimants.

13.3 In respect of all remaining items the only areas where I consider the respondent has a liability to the claimant under its duty of care in respect of construction work which has failed to achieve the standard prescribed by the then Building Code clause E2.3.2 is:

13.3.1 The dining room/family room north-west walls corner for which I have allowed **$1,800.00**.

13.3.2 There is water entry and damage to the laundry door area for which I have allowed **$1,200.00**.

13.3.3 I have allowed in respect of repair work that is required to the chimney area the sum of **$800.00**.

13.4 The total liability of the respondent to the claimants is therefore **$38,428.05**.

13.5 Of these sums the claimants have received from claims made against other parties the sum of **$31,800.00**, leaving a balance due which I now find the respondent is liable to the claimants in the sum of **$6,628.05**.

13.6 There had been certain destructive testing carried out by the respondents as mentioned in this Determination and at the time of the hearing the remedial work to restore and reinstate the dwellinghouse had not been finalised by the respondents although that was a condition of the claimants' having allowing them to carry out that testing. **I DIRECT** that the respondent is to forthwith reinstate **all** destructive testing work that it has done and, pursuant to s42(2) of the Act I determine that if that work is not done by **29 April 2005** there is the further sum of **$3,000.00** payable by the respondent to the claimants.

13.7 No order for costs is made.

13.8 No deduction is made in respect of the payment of $2,770.00 already made in 2002 because that was in settlement of the express matters to which it referred which are not included in the above allowances.

14. **Costs**

14.1 The claimants sought costs against the respondent.

14.2 The grounds for any determination of costs and expenses being met by one party to an adjudication are set out in s43, namely 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."

14.3 I have not any evidence of bad faith on the part of the respondent and in view of the result set out above but in any event I determine that the allegations and objections by the respondent are not without substantial merit.

14.4 Certainly there was very little opposition to the claim by the claimants for the first set of repairs but (apart perhaps from the defence of accord and satisfaction) by far the substantial part of the adjudication process, the hearing and this determination was addressed to claims for further anticipated repair costs which have been responded to in circumstances that I find are not "without substantial merit".

14.5 Accordingly no order for costs is made.

Notice

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

DATED at Auckland this 31st day of March 2005

David M Carden
Adjudicator