CLAIM NO: 00062

UNDER The Weathertight Homes Resolution Services Act 2002

IN THE MATTER of an adjudication

BETWEEN	**LYNNE ROBORGH** and **LEON JOHN ROBORGH** Claimants
AND	No First or Second Respondents
AND	**STEPHEN BRIAN LAY** Third Respondent
AND	**JESSOP TOWNSEND LIMITED** Fourth Respondent
AND	**AUCKLAND CITY COUNCIL** Fifth Respondent
AND	**ARCHITECTURAL WATERPROOFING LIMITED (in Liquidation)** Sixth Respondent
AND	No Seventh Respondent
AND	**TIMOTHY TERRENCE MANNING** as Trustee of the Massey Trust Eighth Respondent
AND	**PETER EDWARD TOWNSEND** Ninth Respondent
AND	No Tenth Respondent
AND	**TIMOTHY TERRENCE MANNING** Eleventh Respondent
AND	**BRUCE CHRISTIAN** Twelfth Respondent
AND	No Thirteenth Respondent

DETERMINATION OF ADJUDICATOR
(Dated 11th day of March 2005)

INDEX TO DETERMINATION

1. BACKGROUND

1.1 The Claimants lodged a claim under the Weathertight Homes Resolution Services Act 2002 ("WHRS Act") in January 2003. The Weathertight Homes Resolution Service ("WHRS") sent one of its assessors to inspect the Claimants' property and, after receiving the report from the assessor, the claim was deemed to be an eligible claim under the WHRS Act. The Claimants filed a Notice of Adjudication under s.26 of the WHRS Act in August 2003.

1.2 The Claimants are joint owners of the property at 9/63 Vermont Street in Ponsonby, Auckland, in their capacity as trustees. I am going to refer to them collectively as "the Owners". They own one of ten townhouses at 63 Vermont Street in Ponsonby in Auckland, known as Ponsonby Gardens.

1.3 Six other owners of townhouses in Ponsonby Gardens had also lodged claims with WHRS and all were deemed eligible. By December 2003 all seven owners had elected to go to adjudication, and they asked whether their seven claims could be heard and considered at the same time.

1.4 I was assigned the role of adjudicator to act on all seven claims, and my first task was to arrange for a preliminary conference for the purpose of meeting all of the parties and setting down a procedure and timetable to be followed for these adjudications.

1.5 Section 32 of the WHRS Act allows for the consolidation of adjudication proceedings, and I have used the word "consolidation" from time to time during these adjudications. However, this may only be done under s.32 with the written consent of all of the parties. I have not actually asked for the written consent of all the parties, but have not received any objections to the procedure that we have followed. In reality, I have continued to process seven separate adjudications concurrently, which has enabled all parties to benefit from an avoidance of unnecessary duplication where appropriate.

1.6 It has been necessary to hold three preliminary conferences and issue nineteen Procedural Orders prior to the conclusion of the hearings. These Orders were needed to set down timetables, and to rule on applications and requests made by the parties in the lead-up to the hearings. Although these Procedural Orders are not a part of this Determination, they are mentioned because some of the

matters covered by these orders will need to be referred to in this Determination.

1.7 The hearings started on 4 October 2004, but were adjourned almost immediately to allow an application to be made to the High Court for leave to continue with the adjudication proceedings against Architectural Waterproofing Limited (the sixth respondent) as this company had recently been placed into liquidation. The application was granted by consent on 6 October, which enabled these hearings to start properly on 7 October 2004.

1.8 The hearings continued on 8, 12-15 October, 1, 2, 3 and 5 November, 7, 8 and 9 December 2004. Closing submissions were presented by the Respondents on the last two hearing days, and closing submissions were provided by the Claimants on 16 December 2004.

1.9 At the hearings the parties relevant to this adjudication were represented by the following persons:

- The Owners (Claimants) by Mr John Gray, the owner of Unit 2;
- Mr Lay (Third Respondent) by Mr Matthew Casey, barrister;
- Jessop Townsend Limited (Fourth Respondent) and Mr Townsend (Ninth Respondent) by Mr Michael Robinson of Turner Hopkins, and for the last three hearing days by Mr Neil Campbell, barrister;
- Auckland City Council (Fifth Respondent) by Mr Rodney Harrison QC, and Ms Helen Rice of Heaney & Co;
- Architectural Waterproofing Limited (in Liquidation) (Sixth Respondent) was not represented;
- Mr Manning (Eighth and Eleventh Respondent) by Mr William McCartney, barrister;
- Mr Christian (Twelfth Respondent) by himself in person.

1.10 All the parties were given the opportunity to present their submissions and evidence, and to ask questions of all of the witnesses. Evidence was given under oath or affirmation by the following persons at the hearings: (in alphabetical order)

- Mrs Lynne Roborgh, owner of Unit 9
- Mr Stephen Alexander, a building surveyor and consultant, called by the Auckland City Council;
- Dr Elizabeth Berry, owner of Unit 8, called by the Claimants;
- Mr Bruce Christian, the twelfth respondent;
- Mr Lawrence Cook, building supervisor and consultant, called by the Claimants;
- Mr Robert de Leur, the Council's principal building officer/inspector, called by the Auckland City Council;
- Mr Jeremy Freeman, owner of Unit 4, called by the Claimants;
- Mr Evan Gamby, a registered valuer, called by the Auckland City Council;
- Mr John Gray, owner of Unit 2;
- Mr Alan Gregersen, a Council building inspector, called by the Claimants under subpoena;
- Mr Martin Gunman, a construction project manager and consultant, called by Jessop Townsend Limited and Mr Townsend;
- Mr Stephen Harding, the technical services manager with Laminex Group, called by the Auckland City Council;
- Mr Michael Hartley, an accountant and professional liquidator, called by Mr Manning;

- Mr Barry Holsted, a Council building inspector, called by the Claimants under subpoena;

- Mr Norrie Johnson, a registered architect, called by Jessop Townsend Limited and Mr Townsend;

- Mr Trevor Jones, a Chartered building surveyor, called by the Auckland City Council;

- Dr Roy Knill, owner of Unit 6, called by the Claimants;

- Mr Stephen Lay, the third respondent;

- Mr Richard Maiden, a quantity surveyor and building consultant, called by Mr Manning;

- Mrs Joanne Manning, a trustee in the Manning Family Trust, called by Mr Manning;

- Mr Timothy Manning, the eleventh respondent;

- Mr Edward Manson, managing director of Manson Developments Limited, called by Mr Christian;

- Ms Judith McDonald, a real estate salesperson in the Ponsonby area, called by the Claimants;

- Mr Roger McElroy, owner of Unit 5, called by the Claimants;

- Mr Andrew McIntyre, the WHRS assessor, called by the adjudicator;

- Dr William Porteous, chief policy adviser at the Building Industry Authority, called by the Claimants under subpoena;

- Dr Michael Shepherd, owner of Unit 7, called by the Claimants;

- Ms Carole Smith, a solicitor who acted for Taradale development companies, called by Mr Manning;

- Mr Paul Smith, the builder who carried out the remedial work, called by the Claimants;

- Mr Peter Townsend, the ninth respondent and a director of Jessop Townsend Limited (fourth respondent);

- Dr Kelvin Walls, an engineer and building consultant, called by Mr Lay.

1.11 At the beginning of the hearings, Mr Harrison suggested some basic ground rules to expedite and simplify the taking of evidence and cross-examination. These ground rules seemed to be eminently sensible and no objections were raised by any of the other parties. Therefore, I decided to adopt the following ground rules.

(1) Evidence given by a claimant will be treated as evidence only in support of that claimant's claim, unless otherwise advised before the particular claimant gives evidence.

(2) Evidence given by those called as experts and all other witnesses will apply generally, unless otherwise advised prior to calling the witness or by the witness in the course of giving evidence, or the context of the evidence requires otherwise.

(3) Contemporaneous documents coming into existence prior to liability issues arising which have already been provided to the WHRS are in evidence and will speak for themselves. But if particular documents are to be relied on by the adjudicator or by any party, they need either to be referred to in evidence or in written submissions (opening or closing). The admissibility of all other documents (other than contemporaneous documents) and statements of fact or opinion contained therein is subject to proof in the ordinary way.

(4) The parties will not be required to put to witnesses for claimants or respondents matters asserted in the previously exchanged briefs of evidence of witnesses (although of course they may do so if they choose).

1.12 I visited the properties on 15 November 2004 and, by prior agreement with all the parties, only Mr Gray was present during my inspections. However, due to a misunderstanding, Mr Townsend was on site at the same time as myself, but we did not discuss the buildings or the claims and I carried out my inspection on my own in relative silence.

1.13 Section 40(1)(a) of the WHRS Act requires me to issue my Determination on claims within 35 working days after the Respondents have filed their responses pursuant to s.28(1) of the WHRS Act. However, this time period may be extended with the agreement of the parties. This matter was raised at our third preliminary conference, and none of the parties objected to there being a reasonable extension to the 35-day period.

1.14 There have been a number of claims for costs by parties in this adjudication, but I will defer my consideration of these claims until I have determined the substantive issues.

2. CHRONOLOGY

2.1 I think that it is always helpful to provide a brief history of the events that have led up to these adjudications. I will only list the dates that relate to the Owners' property at Ponsonby Gardens.

11-Jul-94	Building Consent issued for demolition of old villa (AC/94/4929)
28-Feb-95	Building Consent issued for retaining wall and drive (AC/95/0899)
01-Jun-95	Application for Building Consent for Units 1, 2, 8, 9 and 10 (AC/95/3974)
21-Aug-95	Building Consent issued for Units 1, 2, 8, 9 and 10 (AC/95/3974)
03-Nov-95	Building Consent issued for replace damaged piles (AC/95/8744)
11-Jun-96	Certificate of Title issued for Unit 9 (CT 105A/76)
24-Jul-96	Code Compliance Certificate ("CCC") issued for Units 3 to 7 (AC/95/4526)
24-Jul-96	CCC issued for remaining five units (AC/95/3974)
01-Aug-96	CCC issued for demolition work (AC/94/4929)
01-Aug-96	CCC issued for retaining wall and drive (AC/95/0899)
01-Aug-96	CCC issued for replacing damaged piles (AC/95/8744)
10-Oct-96	Roborghs agreed to purchase Unit 9
08-Nov-96	Settlement of Unit 9 to Roborghs

11-Sep-97	Leaks through roof at Unit 9
13-Nov-97	Leaks in other bedroom – tenant threatened to stop rent
18-Nov-97	Roborghs complained to Manning
19-Dec-97	JT Ltd report on roof inspection
21-Jun-98	Tenants moved out due to leaks
01-Jul-98	Site inspection by Joyce Group of Unit 9
15-Jul-98	Joyce report on Unit 9 roof
28-Aug-98	Repairs to roof started by Taradale on Unit 9
30-Jun-99	Roborghs get the roof fixed
16-Aug-99	Roborghs lodged claim with DT
30-Mar-00	DT adjourned hearing until June
08-Jun-00	DT ordered respondent to pay $7,500 to Roborghs
15-Aug-00	DT ordered a rehearing in Roborgh vs Manning
20-Feb-01	Taradale Ponsonby Gardens Ltd paid the last $3,750 to Roborghs
14-May-02	Report from John Sheriff on Unit 9
03-Jun-02	Roborghs sent Sheriff report to Taradale
15-Jul-02	Taradale Ponsonby Gardens Limited advised Roborghs that legal advice was now being sought
08-Sep-02	Site inspection by Joyce Group of Unit 9
17-Sep-02	Roborghs asked Manning to carry out all remedial work
17-Oct-02	Report by Joyce Group on Unit 9
10-Dec-02	WHRS claim lodged by Roborghs
01-Apr-03	WHRS Assessor only visit to Unit 9
16-Apr-03	WHRS Assessor's report
13-Jun-03	Application for Resource Consent – repairs Unit 9 (AC/03/02745)
13-Jun-03	Application for Building Consent – repairs Unit 9 (AC/03/04176)
04-Jul-03	Builder started work on remedials on Unit 9
07-Jul-03	Roborghs advised Manning and ACC that remedial work to commence
04-Mar-04	Builder substantially complete on Unit 9
23-Mar-04	Builder's final invoices for Unit 9

3. THE PARTIES

3.1 The Owners purchased the dwelling in November 1996 from the Massey Trust, which was a trust under the control of Mr Tim Manning. He was a trustee. I understand that the Massey Trust had purchased the unit in July 1996 when the Code Compliance Certificate was issued and had let it out to tenants. I will now briefly outline the other parties that are involved in this adjudication.

3.2 The Ponsonby Gardens development was set up, organised and completed by the Taradale Group. This was a group of companies under the control and direction of Mr Tim Manning, who had become well known in the Auckland area in the 1990's for residential developments. Taradale Ponsonby Gardens Limited ("TPGL") was incorporated in March 1994 under the name of Ridge Investments Limited, and the name was changed to TPGL in April 1995, when it was decided to use this company for this development. The property, which was initially owned by Taradale Services Limited, was transferred to TPGL in about February 1996. Therefore, TPGL owned the property, paid most of the bills for the construction work and received the payments from the purchasers.

3.3 TPGL ran into financial difficulties and was unable to meet all of the costs when they became due for payment. This resulted in a compromise being reached between TPGL and its creditors in October 1996, whereby the nine outstanding creditors agreed to wait until December 1997 for payment. This company changed its name to Sigatoka Investments No 5 Limited ("SI No 5") in July 1998 and eventually was placed into liquidation in September 2003.

3.4 When the Claimants filed the Notice of Adjudication they named both TPGL and SI No 5 as respondents. At our first preliminary conference it was confirmed that TPGL had changed its name to SI No 5 some years earlier, so that it was illogical to retain both these companies as separate parties to the adjudications. I ordered that TPGL be struck out as a party in Procedural Order No 2 (8 March 2004). After checking the status of SI No 5, I held that I had no jurisdiction to allow the proceedings to continue against a company in liquidation, so that I ordered that SI No 5 be struck out as a party in Procedural Order No 5 (29 April 2004). Therefore, neither TPGL nor SI No 5 is a party to this adjudication.

3.5 The third respondent is Mr Stephen Lay, whom the Owners say was the builder who organised and supervised the construction work. Mr Lay's actual role and responsibilities in the Ponsonby Gardens development will need to be determined by me, but there is no argument about the fact that Mr Lay was involved with the construction work on this project. The Owners claim that Mr Lay failed to manage or supervise the work properly, which led to the defects, which was in breach of his duty of care owed to subsequent owners of the dwelling.

3.6 The fourth respondent is the company of Jessop Townsend Limited ("JTL"), which the Owners say was the architectural practice that undertook the design work, prepared the drawings for the Building Consent, and monitored the construction work of the project. The Owners claim that the drawings were inadequate, and that JTL failed to ensure that suitable materials were used in certain places, and that the work was properly done, which was in breach of its duty of care owed to subsequent owners of the dwelling.

3.7 After the hearing had started, and during one of the adjournments, I was made aware that JTL had been removed from the Register of Companies on or about 1 September 2004. When this matter was raised at the recommencement of the hearing I was told that neither Mr Townsend nor Counsel had been aware of the company's removal, and steps were being taken to have the company reinstated on the Register. Therefore, I am proceeding on the assumption that JTL is still a legally formed and registered company

3.8 The ninth respondent is Mr Peter Townsend, who is a director of JTL. The Owners claim that Mr Townsend has a personal liability for the claims that they have made against JTL. I will need to determine the claims against both JTL and Mr Townsend, but until I address that particular issue I will refer to both JTL and Mr Townsend as "the Architect" for ease of description.

3.9 The fifth respondent is the Auckland City Council ("the Council"), which is the territorial authority responsible for administration of the Building Act in the area. The Owners claim that the Council issued the Building Consent on the basis of inadequate drawings, and issued a Code Compliance Certificate for a building that did not comply with the Building Consent or the requirements of the Building Code.

3.10 The sixth respondent is Architectural Waterproofing Limited ("AWL"), which was the company that supplied the materials and carried out the waterproof membrane to the deck and parts of the roof. This company was placed into liquidation on or about 14 September 2004 and, as mentioned earlier in this Determination, a consent order was obtained from the High Court to continue these adjudication proceedings against AWL. The Owners claim that AWL failed to properly carry out the waterproofing work, which caused leaks into the dwelling, which was in breach of its duty of care owed to subsequent owners of the dwelling.

3.11 There is no seventh respondent in this adjudication. There is a seventh respondent in some of the other adjudications that were being heard concurrently with this adjudication, but I will have no need to refer to this party again in this Determination.

3.12 The eighth respondent is Mr Tim Manning as a trustee of the Massey Trust, who was the owner of this unit for the four months up to the time it was purchased by the Owners. They claim that Mr Manning misrepresented the condition of the unit by failing to disclose that it leaked because it was not properly built.

3.13 The tenth respondent was the Building Industry Authority (BIA), which was joined as a respondent as a result of an application by the Council (refer Procedural Order No 3 dated 1 April 2004). After the BIA had been required to file its Response and evidence, the Council announced on 29 September 2004 that it no longer wished to proceed with the claims against the BIA. Therefore, the BIA was struck out on 29 September and is no longer a respondent in this adjudication (refer Procedural Order No 16).

3.14 There is no eleventh respondent in this adjudication, as Mr David Gibbs was struck out on 30 July 2004 (refer Procedural Order No 9).

3.15 The twelfth respondent is Mr Bruce Christian, whom the Owners say was the person who managed the Ponsonby Gardens developments, and was instrumental in causing the defects to occur. Mr Christian's actual role and responsibilities in the project will need to be determined by me. The Owners claim that Mr Christian failed to manage or supervise the project properly, which led to the defects and which was in breach of his duty of care and to subsequent owners of the dwelling.

3.16 I will not, initially, be considering the liability of the various respondents. It will be necessary for me to firstly review the factual matters that surround the claims about defects, and make findings on the probable cause of any leaks, the appropriate remedial work and the costs. At that, I will return to the issues of liability of each of the respondents.

4. THE CLAIMS

4.1 The claims that I am asked to consider in this adjudication are fundamentally quite simple. The Claimants say that the dwelling was not properly built, which has caused a number of serious leaks into the structure. Although it took a period of time to realise the significance and seriousness of the leaks, the Claimants say that they have been forced to carry out substantial remedial work to stop the leaking and repair the consequential damage.

4.2 The claims are that leaks occurred in the following areas:

- Exterior stucco cladding;
- Weatherboard cladding;
- Cladding penetrations for windows and doors;
- Waterproofing of the decks;
- Balustrades around the decks (and some parapet work);
- Flat roofs;
- Bathrooms.

4.3 The Owners have provided in evidence the details of how these leaks were caused in each of the areas. I will need to carefully review the evidence when analysing each potential area of leak later in this Determination. I will not get immersed in these details at this point, but simply provide an overview of the claims.

4.4 The remedial work has been completed. The Owners know the costs. Their claims are for the reimbursement of these costs, together with other claims for damages and expenses. A summary of the monetary claims is:

Remedial building Costs	Sonic Ltd	$ 67,520.00
Removal of rotten timber	Sonic Ltd	7,235.00
Exterior painting	The House Painters Ltd	5,882.85
Curtain cleaning	Cleana Curtain Co	610.32
Carpet cleaning	Green Acres	300.00
Expert's report	Project 2000 Ltd	225.00
	Joyce Group	4,004.62
Architect fees	Jessop Architects Ltd	6,829.88
Resource Consent fees	Auckland City Council	600.00
Building Consent fees	Auckland City Council	1,154.00

CAR Insurance	Oceanic Insurance Ltd	144.08
Adjudication fee	WHRS	400.00
Visits to Auckland	Air New Zealand	1,152.13
Lost rent	Michael Rennie	4,675.00
Stigma claim		58,685.00
General damages		40,000.00
Interest		to be determined
Costs in DC proceedings	Ian Williams	3,085.00
Costs of preparing claims		to be advised
Witness expenses		to be advised
	Total Claims	$202,502.88

4.5 I am anticipating that it may be necessary, at a later stage in this Determination, to have to break down some of these costs when considering individual claims or alleged defects. I made this point at the Hearing and, as a result of this, the parties have tried to assist in this breakdown.

4.6 For example, the Council has made submissions on the extent of my jurisdiction, and as a part of these submissions it is argued that the remedial work on the bathrooms and the flat roofs can not be recovered by the Owners in these adjudications. Therefore, I have divided the remedial building costs to show these items as separate costs (where appropriate).

Bathroom costs (refer Sonic's letter of 1/11/04)	
Unit 9 Bathroom	$ 7,300.00
Unit 9 en suite	$ 6,862.00
Less water damage from decks into,	
En suite	- 3,278.00
Bathroom	- 2,876.00
	$ 8,008.00
Flat roof area repairs (refer Sonic's letter of 1/11/04)	$ 3,290.00

4.7 Whilst I appreciate that Mr Gray has raised some doubts about the accuracy of some of the Sonic's figures, I have carefully reviewed these, as well as the other evidence given to me that could affect the allocation of these costs. In the end I have come to the conclusion that the Sonic figures are probably as accurate as can be calculated under the circumstances.

4.8 This means that the remedial costs can be further broken down as:

Bathroom repairs	$ 8,008.00
Flat roof area repairs	3,290.00
Remainder of remedial building costs	56,222.00
	$ 67,520.00

5. JURISDICTION

5.1 In this section of my Determination I will address some of the submissions made about my jurisdiction. There are five separate matters that have been raised by Mr Harrison on behalf of the Council, which are:

- Adjudicator's own experience;
- General jurisdiction;
- Leaks with bathrooms;
- Claims associated with the flat roofs;
- General damages;
- Consequential losses.

5.2 Adjudicator's Own Experience

5.2.1 In his closing submissions, Mr Harrison made some detailed submissions on the dangers of adjudicators under the WHRS scheme applying "his or her personal knowledge or indeed perceived expertise in building construction to the determination of a claim."

5.2.2 I would accept that an adjudicator under the WHRS scheme should not apply personal experience or opinions, without giving the parties an opportunity to comment on or respond to the accuracy or relevance of these views. Therefore, from time to time during these adjudication hearings I have shared with the parties, and their Counsel, my own understanding of particular matters or interpretations.

5.2.3 No judicial officer can or should impose his or her own personal view or opinion on the parties or the process. My determination will be based upon the evidence produced and tested at the hearing, together with the submissions made by the parties.

5.3 General Jurisdiction

5.3.1 It is submitted by Mr Harrison that the WHRS Act empowers the resolution by adjudication of 'eligible claims' only. These are limited to compensating claimants for the cost of "work needed to make the dwelling house watertight" and the cost of repairing "any damage caused by the water entering the dwelling house".

5.3.2 The basis for this submission is that s.3 of the WHRS Act mentions "assessment and resolution" in the one breath, indicating that they are to be strongly linked together. The submission then suggests that claims that can be determined at adjudication must only be "eligible claims", and that the decision as to whether a claim is an eligible claim is made after consideration of the assessor's report. The submission concludes

> It is entirely understandable that Parliament might see fit to provide "speedy, flexible, and cost-effective procedures" for claims relating to homes that are not "weathertight", with a view to providing an avenue of redress against wrongdoers aimed specifically at remedying the lack of weathertightness by compensating for (in the words of s.10(1)(b)(iii) the cost of "the work needed to make the dwelling house watertight and repair that damage". Equally it follows from the strong linking, in the Act's long title and elsewhere, of the twin procedures of "assessment and resolution of claims" that it is those issues on which an assessor may report; and then only on those issues which, when approved by an evaluation panel on the basis of an assessor's report, will constitute the subject matter of an "eligible claim".
>
> In short, these are summary remedies, depriving the parties and in particular respondents to claims of many procedural if not substantive safeguards which they would receive in the ordinary courts. They enable claimants to seek redress for damage to a dwelling house which qualifies as a "leaky building" and has suffered damage as a consequence. But the redress is strictly limited to the cost of "work needed to make the dwelling house watertight" and to repair "any damage caused by the water entering the dwelling house."

5.3.3 I will start with s.3 of the WHRS Act, which reads:

> 3. **Purpose**
> 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.

5.3.4 Although the words “assessment and resolution” are placed together in the sentence, I am not convinced that this means that the two processes are linked together for all purposes of interpretation. Section 3 is the long title of the Act and explains, in general terms, the intended purpose of the legislation. When one examines the contents of the Act, it is clear that there are several separate component parts:

1. Assessment and evaluation of claims;
2. Mediation of claims;
3. Adjudication of claims.

5.3.5 The assessor’s report is prepared for the purpose of evaluating a claim made by an applicant owner. The requirements of the assessor’s report are outlined in s.10 of the WHRS Act, and the criteria for eligibility of claims are given in s.7 of the WHRS Act. When the claim has been accepted as an “eligible” claim, then the claimants can proceed to a mediation, or give a Notice of Adjudication.

5.3.6 Whilst I would accept that claims must be evaluated and deemed to be eligible claims before the matter can proceed to adjudication, that does not mean that claimants are restricted in matters raised or mentioned in the WHRS assessor’s report. The prime purpose of the assessor’s report is evaluation of the claim. In many adjudications it has been found that claimants proceed to adjudication claiming only the matters raised in the assessor’s report. However, that is not always the case, and it is not the case in this adjudication.

5.3.7 Once the claim has been deemed eligible, the claimants are free to extend their claims, provided that these are articulated so that the respondents are fully aware of the claims being made against them. This does not mean that the adjudicator can consider claims that do not relate to “leaky buildings”, because the WHRS adjudication process is not a general building disputes tribunal.

5.3.8 For these reasons I do not accept that the wording in s.10 should be taken to indicate some limitation on the jurisdiction of the adjudication process, or restrict the adjudicator to claims for the cost of “work needed

to make the dwellinghouse watertight", and to repair "any damage caused by the water entering the dwellinghouse".

5.3.9 Section 3 states that the purpose of the Act is to provide owners with procedures for the resolution of claims relating to leaky dwellings. Section 42(1) states that an adjudicator may make any order that a court of competent jurisdiction could make in relation to a claim in accordance with principles of law.

5.3.10 Mr Harrison, in his submissions, says that s.42(1) does not widen the extent of jurisdiction, and only allows the adjudicator to make this wide array of orders as they relate to eligible claims. As the claimants are not entitled to claim anything outside the narrow parameters set by the "physical repair work", he says that s.42(1) has no bearing on the matter of jurisdiction.

5.3.11 After the hearing was concluded I was provided with a copy of a judgment by Judge F W M McElrea in the Auckland District Court in *Waitakere City Council v Smith* (CIV 2004-090-1757, dated 28 January 2005). Counsel alerted me to this case which had been argued before Judge McElrea at the same time as closing submissions were made in these adjudications. It was suggested by Counsel that I might find the decision of assistance to me.

5.3.12 Whilst I appreciate that the closing submissions made by Mr Harrison in these adjudications were not the same as those made before Judge McElrea, I certainly have noticed some similarities. In the *Waitakere City Council* case the arguments raised in support of the submission that WHRS adjudicators do not have the jurisdiction to award general damages, the applicant relied substantially upon the views expressed by the Hon Robert Smellie, CNZM, QC, in his article that was published in *NZ Lawyer* (Issue 8, 21 January 2005). I have had the benefit of reading the article.

5.3.13 I respectfully agree with the carefully considered reasoning and the conclusion reached by the Judge. I will quote his summary in paragraph 78 and would respectfully adopt it as my own conclusion to this part of my Determination.

> [78] Standing back and looking at the matter overall, I am clear that the purpose and intent of the Act is not inconsistent with a power to award general damages but is in fact enhanced by it. Both in s 29 dealing with jurisdiction and s 42 dealing with the substance of decisions, Parliament has used the widest language possible, and it would be inappropriate for the courts to try and cut that down so as to impose restrictions on the jurisdiction of the WHRS. The Act should be interpreted in a way that allows it to afford the fullest possible relief to deserving claimants.

5.4 **Bathrooms**

5.4.1 It is submitted by Mr Harrison for the Council that internal leaks and dampness are not within the jurisdiction of WHRS adjudications unless the dampness is caused directly from leaks from the outside of the building. In support of this submission is the wording of the definition of a 'leaky building" (s.5 in WHRS Act) which is "a dwellinghouse **into** which water has penetrated …".

5.4.2 In a brief submission, Mr Casey supports this submission on the grounds that claims under the WHRS Act relate only to water ingress from the outside. Mr McCartney also supports this submission and suggests that the name of the Act clearly indicates that it concerns weathertightness, and leaks in the bathroom have nothing to do with the weather.

5.4.3 Mr Harrison has referred me to Adjudicator Green's determination in WHRS Claim 277 (Smith) where, in paragraph 101 he concludes:

> [101] To summarise the position then, it is sufficient to say that an adjudicator has jurisdiction to determine any claim made in relation to the cause or consequence of the penetration of a Claimant's dwellinghouse by water.

5.4.4 Adjudicator Green was considering whether he had jurisdiction to consider a claim for sub-floor water penetration. His conclusion was that he had jurisdiction because water was entering into the building from the sub-floor area and this was damage in its own right. He was not asked to consider 'internal' leaks, and I do not think that his determination has any direct bearing on the questions that are now being put to me.

5.4.5 Mr Gray, on behalf of the Claimants, has responded to this submission. He says that the Act does not mention from where the water or moisture

must originate, and only states that water must enter (s.10(1)(b)(i)) or penetrate (s.5 – leaky building) the dwellinghouse. A dwellinghouse, as defined by s.5 can be a building or a part of a building.

5.4.6 Mr Gray then points to the meaning of "building" and turns to s.3 of the Building Act 1991 for assistance. This definition is:

> **Meaning of "building"** – (1) In this Act, unless the context otherwise requires, the term "building" means any temporary or permanent movable or immovable structure (including any structure intended for occupation by people, animals, machinery, or chattels); and includes any mechanical, electrical, or other system, and any utility systems, attached to and forming part of the structure whose proper operation is necessary for compliance with the building code;

5.4.7 He then says that, as a building is comprised of elements (these are also defined in the NZ Building Code), any water that leaks or penetrates a building element can properly be described as a leak into the building. In support of this he refers to the NZ Building Code, which does not single out moisture penetrations to the exterior envelope as it is concerned with any unwanted moisture penetration in the whole building.

5.4.8 In conclusion, Mr Gray says that his interpretation is entirely consistent with what the governing legislation is all about, and refers back to s.3 in the WHRS Act, which I have quoted in paragraph 5.3.3 above.

5.4.9 Whilst I find that Mr Gray's submissions are impressive, I do not find them strong enough to persuade me that the WHRS Act covers, or was intended to cover, leaks from within the building. An errant nail through a water pipe would cause a leak, and probably some damage before it was discovered and repaired. This is a building defect, but I do not think that Parliament intended this sort of defect to be resolved under the provisions of this Act.

5.4.10 I accept the point made by Mr McCartney that the title of the Act speaks volumes. Broadly speaking, we are dealing with leaks caused by the weather, and these are leaks that will cause water to enter the building (or its elements) from the outside. The water that leaks out of a shower

cubicle is not a leak caused by the weather, but is caused by water that was deliberately piped into the building.

5.4.11 As a result of this, I find that I do not have jurisdiction to determine the claims made for leaks within the bathrooms or en suites, and so I simply will not consider the claims further.

5.5 **Flat Roof Claims**

5.5.1 It is submitted by Mr Harrison on behalf of the Council that claims for remedial work to the flat roofs on units 2, 8 and 9 are outside my jurisdiction on the grounds that there is no evidence of water entry as a result of these defects.

5.5.2 Mr Gray has responded by saying that there were leaks at the parapet walls, which required the Butynol roofing to be re-laid to create an adequate upstand so that the Butynol needed replacing.

5.5.3 I am not going to consider, at this stage of my Determination, whether these flat roofs were leaking, or whether Mr Gray's point about the parapet walls is correct. I will need to review all of the relevant evidence and make certain factual findings. However, it is appropriate to consider the submission made by Mr Harrison as a principle. That is, if the flat roofs do not actually leak but are just badly built, is the claim still within my jurisdiction?

5.5.4 As a starting point, I do accept that the WHRS does not provide a service for the resolution of general building disputes, and usually can only properly consider claims that relate to "leaky buildings". I have already mentioned that the definition of a "leaky building" is given in s.5 of the WHRS Act as "a dwellinghouse into which water has penetrated as a result of any aspect of the design, construction, or alteration of the dwellinghouse, or materials used in its construction or alteration".

5.5.5 The normal layman's interpretation of the word "leak" conjures up a vision of water seeping, dripping or even flowing through cracks or holes. There is an expectation of seeing, or at least finding evidence of, moisture entering into the structure or into the inside of the dwelling. However, water can penetrate into a building when it has found a way

through (or around) the weatherproofing layer, and this will not always be visible from the inside of the dwelling.

5.5.6 Mr Harrison has referred me to the determination by Adjudicator Green in WHRS Claim 277 (Smith) and I will quote from paragraph 97 of that Determination:

> … it follows that water need only penetrate the outermost building element of a dwelling (if it was not intended by design, that water should penetrate that particular element, or penetrate that element to the extent disclosed in any particular case) for the dwelling to be defined as a "*leaky building*" and for a resulting claim to meet the eligibility criterion under section 7(2)(b). For example, a coat of paint or a protective coating of some description, or a particular cladding material may in some cases be the outermost building element into which, or through which, water has passed, thus qualifying the dwellinghouse concerned as a dwellinghouse into which water has penetrated …

5.5.7 In the case of butyl rubber roofing, there will need to be evidence to show that water has penetrated the rubber membrane, or entered by getting around an inadequate upstand, lap or joint with other materials. If there were such evidence, I consider that the defect in the roofing would be within my jurisdiction, and I will proceed to rule on the claim on its merits.

5.5.8 If Mr Gray is correct about leaks in the parapet walls, then the necessary rectification work becomes a part of the repair costs for that (or those) leak(s). If the Butynol had to be lifted or repaired as a consequence of the parapet leaks, it would make no difference to the issue of jurisdiction concerning the Butynol roof itself.

5.6 **General Damages**

5.6.1 I have already addressed these submissions and concluded that I am empowered by the WHRS Act to award general damages for anxiety, stress, pain and suffering, if I am satisfied that the claims are sustainable.

5.7 **Consequential Losses**

5.7.1 For the same reasons that I have concluded that I am empowered by the WHRS Act to award general damages, I find that I have the power to consider other claims for consequential losses. These would include, but

not be restricted to, claims for 'stigma' damages, loss of rental, storage fees and other costs that may flow from the defects and remedial work.

6. FACTUAL ANALYSIS OF CLAIMS

6.1 In the following sections of my Determination I will consider each heading of claim, making findings on the probable cause of any leaks and considering the appropriate remedial work, and its costs.

6.2 I will not be considering liability in these sections. Also, I will not be referring to the detailed requirements of the New Zealand Building Code, although it may be necessary to mention some aspects of the Code from time to time. Generally I will be trying to answer the following questions for each alleged leak.

- 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?

6.3 It is often difficult to identify with certainty exactly where buildings leak, and why they leak. This dwelling is no exception. However, as the Owners have identified a number of areas in which they say there were leaks, I am going to break my consideration into various areas. I will, therefore, focus on the following areas:

- Stucco, or external plaster cladding;
- Weatherboard cladding;
- Windows and door penetrations;
- Waterproofing of the deck;
- Balustrades;
- Roofing;
- Bathrooms.

6.4 I have received the views of several experts in this adjudication, and each has given me their opinion on the technical aspects of these claims. Obviously, an expert's ability to make helpful and informed comment is improved when they have been able to inspect before, during and after remedial work has been

undertaken. I will have to take this into account when trying to determine matters on which the experts do not agree.

6.5 Some criticisms were raised by both Mr Jones and Mr Alexander about the failure to notify them when remedial works were being undertaken, and the difficulties they experienced in gaining access to inspect some of the properties. Therefore, I have reviewed the evidence in respect of what notification was given by not only the Owners of this unit, but also the Owners of the other properties in Ponsonby Gardens.

6.6 Three of the unit Owners had started proceedings in the District Court in November 2002 against the Council and other defendants. Therefore, the Council was put on notice that problems existed with three of the units, and could have taken steps to inspect the properties. Mr Alexander's first inspection was not until 8 March 2003 and, it was my understanding that no prior arrangements were made with Dr Berry to inspect her unit at this time, so that it was not surprising that Mr Alexander was not able to inspect the inside of unit 8 on this occasion.

6.7 It is reasonably clear to me from the evidence that Mr Gray was particularly helpful when it came to providing access to the properties and information about the remedial work that was taking place at Ponsonby Gardens. All of the Owners gave written notice to the Council and to Mr Manning when they had decided to undertake the remedial work. All of the Owners obtained Building Consents from the Council before starting on their remedial work. All of the remedial work was organised by Mr Smith of Sonic, and I was told that he was always available and willing to show the various experts around the properties. I am not sure what else these Owners should have done to enable the Council, the other Respondents, or their experts to inspect their units before, during or after the remedial work was done.

6.8 I appreciate that Mr Harrison did tell me, whilst Mr Gray was cross-examining Mr Jones about the alleged lack of access (on the eleventh day of the hearing), that the Council did not intend to make an issue about access. However it had been raised in the witness briefs as if it were a serious issue that had prevented the Council's experts from checking on the remedial work. Therefore it has to be properly considered, and I would find that the Owners gave all Respondents

more than adequate notice and opportunity to inspect their dwelling and the remedial work.

7. STUCCO (External Plaster Cladding)

7.1 The external walls of the dwelling were shown on the building consent drawings as a mixture of horizontal weatherboards and solid plaster. The solid plaster was described (and drawn) as 20mm cement plaster with expanded metal lathing, on building paper, on H3 treated 50 x 25 battens, on building paper – on the timber wall framing. This is what would generally be described as solid plaster on a non-rigid backing with a ventilating cavity.

7.2 It is accepted by all the parties that the method of external plastering was changed from that shown on the consent drawings. A rigid backing was used, without a ventilating cavity. The actual construction was 20mm cement plaster with expanded metal lathing, on Triple 'S' backing, onto the timber wall framing. It does not appear that this change was noted on the building consent documents, or recorded on the Council's files.

7.3 This change in the method of external plastering has caused a number of criticisms, and led to an extensive volume of evidence from many witnesses. I will need to consider the following:

(i) Did the use of Triple 'S' contravene the Building Code?
(ii) Should a ventilating cavity have been formed?
(iii) Was the Triple 'S' installed correctly?

7.4 Did the Use of Triple 'S' contravene the Building Code?

7.4.1 I was shown a BRANZ Appraisal Certificate No 185 (1994) for Triple 'S' sheeting. Strictly speaking, this was a BTL Appraisal Certificate, but as Building Technology Limited ("BTL") is a company wholly owned by BRANZ, I think that it is more readily recognised if the more familiar style of title is used. This Certificate makes it quite clear that, if Triple 'S' is used in accordance with conditions of the Certificate (i.e., the sheeting is manufactured by Fletcher Wood Panels Ltd, and installed in accordance with their written instructions) then it will comply with NZBC clause B2 (durability), E2 (external moisture) and F2 (hazardous building materials).

7.4.2 All of the experts did agree that Triple 'S' was a product that was in reasonably wide usage in 1995-96, and that it was accepted that it would comply with the requirements of the Building Code if installed properly.

7.4.3 I conclude that the introduction of Triple 'S' into this building would not constitute a breach of the Building Code. If it had been included in the drawings for a building consent, I have no doubt that it would have been accepted (as a material) by the Council. If a change had been formally requested by the builder, and the change included the use of Triple 'S', I also have little doubt that the Council would have approved the change.

7.5 **Should a Ventilating Cavity have been Formed?**

7.5.1 In his assessor's report Mr McIntyre stated that the omission of a drained cavity behind the Pinex Triple 'S' was not in accordance with good trade practice, or the details depicted in the BRANZ *Good Stucco Practice* booklet. When further questioned on this statement at the hearing, Mr McIntyre explained that he did not consider Triple 'S' to be a rigid backing as defined by E2/AS1, and a non-rigid backing always needed to have a ventilated cavity between the plaster and the wall-framing.

7.5.2 The BRANZ *Good Stucco Practice* booklet was first published by BRANZ in February 1996. It is not a part of the Building Code. Mr Cook explained to me that it was a *Good Practice* guide put out by BRANZ to bring together information already in the marketplace to assist designers, builders and tradesmen when constructing buildings with solid plaster external claddings. This seems to be confirmed by the Editorial Note at the beginning of the booklet.

> Applying stucco is highly skilled work in which the finished quality relies greatly on the plasterer. Current practice appears to be based more on tradition and site experience than on scientific knowledge. Recommended practices in this publication rely heavily on the opinions of experienced plasterers and on the technical information readily available at the time of publishing. The contents are not claimed to be comprehensive but are aimed at meeting an industry need in a field where alternative information appears to be lacking. The audience for this publication is plasterers, builders, building officials, designers and students of building.

7.5.3 Mr McIntyre's comments regarding the need for a cavity can be better appreciated when one reads page 31 of the BRANZ booklet. There it says that Triple 'S' can be used in two ways – either as a rigid backing covered over with building paper, or as a replacement for building paper with the plaster being applied directly to the sheets. However, as was pointed out by other experts, the wording of the BRANZ booklet is potentially misleading, and the technical literature issued by Fletcher Wood Panels together with the BRANZ Appraisal Certificate No 185 (1994) confirm that Triple 'S' is always used as a rigid backing – whilst the two options relate to the use of building paper.

7.5.4 This ambiguity is clarified by Figure 21 on page 31 of the BRANZ booklet, which shows Triple 'S' fixed directly to the wall framing (without a cavity) and flashings and cover strips over all joints. My attention was also drawn by Mr Maiden to a comment on page 32 of the BRANZ booklet,

> Because of the time involved in protecting "Triple 'S'" joints correctly, many plasterers prefer to cover it entirely with building paper. **BRANZ recommends** this approach.

7.5.5 Some of the experts were of the opinion that this recommendation by BRANZ should have been more strongly put. Both Mr Cook and Mr Maiden considered that the risks of failures were too great, and the relatively low cost of building paper made it foolhardy to proceed without applying building paper over the entire external surface. They said that Triple 'S' was extremely absorbent and that it was difficult to fully protect all the exposed edges (at joints, angles and abutments) with strips of plastic or building paper.

7.5.6 Mr Harding explained that Triple 'S' tends to swell when it absorbs moisture, and that it would not regain its original shape or thickness when it was allowed to dry out. This reinforces the concerns expressed by the experts that the boards must be kept dry at all times during construction, and all exposed edges and surfaces fully protected against the possibility of moisture ingress.

7.5.7 However, to return to the question of a ventilating cavity. Mr Alexander told me that, although rigid backings behind stucco plaster generally

require building paper to be applied over the top of the rigid backing, in the case of Triple 'S' this was optional. I would accept this as being the correct interpretation of the technical documentary evidence. This means that a ventilating cavity would not be required behind rigid backings, and as Triple 'S' was deemed to be a rigid backing, it would not have required a cavity in order for the system to comply with the Building Code.

7.5.8 Mr Maiden has, however, pointed out that times have changed since 1995/96. A ventilating and drained cavity is now required by the Council behind all rigid backings and solid plaster claddings. This has no relevance to my Determination other than to acknowledge that opinions have changed over the last eight to ten years.

7.6 **Was the Triple 'S' installed correctly?**

7.6.1 Mr McIntyre noted in his report that the Pinex Triple 'S' sheeting as installed did not comply with good trade practice, or with the details shown in the BRANZ *Good Stucco Practice*. He went on to say that the sheets appeared to be simply butted together with no attempt to seal the joints against water ingress.

7.6.2 He also noticed that the exterior plasterwork was randomly cracked in several locations, and that the cracks were both horizontal and vertical. He attributed the cracking to a range of possible problems, but he was in no doubt that water was penetrating the plasterwork and leaking into the building.

7.6.3 In Mr McIntyre's opinion the backing to the plaster was a contributing cause:

> The Pinex Triple S sheeting as installed does not comply with good trade practice or with details depicted in BRANZ *Good Stucco Practice*, eg: the sheets appear to be simply butted together with no attempt to seal the joints against water ingress, and there is no drained cavity provided.
>
> The Pinex Triple S sheeting has failed due to moisture ingress. Therefore it has not met the durability requirements of NZBC clause B2.3(b). This states that: "For services to which access is difficult, and for hidden fixings of the external envelope and attached structures of a *building*: the life of the *building* being not less than 50 years".

7.6.4 Mr McIntyre's photo 7 (on Unit 2) hows an example of where a horizontal butt joint in the Triple 'S' has had no flashing or protection. He told me that he noticed that there were no cover strips or flashings on several of the joints he inspected, which caused him to note it in his report (see above).

7.6.5 Mr Alexander had recorded different observations and has seen the two flashings made out of building paper which, he told me, were visible on at least six photographs. When asked, he was only able to show me one photograph. Mr Cook was adamant that there were no adequate flashings or cover strips over many of the joints, but as with Mr Alexander, only limited photographic evidence was available.

7.6.6 Mr Smith told me that no Z flashings were provided on horizontal joins and no flashings at the corners, but 100mm wide strips of black building paper were nailed over most joins in the sheets. On being questioned, he did agree that the building paper was fixed into a Z profile on most horizontal joins, but the method of fixing by nailing did not ensure that the cover strips were working effectively.

7.6.7 On balance, I prefer the evidence of Mr McIntyre on this matter, and conclude that although the builders had attempted to cover all of the exposed joins in the Triple 'S', they were not successful. Some joins were not covered, and some were covered inadequately. The Triple 'S' was not installed correctly.

7.7 **Did the Stucco Leak?**

7.7.1 I do not think that there was a single witness who said that this dwelling did not leak. There is a considerable body of evidence to show that water was leaking into this building either through or from around the stucco cladding. The Triple 'S' was found to be extremely wet in some areas. Therefore, I find that leaks existed through or around the stucco.

7.8 **What was the Probable Cause of the Leaks?**

7.8.1 Mr McIntyre suggested that there were a number of probable reasons why the stucco was leaking and these included:

- lack of control joints;
- inadequate clearances at base of plaster;
- inadequate flashings at junctions with other claddings;

(and other causes that I will consider under other headings).

7.8.2 In his report Mr McIntyre noted that the plaster showed "random horizontal and vertical cracking in several locations". Cracks will allow water to penetrate the plaster, but he was unable to say whether the cracking was causative of the leaks, or whether the cracking was the result of moisture penetrating the plaster and causing expansion in either the backing or timber framing.

7.8.3 Mr Cook also gave a list of defects in the external plaster claddings, but he also was reluctant to isolate any particular defects or faults as being the cause of the leaks. He summarised his views as:

> There are so many defects in the installation of the stucco as it is installed at Ponsonby Gardens that no amount of maintenance would have prevented the cladding system from failing.

7.8.4 Mr Alexander, in his first brief of evidence, listed nine defects that he considered to be responsible for most of the leaks. Some of these defects I will return to when I consider other aspects of the construction, but those relating to the stucco were::

- poor connections between the plaster of the balustrade walls and the weatherboards (Alexander item 3);

- poor connections of the plaster cladding to walls and adjacent weatherboard walls (Alexander item 4);

- cracks in plaster (Alexander item 8).

7.8.5 It is significant and helpful to note that Mr Alexander agreed with Mr Cook's summary (given in paragraph 7.8.3 above) that the defects were so extensive that they required and justified the replacement of the entire external plaster claddings, on this unit (and also on other units in Ponsonby Gardens).

7.8.6 Having considered all of the evidence from the experts, I generally prefer that given by Mr McIntyre about causation. Therefore, I conclude that the probable causes of the leaks through the stucco were the inadequate clearances at the base of the plaster (either at decks, abutments or ground level), the inadequate junctions between plaster and weatherboards, and the failure to flash or seal the exposed edges and joins in the Triple 'S'.

7.9 **What Damage was Caused by the Leaks?**

7.9.1 The remedial work has already been undertaken. The extent of the damage caused by the leaks can be accurately assessed and quantified. Mr Smith, the remedial builder, told me what had been uncovered during the remedial process, and none of the parties or their experts have suggested that his evidence on these matters is unreliable.

7.9.2 The leaks had caused large areas of the Triple 'S' to get wet which, in turn, transferred moisture into the wall framing. The photographs speak for themselves (refer to Owners' photographs 2, 3, 4, 7, 8 and 17 as examples) and illustrate that some of the timber framing had reached an advanced state of decay due to the moisture. I appreciate that some of this damage will have been caused by other leaks (which I have yet to consider), but I accept that the extent of the damage is that described to me by Mr Smith and included in his remedial work.

7.10 **What Remedial Work was Needed, and at What Cost?**

7.10.1 I have already addressed these questions in the previous section of this Determination and will return to the topic of the cost of remedial work when I have completed my review of all areas of alleged defects in the dwelling.

8. WEATHERBOARDS (External Cladding)

8.1 Some of the external walls of the dwelling were clad with horizontal timber weatherboards. These were described as 150mm timber bevelled back weatherboards on building paper.

8.2 In Mr Cook's report dated September 2002 he commented that the timber weatherboards were taken hard down onto deck surfaces, and in one place

below the external ground level. None of the other experts contested this observation, nor did they disagree with the opinion that this represented a defect in the work.

8.3 Mr Smith told me that the weatherboards were buried into the concrete paving at one point at the front of the house, and taken down hard onto the surface of the western deck at the first floor level.

8.4 Did the weatherboards leak? I accept the evidence of Mr Smith that moisture had been sucked into the bottom weatherboards in the two areas that he mentioned and had caused the bottom wall plate to become damp.

8.5 What was the probable cause of the leaks? It was Mr Cook's opinion that the cause of these leaks was the failure to provide an adequate gap between the bottom of the weatherboards and the deck surface or adjacent ground levels. He tells me that this is a breach of the Building Code, which has caused water to penetrate the dwelling. I accept Mr Cook's opinion on this matter.

8.6 What damage was caused? The damage caused by these defects was relatively minor, when compared with the damage caused by other leaks. However, the evidence is that the lower weatherboards were removed (and replaced), and the bottom plate was replaced where it had started to rot or decay. Mr Smith did not isolate the actual cost of this work as it was carried out at the same time as the other remedial work, and his company did not attempt to isolate the costs. If I find that I need to separate these costs, I will place an approximate cost of $900.00 on the remedial work to the weatherboards, which is based on the extent of weatherboard replacement as described by Mr Smith.

9. WINDOW AND DOOR OPENINGS

9.1 It is difficult to isolate the problems with the window and door openings from the problems with the stucco itself. However, as there are some issues that are specific to the windows and doors, I will review them at this stage.

9.2 Mr Cook, in his September 2002 report, identified the following potential defects in or around the window and door penetrations:

- no flashing to sill of windows;
- no flashing to sides of windows;

- stucco hard down onto window head flashing;
- flat stucco at window sills holding water;
- no flashing at garage door jambs;
- installation of head flashings to windows needs attention.

9.3 Mr McIntyre, in his assessor's report, noted that there appeared to be no side or sill flashings around the windows, that the head flashings were not turned up at ends and were an incorrect profile of flashing for the windows. He also criticised the fact that the stucco was finished hard down onto the top of the window head flashings, thus preventing water from draining to the outside.

9.4 When the remedial work was undertaken, no sill, side or jamb flashings were found around any of the windows. Mr Alexander says that E2/AS1 in the Building Code requires head flashings, but not sill or side flashings. This Acceptable solution requires scribers or proprietary seals between facings and claddings, and it is Mr Alexander's opinion that it was widely regarded as acceptable in the industry in 1995 to use sealant around window openings.

9.5 Mr Cook says that the failure to install sill flashings, or at least provide a suitable slope and flexible joint at the window sills, has contributed to water penetration. Mr Smith told me that the Triple 'S' backing was wet around the sills of all the windows. This indicates to me that Mr Cook is probably correct and there have been consistent failings at the sills of the windows.

9.6 Another point that is raised by Mr Cook is that the windows in this dwelling are not face-fixed but recessed. If the windows had been face-fixed he indicated that he would agree with Mr Alexander in that a properly applied sealant behind the window flange would have been considered satisfactory in 1995. But when the windows are recessed into the cladding, he pointed out that the BRANZ *Good Stucco Practice* booklet recommended sill flashings (figure 5 – page 14), and also recommended side or jamb flashings (figure 7 – page 15). I could add that this booklet also recommends side flashings for face-fixed windows (refer figure 6).

9.7 The Building Code is, of course, a performance document. It outlines the performance standards that are to be met, but does not tell you how to achieve these standards. As I have mentioned E2/AS1 mentions "scribers or proprietary seals between facings and claddings". The windows in this dwelling

had no scribers fitted, and the evidence of Mr Smith was that sealant was applied around the windows to the surface of the plaster-to-window junction, which does not equate to a proprietary seal "between facing and cladding". This seems to confirm Mr Cook's view that the windows, as installed in this dwelling, did not meet the requirements of the Building Code.

9.8 The evidence from Mr de Leur was predominantly concerned with the actions and responsibilities of building inspections in 1995/96. He says that there was no requirement in the Building Code for side or sill flashings, and that the BRANZ *Good Stucco Practice* booklet was not generally available until late 1996. Therefore, he says, the booklet was not available to Council inspectors on this project.

9.9 Mr Cook disagrees. He says that the BRANZ booklet did not produce new material, but tended to bring together in one publication details and recommendations that were already known within the Industry. For example, he drew my attention to BRANZ *Bulletin No 304*, which was published in February 1993, entitled *Flashing Design*. The *Bulletin* starts off:

> Current trends in building have been to rely on sealants instead of flashings to provide weatherproofing to openings, junctions between materials and the like.
>
> Sealants have their place in building, but they are often expected to perform functions for which they were not designed. In many instances there is no acceptable substitute for good flashings.
>
> This Bulletin examines the functions of flashings, and outlines recommended design criteria to ensure flashings are properly used. Installing domestic flashings is detailed in Bulletin 305.

9.10 I prefer the evidence of Mr Cook on this matter and I consider it relevant (but not determinative) to take into account the information provided in the BRANZ booklet. It seems to me to indicate the standards that were in the building industry at that time.

9.11 Did the windows and doors leak? There is no evidence to show that any of the doors leaked, although the absence of a head flashing above the garage door may have contributed to the leaks beside the door jambs. I am satisfied that the evidence showed that water entered the stucco backing from around the

windows. The windows themselves do not appear to have been leaking, but they were incorrectly installed.

9.12 What was the probable cause of the leaks? I prefer the opinion of Mr Cook on this matter. Water entered at the sills because the plaster was taken up to the aluminium window flange with no slope to shed water to the outside. Furthermore, the sealant was applied to the junction after plastering, rather than being used in the correct method as a sealant between two surfaces. As there was no sill flashing, water entered the Triple 'S' backing.

9.13 It is also suggested that it was probable that some water leaked in around the sides of the windows, and collected at each end of the sills. However, this opinion, which was given by Mr McIntyre, can only be classified as intelligent speculation as no direct evidence was given to me to show that water did leak in and around the sides of the windows. I would put it as a distinct possibility, but not a probability.

9.14 What damage was caused? The damage caused by these leaks was reasonably significant, and was one of the reasons why the stucco cladding had to be replaced.

9.15 What remedial work was needed, and at what cost? It is not going to be possible to isolate the costs of rectifying the stucco around the windows from the total costs of the re-cladding. Therefore, in the event that I will need to separate these costs (when considering liability and the like) I will have to rely upon a percentage of the total re-cladding costs. My assessment of that percentage is 30%, based upon the extent of the area of stucco that is adjacent to, or beneath the window and door openings.

10. DECKS

10.1 The problems that Mr McIntyre identified with the decks were::

- difference between deck and internal floor level should be 150mm;
- deck construction has failed and let water penetrate past the membrane into the structural framing, thereby causing decay;
- decks did not have adequate falls, and were ponding in places.

10.2 The decks were shown on the building consent drawings to be a "Chevaline Dexx on ply to falls" with a lowered internal gutter across one end, discharging into a rainwater head. The decks were actually finished with a product called Aquadex, which is a high-build acrylic glass-reinforced flexible waterproof membrane.

10.3 Many of the witnesses were under the impression that the deck membrane had been altered from Butynol to Aquadex, and their evidence was directed at who authorised this change. This may have been the case on other units in Ponsonby Gardens, but was not the case with Unit 9. None of the experts suggested that Aquadex was inferior to Chevaline Dexx, so I need not dwell on this matter.

10.4 **Did the decks leak?** Mr Smith told me that water was found to have been leaking in from the corners of both decks, below the doorways into the bedrooms and around the deck outlets, and into the ceiling framing of the lounge and the garage. I was shown photographs of the framing in these areas and the signs of dampness and decay are self-evident. In the absence of evidence to the contrary, I accept that the decks did leak.

10.5 **What was the probable cause of the leaks?** It was the view of Mr McIntyre that the three problems he had identified were all contributing to the failure of the waterproofing membrane. The inadequate step-down at the doors to the bedrooms was, in his opinion, probably the main reason that there was a leak at that point. A failure in the membrane in the corners by the en suite and bathroom, together with the inadequate step-down, pointed to these causes for the leaks into the ceilings, en suite and bathroom.

10.6 None of the other experts who gave evidence contradicted Mr McIntyre's views on causation. Their evidence was directed more at the type of waterproofing membrane that was used, the technical information that was available, and the problems of ensuring that the membrane had been properly applied.

10.7 I accept that the probable causes of the leaks in the decks were the failure to provide an adequate step-down between the deck level and the internal floor levels, and a failure to lay the membrane properly. I am not convinced that the failure to have adequate falls was a major contributing factor, although it may

have caused more extensive leaking if there were ponding in areas where the membrane had failed.

10.8 Before I leave the topic of causation, I should mention the helpful and informative details given by Mr Alexander and Mr Maiden on liquid-applied waterproof membranes. In Mr Alexander's opinion, the leaks were probably caused by inadequacies in the application of the membrane, and what has happened on this dwelling is a typical and common failure with this product. He told me that failure of this type of membrane is a feature of many, and he put it perhaps as high as 50%, of the building defect cases that he investigated. Mr Maiden pointed me to several publications that were available at that time, including a BRANZ warning stating that "lack of slope which results in water ponding which in turn can accelerate the deterioration of the membrane". His concluding opinion was that although liquid-applied waterproof membranes had become popular, time had proven that they did not meet the durability claims made by the manufacturers.

10.9 **What damage was caused by the deck leaks?** There was a considerable amount of damage caused to the framing timbers in and around the decks, and damage to the lounge ceiling at the west end, and in the garage ceiling below the east deck. Much of the replaced rotten timbers changed by Sonic relate to this damage.

10.10 **What remedial work was needed, and at what cost?** The costs of repairing the damage caused by the deck leaks were not all kept separate by Sonic. I have been told that the damage caused in the en suite and the bathroom by the deck leaks was $6,154.00, and a similar amount of remedial work was done at the other end of these decks, beneath the bedroom doors. In addition to this, the damage around the outlets and the re-surfacing of the decks would have needed to have been done.

10.11 Based upon the evidence and information given to me I assess that the total costs of repairing the damage caused by the deck leaks was $16,100.00, plus a proportion of the replaced rotting timber costs.

11. BALUSTRADES

11.1 The problems identified by Mr McIntyre relating to the balustrade walls around the decks were given as:

- Appears not to be any saddle flashing between top of wall and stucco cladding;

- No cap flashing to top of balustrades;

- Handrail steel supports penetrate the top of the balustrade, and leak.

11.2 The balustrades around the decks on Unit 9 were shown on the building consent drawings as a solid balustrade 1.0m high, with a timber handrail and sections of cedar trellis. This is confirmed by the typical handrail/balustrade detail (drawing A3.4.2) which shows a solid balustrade 1000mm high with a 200 x 50 hardwood capping along the top. This also shows that some sections were intended to be open cedar trellis.

11.3 I would also note that different details were shown on the drawings for other units at Ponsonby Gardens. The most common details were a solid balustrade, with compressed sheet linings on the inside face, stucco on the outside face, and a 200 x 40 hardwood capping along the top. However, other details show glass panels, and one detail indicates a 50mm diameter hardwood rail on steel brackets on top of the solid balustrade.

11.4 The balustrades were constructed around the front deck as solid to 900mm high, clad on both sides and top with Triple-S and plaster. Around the top was a 50mm diameter steel pipe handrail supported on 15mm rod brackets, the brackets being let into the top of the plastered capping. The balustrades were constructed around the rear deck as solid to 900mm high, clad on both sides and top with Triple-S and plaster. Over the top of this balustrade was a timber capping fixed to the top of the plaster, so that the overall height of the balustrade was less than the 1.0m required by the Building Code. It would seem that the rear deck was originally built the same as the front deck, but the handrail was removed and replaced by a timber capping at some time.

11.5 **Did the balustrades leak?** Mr Smith told me that water damage was found when the stucco was removed from the top of the balustrades, and it was particularly noticeable at the points where the handrail supports penetrated the top of the balustrades. There were also signs of leaking at the points where the balustrade joined the main house. I conclude that the balustrades leaked.

11.6 **What was the probable cause of the leaks?** Most of the experts appeared to agree with Mr McIntyre's views. For example, Mr Alexander considered that the flat top to the balustrade wall without waterproofing, and the handrail penetrations into the top of the balustrade wall, were two of the main reasons that leaks had occurred on this building. Mr Cook was highly critical of the lack of a suitable slope to the top of the balustrade, and referred me to BRANZ Bulletin 305 (February 1993) which showed parapet flashings "laid to a fall to drain water off"; and the BRANZ *Good Stucco Practice* booklet, which showed a 15° minimum slope, or 30° if heavily textured.

11.7 Therefore, I will conclude that the probable causes of these leaks into the balustrade walls were the inadequately sealed handrail bracket fixings, and the flat-topped balustrade wall with no cap flashing or underflashing.

11.8 **What damage was caused by these leaks?** The water had penetrated the Triple-S backing and started to cause decay in the timber framing, so that it was necessary to remove all the plaster cladding to effect repairs or replacement of damaged timbers.

11.9 **What remedial work was needed, and at what cost?** The balustrade walls were essentially re-built, and this would have necessitated cutting back and repairing the stucco cladding on the dwelling at both ends of the balustrade. The costs of this work were not kept separate by Sonic and, indeed, it would have been virtually impossible to try to keep them separate from the main re-cladding costs.

11.10 The area of stucco on the balustrades represented approximately 20% of the total area of stucco that was replaced during the remedial work. If the values of the repairs to the timber weatherboards and the decks are deducted from the $56.222.00 costs (refer paragraph 4.8 above), 20% of these residual costs is $7,844.40. This is the figure that I am going to enter as being the actual repair costs to the balustrades.

12. ROOFING

12.1 The roof on this dwelling appears to have been a problem from the time the Owners purchased, or at least soon thereafter. After Taradale had attended the house to repair leaks from the roofs, Mr Manning (in November 1997) asked the

Architect to inspect the roof. The report that came back was not very complimentary about the roof, as it said:

> The problems with the leaking roof can almost certainly be attributed to poor workmanship on the part of the original roofing contractors. There are several examples of work which falls well below current accepted standards of trade practice.
>
> The remedial work undertaken by Topline Plumbing appears to have rectified the problems and although not ideal, has been achieved without having to dismantle and/or demolish parts of the building which may not be justified in this case and could well involve considerable expense.
>
> There are however two areas which still concern me:
> [Sealing of barge roll; and the internal gutter are described in some detail.]
>
> In summary, it is very difficult to observe poor workmanship which has since been covered by more recent remedial repairs. I can only comment on what is visible and although the remedial work may appear sufficient, there can be no guarantees that the roof will now perform as required.
>
> Under ideal conditions, the only proper course of action would be to remove the roofing and cladding in the areas in question and resolve to an acceptable trade practice standard. As mentioned before, this can involve considerable expense and must be weighed up against the long term costs of maintaining a less than ideal roof construction.

12.2 In August 1998 workmen engaged by Taradale again visited to carry out repairs on the roof. I have not been told what the problem actually was, or what the workmen did in any of the repair visits, but the Owners told me that water was still leaking into the dining room and lounge ceilings in early 1999.

12.3 When they could get no active response from Taradale, the Owners engaged Joyce Group to inspect the roof, and then employed a roofing contractor to carry out the necessary repairs. They started proceedings in the Disputes Tribunal for the recovery of these costs from Mr Manning. The repairs seem to have stopped the leaks that emanated from the roof.

12.4 In May 2002 Mr John Sheriff inspected the house, but made no comments about the roof or roofing. When Mr Cook visited in September 2002, he does not appear to have found any problems with the roof as it is not mentioned anywhere in his report.

12.5 Mr McIntyre, in his assessor's report in April 2003, noted that the fall provided was minimal and the ply substrate under the flexible membrane appeared to be inadequate. However, his photograph 8 shows a very definite cross-fall over the Butynol flat roof, and his only criticisms appear to be an inadequate seal around the gas flue, and some poor detailing at the edge of the small flat roof over bedroom 3.

12.6 The building consent drawings show this flat roof as being Chevaline Dexx on 17.5mm CpD plywood laid to falls to gutter. The degree of fall is not stated. This flat roof was finished with Butynol rubber membrane, but no issue was taken with that apparently unauthorised change.

12.7 The Butynol roof was taken up and Mr Smith told me that he found that the plywood was in good condition and the roof construction was sound. He says that the membrane was in poor condition.

12.8 **Did the roof leak?** There was no evidence to show that water had penetrated through (or around) the roof membrane. Mr Cook says that the flat roof would have leaked, and it was only a matter of time, but no one was prepared to say how long the roofing membrane would keep out the water.

12.9 It is outside my jurisdiction to allow claims which have no evidence to show that there were leaks. Water has not penetrated into this dwelling as a result of any problems with the roof (with the exceptions of the previous leaks that were fixed between 1996 and 1999). Therefore, I cannot allow the claims for the repair costs to the flat roof areas and they will be dismissed.

13. QUANTUM

13.1 The Owners' claims for the remedial building costs is based upon the invoices for the work from Mr Paul Smith of Sonic Ltd. Some of the witnesses have commented on the relevance and/or accuracy of these costs, so that I do need to decide whether any adjustments need to be made.

13.2 Mr Jones, who was an expert witness called by the Council on quantum, has not attempted to establish what he would consider as being "reasonable quantum" because he says that there is a lack of information to support the claims, specifically as regards the building work. Therefore, Mr Jones did not undertake

a full quantum analysis, and was reasonably limited in his agreement or criticisms of the actual costs invoiced by Sonic Ltd.

13.3 Other than challenging the relevance of claiming the "Bathroom" repairs, Mr Jones and the other experts have made no detailed comments on the claimed remedial building costs.

13.4 I have reviewed these costs and the evidence relating to the quantum, and I can see no reason for altering or rejecting the costs claimed by Sonic. The work was necessary to repair the leaks, and the costs of the work appear to be reasonable. The Sonic costs were $67,520.00 + $7,235.00 for removal of rotting timber, or a total of $74,755.00. I have attempted to allocate these costs to the separate repair areas as outlined in the previous sections of this Determination. Therefore, I find that the repair costs were:

• Stucco (as section 7)	$ 26,162.42
• Weatherboards (section 8)	900.00
• Door and window openings (section 9)	7,747.43
• Decks (section 10)	18,632.25
• Balustrades (section 11)	10,014.90
• Flat roofs (as para 4.8)	3,290.00
• Bathrooms (as para 4.8)	8,008.00
	$ 74,755.00

14. OTHER CLAIMS

14.1 There are a number of other claims that have been made by the Owners that are either associated with, or consequential to, the remedial work carried out by Sonic Ltd. These are:

- Expert's reports;
- Architect fees;
- CAR Insurance;
- Consent fees;
- Exterior painting;
- Curtain cleaning;
- Carpet cleaning;
- Interest.

[Note that claims for recovery of costs, the stigma claim, and general damages will be considered later in this Determination.]

14.2 **Expert's Report**

14.2.1 There are two claims by the Owners for the recovery of fees paid to building consultants. The first is a fee of $225.00 charged by Mr John Sheriff of Project 2000 for his report in May 2002, and the second is a fee of $4,004.62 paid to Joyce Group in October 2002 for the inspection and report by Mr Cook.

14.2.2 I consider that it is reasonably foreseeable that the Owners would need to seek professional advice when faced with the problems concerning the leaks into this dwelling. These costs were incurred prior to the Owners lodging a claim with WHRS and are not a part of the costs of the adjudication proceedings.

14.2.3 I find that the charges from these two consultants are reasonable. I will allow this claim by the Owners in the full amount of $4,229.62. As the report covered practically all the claimed defects, I will apply this cost proportionally across the costs listed under paragraph 13.4 above.

14.3 **Architect Fees**

14.3.1 This is a claim for $6,829.88 for the fees charged by Jessop Architects Ltd for preparing the plans and specifications for the necessary building consents, and to explain to the builders the extent of the remedial work.

14.3.2 It is realistic for the Owners to seek professional help in preparing drawings and obtaining the necessary consents for this remedial work. The Owners did not carry out any alterations at the same time as the remedial work, and Mr Jones is mistaken when he says that alteration works were undertaken which created the need for a resource consent.

14.3.3 Mr Jones has told me that a Resource Consent should not have been needed for the remedial work. The Owners say that they were advised that a Resource Consent was required, because the remedial work included the introduction of a ventilating cavity which altered the exterior envelope, albeit marginally.

14.3.4 The evidence from other experts on this matter was inconclusive. I note that of the seven dwellings in Ponsonby Gardens, only one proceeded without a Resource Consent having been obtained, although three units had no alterations made to the exterior envelope (other than the re-cladding work). This indicates to me that there was an element of inconsistency in the air. However, in the end, I must prefer the view of Mr Jones, and find that the Resource Consent costs should not be included as a part of the building remedial work as it was not needed.

14.3.5 As a result of this, I will allow the following as architect's fees directly associated with the remedial work:

• Quoted fee	$ 5,650.00
• Lodging for building consent	125.00
• Proportion of expenses	381.15
• GST	769.52
	$ 6,925.67

As the architect's work covered all the claimed defects, I will apply this cost of $6,925.67 proportionally across the costs listed under paragraph 13.4 above.

14.4 **CAR Insurance**

14.4.1 This is a claim for $144.08 for the cost of taking out Contractors All Risks insurance with the Body Corporate Managers for the period of the remedial work.

14.4.2 None of the Respondents made submissions on this claim, and none of the expert witnesses offered any opinion on the costs. There seems little doubt that this would be a necessary part of the costs of the remedial work. I will allow this claim by the Owners in the full amount of $114.08. Furthermore, I will apply this cost proportionally across the costs listed under paragraph 13.4 above.

14.5 **Consent Fees**

14.5.1 This is two claims by the Owners for $600.00 (Resource Consent) and $1,154.00 (Building Consent) for the costs of obtaining these Consents from the Council to enable the remedial work to proceed.

14.5.2 Mr Jones says that he has not been able to establish the make-up of the claimed costs, although the Owners have produced the usual detailed receipt issued by the Auckland City Council. From this receipt it can be seen that a $500.00 street damage deposit has been included in the amount of $1,154.00. The Owners should have been able to recover that deposit, so that it cannot now be claimed as part of the damages.

14.5.3 I have already considered the costs of the Resource Consent when I reviewed the claim for Architects' fee in paragraph 14.4 above. I found that the Resource Consent costs should not be included as a part of the building remedial work.

14.5.4 As a result of these findings I will allow the claim by the Owners for the Building Consent for the reduced amount of $654.00, but disallow the claim for the cost of the Resource Consent. I will apply the Consent cost proportionally across the costs listed under paragraph 13.4 above.

14.6 **Exterior Painting**

14.6.1 This is a claim for $5,882.85 for the cost of repainting the exterior of the dwelling after the completion of the remedial work. The claim has been calculated as the actual cost to repaint the entire exterior, less the value of the expired life of the paint on the undamaged exterior walls.

14.6.2 Mr Jones is of the opinion that the dwelling had reached the stage where redecoration was required because the original paint had already reached the end of its effective service life. He points to Unit 3 to support his opinion which, he says, had the weatherboards repainted by the Body Corporate at the same time as other units in Ponsonby Gardens were being repaired. Unit 3 is not one of the units in these adjudications.

14.6.3 I am told by Mr Gray that Unit 3 had the weatherboards repainted by the Body Corporate, because the paintwork had been marked and damaged by the builders carrying out the new plasterwork on Unit 2. The two units are about 1.5m apart at this point, and it does appear to be correct that only the weatherboarded walls adjacent to unit 2 were repainted on Unit 3 at this time.

14.6.4 The plastered surfaces on Unit 3 did not appear to have been repainted for some time when I visited the site in November 2004, and yet they did not give an appearance of being distressed or in urgent need of repainting. I do not find the fact that the weatherboards had been repainted in November 2003 as being convincing evidence to show that the paint had reached the end of its effective life after seven years. I prefer the evidence from Mr Cook that it would be reasonable to expect the external paint on this dwelling, taking into account its location and the visual appearance of the actual paintwork, to give a service life of ten years.

14.6.5 In her closing submissions for the Council, Ms Rice suggested that the Claimants had agreed to reduce their exterior painting claims, and that these reduced claims were set out in the revised Appendix 3 to Mr Jones' evidence. The Owners, in their closing submissions, do not accept that they had agreed to reduce the claims for exterior painting. Therefore, I have needed to check back on the evidence given at the hearing.

14.6.6 Firstly, I have transcribed the questions that Mr Gray was asked by Mr Casey about the calculations for carpet and external painting costs, as this is quoted by Ms Rice as being relevant to the alleged agreement to reduce the claim.

7 October 2004, at 2.12 pm (Cross-examination of Gray by Casey):

Casey	*I am having some difficulty in following the method of your calculating a credit against the cost of replacement carpet and repainting. As I understand it you acknowledge, … at least in paragraph 58 you say that the carpet would have a 15-year service life?*
Gray	*Yes*
Casey	*And do I understand it correctly that you have replaced the whole carpet throughout the unit?*
Gray	*That is correct, the carpet is laid to the top storey only – there is no carpet downstairs.*
Casey	*So all the carpet in the house you have replaced?*
Gray	*Yes.*

Casey *And again if I have got it right, you say that you have replaced it after seven years?*

Gray *Correct.*

Casey *So you had seven years use of it, and you have replaced it?*

Gray *Yes.*

Casey *And then you give credit for a portion of the replacement cost being the cost to re-carpet the unaffected half of the house, is that right?*

Gray *Yes.*

Casey *For the remaining eight years … sorry, this is where you lose me I am afraid Mr Gray, that's why I want an explanation … so you gave credit for the cost of re-carpeting the unaffected half, but only for the seven or eight years that it was used?*

Gray *Correct.*

Casey *But you had the use of the carpet for the whole area carpeted for that seven or eight years, didn't you?*

Gray *Yes.*

Casey *Now, when we talk about the painting costs, I think that is covered on page 18, paragraph 65, did you repaint the whole of the exterior?*

Gray *Yes.*

Casey *And you say that it would have had a ten-year service life?*

Gray *Yes.*

Casey *And it was seven years into that ten years?*

Gray *Yes.*

Casey *So you have had to repaint three years earlier than you might otherwise have expected?*

Gray *Yes.*

Casey *And again, do you give credit only for the one third of the house that was unaffected?*

Gray *I do, because all the other areas required repainting purely because of the remedial works.*

Casey *But they would have required repainting in three years time in any event wouldn't they?*

Gray *Yes.*

Casey *So what's happened is that you have had to repaint it three years sooner than you would otherwise have had to repaint it?*

Gray *Yes.*

Casey *And that applies to the whole house, and not just to the one third that was unaffected, or for that matter to the two thirds that was affected, do you agree?*

Gray *Yes.*

Casey *Thank you.*

[Questions follow about Mr Gray's health.]

14.6.7 Then I have refreshed my memory about the evidence given by the other Claimants in these adjudications, which I will give in the order in which they gave their evidence at the hearing.

14.6.8 Dr Berry (Unit 8) was not asked any questions about her claim for external painting costs.

14.6.9 Mr Freeman (Unit 4) was asked questions by Mr Casey on 8 October 2004 at 12.34 pm, as follows:

Casey *Your claim for painting is, as I read it, has been calculated on much the same basis as Mr Gray?*

Freeman *Exactly the same.*

Casey *And you were here when I was asking Mr Gray about the method of calculation?*

Freeman *Yes.*

Casey *And you would agree with the answers he gave me?*

Freeman: *Yes.*

[End of questions on painting.]

14.6.10 Dr Knill (Unit 6) was asked questions by Mr Casey on 8 October 2004 at 3.18 pm, as follows:

Casey *Now you have claimed for painting, the repainting of the unit?*

Knill *That's correct.*

Casey *But not for carpet?*

Knill *We did re-carpet, but I have not claimed for it.*

Casey *You haven't claimed for it, … and the painting is on the same basis as Mr Gray's claim?*

Knill *That's correct.*

Casey *Were you here when I was asking Mr Gray about that?*

Knill *I was.*

Casey *And you have the same answers?*

Knill *Yes.*

Casey *Thank you very much.*

14.6.11 The next claimant to give evidence, Mr McElroy (Unit 5) was asked the following questions by Mr Casey on 12 October 2004 at 10.49 am:

Casey *Now, in your claim … as I understand it … you are claiming the costs of repainting the Unit?*

McElroy *Part of the costs, yes.*

Casey *And you have given credit for a deduction as is set out in paragraph 21 of your evidence?*

McElroy *Yes.*

Casey *And, again as I understand it, that has been calculated on the same basis as has been done by Mr Gray?*

McElroy *Yes.*

Casey *And you heard me ask Mr Gray about that, and you wouldn't have any different answers to those given by Mr Gray, would you?*

McElroy *No.*

Casey *Thank you, Mr McElroy.*

14.6.12 Dr Shepherd (Unit 7) was not asked any questions about his claim for external painting, but it should be noted that his method of calculation differed from that used by all the other Claimants. When he gave his evidence, he introduced some changes to his written statement by way of replacement pages. One of the changes was a reduced claim for exterior painting and he commented "I thought that I would save Mr Casey a question by recalculating the paint costs."

14.6.13 The last Claimant to give evidence was Mrs Roborgh (Unit 9) and her answers to Mr Casey, together with some confusion contributed by myself, were particularly interesting. This evidence was given at 12.05 pm on 12 October 2004.

Casey *You have claimed the cost of repainting?*

Roborgh *We have.*

Casey *And you haven't amended that claim in the way that Dr Shepherd has amended his claim?*

Roborgh *No.*

Casey *Do you agree that Dr Shepherd's calculation is probably the more correct one?*

Roborgh *I haven't looked at his. I heard him speaking about it, but I couldn't follow what it was meaning.*

Casey *What he said was that because he had already got eight years' value out of the paint job that was there originally, and because the paint job was likely to have only lasted ten years, so he was claiming only two-tenths of the cost of the repainting.*

Adjudicator *I think in fairness, it is not quite that simple. If I understand the Claimants' calculations properly, they are saying that there was X amount of wall that was renewed and had to be repainted. Part of the remedial costs is repainting that part of the wall. Other parts of the wall did not need to be renewed but were repainted at the same time as the remedial work was done and because that already had eight out of ten years' usage, then consideration should be given for the … wear and tear … that was in no way related to the remedial work.*

Casey *Maybe I haven't correctly understood Dr Shepherd's claim.*

Adjudicator (to Dr Shepherd) *Is that the way you calculated it?*

Shepherd *No, that was the original way I calculated it.*

Adjudicator *Shall we let him clarify it so I get it right as well?*

Casey *Absolutely.*

Shepherd *Originally I had calculated it by the method that you just described. But the point that Mr Casey makes is that even if remedial work had not been required, the rest of the plaster surfaces would have required repainting in a further two years. In which case …*

Adjudicator *So you **are** giving a credit for all the painting for the usage that you got out of it?*

Shepherd *Yes.*

Adjudicator *Fair enough. I am glad I put my foot in it there, because that has corrected me.*

Shepherd *The number of years remaining will depend on when the remedial work was done … I'm not sure.*

Casey *Yes, the numbers might be different because there might be a different number of years or a different cost of repainting, but the principle must be that the Claimants have all had the benefit of seven or eight years of the original paint job, with only two or three years remaining.*

Casey (to Roborgh) *Do you agree with that, do you?*

Roborgh *I agree with it up to a point, but I don't know that we would have definitely repainted it the ten years – I don't know that. I don't know when we would have repainted.*

Casey *But it's conceivable, for example, that you might have had to paint it after eight years, or it might be ten, or it might be twelve?*

Roborgh *You couldn't know really … so I am happy to just leave the claim as it is, really.*

Casey *You do agree that at some point in time it would have had to have been repainted?*

Roborgh *Yes.*

14.6.14 I do not think that all of the Claimants in these adjudications did accept to reduce their claims for external painting costs. It would appear that Mr Casey and Ms Rice understood that Mr Gray had agreed that his claim should be reduced and thus signalled that all the Claimants would follow. I did not understand that Mr Gray had made such a concession, and he confirmed in his closing submissions that he had not made the concession. Dr Shepherd did agree to reduce his claim, but that does not mean that other claimants are obliged to follow.

14.6.15 Ms Rice has submitted that the agreement to reduce these painting claims was included in the revised Appendix 3 attached to Mr Jones' evidence. This has also taken me a bit by surprise and caused me to revisit the evidence given by Mr Jones when this revised sheet was produced. Mr Jones gave his evidence at 10.45 am on 5 November, and produced an amended first sheet to his Appendix 3 before confirming his written brief of evidence. The transcript shows:

Harrison *To help me as well as everyone else could you please point out what the differences are (between the two sheets)?*

Jones *The main difference is in the top two lines of the original schedule – labelled "fees" and "building works" – I have now split the statement claim to show "fees", "building works and associated costs", "exterior painting" and "garden restoration". The remaining figures are the same. I have added an additional line which shows the total figure excluding painting … in the first set of three … about three … in about three rows of figures … and the figures take into account some updated statements by the Claimants.*

Harrison *Right … so … does this replacement page simply revise in light of updated statement, or does it do more than that?*

Jones *It … other than for Unit 2 where there was an error in the original schedule that didn't include a figure for exterior decoration… I think the figures are as per the statements.*

Harrison *All right, thank you … I have no further questions.*

14.6.16 At the time I had noted that the new schedule was 'updated' by splitting out certain costs, and correcting the figures in two of the Units. I did not understand that he had reduced the amount claimed for external painting to indicate that these figures had been agreed. It would seem that the explanation given by Mr Jones was clearly not understood by the Claimants in these adjudications to be suggesting that they had reduced their claims. However, given what I have now been told, I can see that Mr Jones was amending his Appendix 3 to show what he had been told had been accepted by the Claimants.

14.6.17 The issue of betterment is often raised in building disputes and WHRS adjudications. The arguments from both sides are often finely balanced, and I believe have been excellently outlined in the judgment of Fisher J in *J & B Caldwell Ltd v Logan House Retirement Home Ltd* [1999] 2 NZLR 99. After covering the authorities, he concluded on page 108:

> I accept the logic of an approach which makes a deduction for betterment only after allowance for any disadvantages associated with the involuntary nature of the plaintiff's investment eg interest on the premature use of capital to replace a wasting asset which would at some stage have required replacement in any event.

14.6.18 I propose to adopt the logic of Fisher J and apply it, as best as I can, to the situation on this dwelling. The total cost of the external painting was $7,650.00.

14.6.19 The Owners have claimed that one third of the external painting work was not on areas affected by the remedial work. They had offered a reduction to 3/10 of the cost of this one third on the basis that there were only three years left out of the ten-year life expectancy of the paintwork. The area of external stucco walling was 47% of the total area of the external walling, so that any calculation along the lines suggested by the Owners needs to be adjusted for that fact.

14.6.20 This logic was accepted by several of the Respondents with the important exception that the life expectancy would have been only seven or eight years. Mr Jones (as I have already mentioned) was of the opinion that the dwelling had reached the stage when redecoration was required, together with other routine maintenance work. On the other hand, Mr Cook considered that hi-build paint, such as was used on these houses, should last at least ten years before it needed to be repainted. I will accept the evidence of Mr Cook and will use a life expectancy figure of ten years.

14.6.21 Therefore, for 53% of the painting costs I will allow the Owners to recover 3/10 of the costs, and the remaining 7/10 I assess as being the betterment gained by the Owners:

$7,650.00 x 53% x 3/10	=	$1,216.35

14.6.22 The remaining costs of $3,595.50 are directly associated with the remedial work. To paint an existing previously painted surface in good condition will be less than painting a new and previously unpainted surface. There will be no sealer coat, and probably one less top coat. The Owners are entitled to recover the extra cost of painting on the new plasterwork over and above the cost of repainting after a seven-year life. I assess these extra costs as being 55% of the total costs. On the remainder of these costs (being the equivalent of a repaint cost) I will allow the Owners to recover 3/10 of the costs, and the remaining 7/10 I assess as being the betterment gained by the Owners.

$3,595.50 x 55%	=	$1,977.53
$3,595.50 x 45% x 3/10	=	485.39
		$2,462.92

14.6.23 To conclude, I will allow this claim by the Owners for the amounts of $1,216.35 and $2,462.92, or a total of $3,679.27. I will apply this cost proportionally across the costs listed under paragraph 13.4 above, with the exception of the roofing and bathroom items, as these would have had no effect on the external painting.

14.7 **Curtain Cleaning**

14.7.1 This is a claim for $610.32 for the cost of having curtains cleaned after they had become dirty due to the remedial work.

14.7.2 Mr Jones and Counsel for the Council are under the impression that the claim is for replacing the curtains, and they are not sure why this would have been necessary in connection with a re-cladding project. The invoice produced by the Owners is for cleaning the curtains.

14.7.3 The re-cladding work required all affected windows and doors to be removed and refitted. The house was occupied throughout the remedial work. It does not surprise me that the curtains needed cleaning at the end of the work. I will allow this claim by the Owners in the full amount of $610.32, and apply it proportionally across the costs listed under para 13.4 above.

14.8 **Carpet Cleaning**

14.8.1 This is a claim for $300.00 for the cost of having the carpets cleaned after they had become dirty due to the remedial work.

14.8.2 For the reasons given in the last item, I will allow this claim by the Owners in the full amount of $300.00, and apply it proportionally across the costs listed under para 13.4 above.

14.9 **Interest**

14.9.1 The Owners have made a claim for interest and have asked that it be determined on the basis of amounts of their claims that are allowed. They have not claimed a specific interest rate, or stated from when they believe interest should start to run.

14.9.2 An adjudicator has the power to award interest pursuant to clause 15 in the Schedule to the WHRS Act, which reads:

> (1) Subject to subclause (2), in any adjudication for the recovery of any money, the adjudicator may, if he or she thinks fit, order the inclusion, in the sum for which a determination is given, of interest, at such rate, not exceeding the 90-day bill rate plus 2%, as the adjudicator thinks fit, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the judgment.

(2) Subclause (1) does not authorise the giving of interest upon interest.

14.9.3 I can exercise my discretion as to the rate and the period in accordance with the normal accepted principles. In this adjudication, the Owners formally made their claims known to the Respondents when the Notice of Adjudication was issued, so that the earliest date from which I would apply interest would be December 2003.

14.9.4 The majority of the Owners' costs for which they are claiming reimbursement had been incurred prior to December 2003. I do not think that there will be any injustice in setting 1 January 2004 as an appropriate starting date. The 90-day bank bill rate has varied over the last three months from 6.2% to 6.9%, and I set the rate of interest at 7.5% per annum simple.

14.9.5 I have calculated the interest that is due up to the date of publication of this Determination, which is 11 March 2005. This interest will continue to accrue up to the date of payment.

14.10 **Summary**

14.10.1 In paragraph 13.4 I listed the remedial costs that I have found proven against the separate areas of leaks. The additional or associated losses that I have now considered in this section of my Determination need to be added to these costs.

14.10.2 Stucco, or external plaster cladding

Costs as para 13.4	$ 26,162.42
Experts report	1,480.26
Architect fees	2,423.81
CAR Insurance	50.42
Building Consent fees	228.88
Exterior painting	1,516.91
Curtain cleaning	213.60
Carpet cleaning	104.99
Interest	2,479.72
	$ 34,661.02

14.10.3 Weatherboards

Costs as para 13.4	$ 900.00
Experts report	50.92
Architect fees	83.38
CAR Insurance	1.73
Building Consent fees	7.87
Exterior painting	52.18
Curtain cleaning	7.35
Carpet cleaning	3.61
Interest	85.30
	$ 1,192.36

14.10.4 Door and window openings

Costs as para 13.4	$ 7,747.43
Experts report	438.35
Architect fees	717.76
CAR Insurance	14.93
Building Consent fees	67.78
Exterior painting	449.20
Curtain cleaning	63.25
Carpet cleaning	31.09
Interest	734.32
	$ 10,264.11

14.10.5 Decks

Costs as para 13.4	$ 18,632.25
Experts report	1,054.21
Architect fees	1,726.18
CAR Insurance	35.91
Building Consent fees	163.01
Exterior painting	1,080.31
Curtain cleaning	153.12
Carpet cleaning	74.77
Interest	1,766.00
	$ 24,684.76

14.10.6 Balustrades

Costs as para 13.4	$ 10,014.90
Experts report	566.64
Architect fees	927.83
CAR Insurance	19.30
Building Consent fees	87.62
Exterior painting	580.67
Curtain cleaning	81.76
Carpet cleaning	40.19
Interest	949.23
	$ 13,268.14

14.10.7 Flat roofs

Costs as paragraph 4.8	$ 3,290.00
Experts report	186.15
Architect fees	304.80
CAR Insurance	6.34
Building Consent fees	28.78
Curtain cleaning	26.86
Carpet cleaning	13.20
	$ 3,856.14

14.10.8 Bathrooms

Costs as paragraph 4.8	$ 8,008.00
Experts report	453.09
Architect fees	741.90
CAR Insurance	15.43
Building Consent fees	70.06
Curtain cleaning	65.38
Carpet cleaning	32.14
	$ 9,386.00

15. DAMAGES FOR STIGMA

15.1 The Owners are claiming that their dwelling has suffered a diminution in value due to the stigma that has attached to it being a “leaky home”. They say that this loss in value is a direct result of the fact that the dwelling was badly built, and is now known to have been badly built.

15.2 They submit that "stigma" is an uncertainty or perceived risk of trouble which may result from the purchase of a property that has been damaged. They say that it is unlikely that the average prospective purchaser would make a distinction between repair or remediation, so that it is probable that the public would see a repaired house as being something less than a properly built house. I imagine that an appropriate analogy would be a new car that has needed to have a damaged panel panel-beaten and repainted – it would change from being a new car to being a repaired car.

15.3 It is submitted on behalf of the Council that there is no proof of stigma value loss.

15.4 It would appear that claims for loss in value due to stigma have been recognised by the New Zealand courts. I have been referred to a number of cases that establish that recognition, and three cases where stigma damages have been awarded – *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548; *Scott v Parsons*, Auckland High Court CP 776.90, Cartwright J, 19 September 1994; *Evans v Gardner* (1997) 3 NZ Conv C 95.316.

15.5 Counsel has also referred me to my own decision in *Miller-Hard v Stewart & Ors* (WHRS Claim 765, 24 April 2004). I think that it will be helpful to repeat some of that Determination.

> The Owners are claiming that their house has suffered a diminution in value due to the stigma that has attached to "leaky homes". The Owners referred me to a research paper by Song Shi prepared as a part of her studies towards a Masters degree at Massey University. The conclusion was that there was clear evidence of a "stigma" directed at monolithic-clad houses, and that an average loss in value of about 13% was being experienced.
>
> Mr Tomaszyk also referred me to *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548, where he tells me that Hardie Boys J (as he then was) allowed a reduction on account of stigma of approximately one third. I am familiar with this case, but I think that the Court allowed $5,000.00 as a loss on a property worth $47,500.00 in total. This equates to a 10.5% diminution of value.
>
> A similar argument was raised before the Adjudicators Carden and Gatley in *Putman v Jenmark Homes Ltd & Ors* (WHRS claim 26 – 10 February 2004) and their conclusions were as follows:

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

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

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

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

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

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

I have carefully read the Research Paper by Song Shi, and I would have preferred to have had her figures and table in colour (for easier comprehension)

> and to have been able to review the Appendices (which were not attached), but this has not prevented me from grasping the essential points. However, I feel that her conclusions and analysis appear to show that the marketplace stigma is more pertinent to monolithic clad dwellings in general, rather than individual and identified leaky homes.
>
> For this claim to succeed, the Owners have not only got to show that there is a public resistance to purchasing houses that might be known or perceived to be 'leaky homes', but also that the problems with their house would probably lead to a loss in value. Furthermore, if the stigma is of the type that will diminish with time, the stigma will only translate into a loss if the Owners sell within the period that the stigma still attaches to the property. The only evidence that I have about the value of this property is that the registered valuer saw no stigma or loss in value. The valuer would be in the same position as a prospective purchaser, and I would have expected him to send a warning to a mortgagee if the value of the house was affected by the stigma.

15.6 It is submitted on behalf of the Council that there is no proof of stigma value loss on the properties in Ponsonby Gardens. Mr Gamby, who is a registered valuer, told me that he could find no evidence or signs that the houses in Ponsonby Gardens were, or would be, affected by stigma.

15.7 Unit 6 was sold at auction in August or September 2004. This is the unit owned by interests essentially under the control of Dr Knill and is the subject of WHRS Claim No 932. The dwelling had been extensive repaired (or remediated) by complete replacement of all external stucco – with a ventilating cavity introduced – and all other known defects were corrected. Mr Gamby put a value on Unit 6 as at October 2004 of $660,000.00. He was aware that this dwelling had been remediated and upgraded, but he did not take into account in his valuation for the improved value that may have been caused by the upgrades. His valuation was for Unit 6 in its original 1996 layout and finishings, but remediated to overcome all leaking problems.

15.8 Unit 6 sold at auction for $657,500.00 which, Mr Gamby points out, is close to his own valuation of $660,000.00. In his opinion, this sale price showed no element of stigma, and confirms his view that none of the dwellings has suffered any loss in value due to the stigma.

15.9 Ms McDonald was the real estate salesperson who arranged the auction, and was in touch with many of the potential purchasers. She told me about the

condition of the property when it was being offered for sale, and said that the interior of the dwelling had been completely renovated to an "as new" condition. Counsel for the Council objects to her evidence as being unqualified in terms of expertise. If that objection means that she was not qualified to give "valuation" expert evidence, then I would have no difficulty in accepting that the objection was justified. However, I do not see that there can be any valid objection to Ms McDonald giving evidence about the condition of the property, the auction, or the marketing of the property prior to the auction.

15.10 Mr Gamby did not make any allowances in his valuation for the "upgrades" which included extending the second bedroom into the old balcony area to create a larger bedroom, replacing all carpets, tiles and flooring, creating a new pantry under the stairs and resurfacing the kitchen cupboards, landscaping the gardens with 40m² of decking, raised planter boxes, water feature and pond, with planting and an extensive lighting system. When asked what impact the extra space in the bedroom would have on his valuation, he thought it would only be a small increase in the value. No one asked Mr Gamby what his valuation would have been for Unit 6 in its upgraded and remediated conditions in October 2004.

15.11 The improvements and upgrades to Unit 6 as described to me by the witnesses cannot be dismissed as having had no impact on the sale price in mid 2004. Mr Gamby would have made a small increase for the enlarged bedroom, but I would have thought that it was obvious and probably inevitable that the new flooring, rejuvenated kitchen and the newly landscaped garden would have encouraged the potential purchaser to pay more for this unit. Ms McDonald told me that the real estate salespeople at her office had put a "mean" selling price of $685,000.00 on Unit 6 prior to the auction and, although I appreciate that this figure cannot be taken to be an expert valuation, it can be taken as a view from the coal-face. Does this mean that the improvements made by Dr Knill to his unit prior to putting it on the market should have increased its probable selling price by $25,000.00? Even if this were to be the case, the difference between the salespeople's expectations of $685,000.00 and the actual selling price of $657,000.00 was only 4% - which Ms McDonald says was not an unusual variation under the circumstances.

15.12 In the light of all of the evidence and submissions, I am not convinced that the Owners have been able to show that Unit 6 suffered a loss in value as a result

of stigma, or that other units in Ponsonby Gardens have suffered, or will suffer, losses as a result of stigma.

15.13 The reality of this situation is that the Owners have taken the steps that have reduced, if not eliminated, the opportunity for further losses due to stigma. They have arranged to have the faulty stucco "remediated" rather than repaired. They have engaged consultants to advise them on the full extent of the defects, and then they have not tried to plaster over the problems with "brown paper or Band-Aids". The extent of the remedial work is a matter of public record because it is described in the building consent documentation.

15.14 It may seem to be unfortunate that the actions of the Owners have, in all probability, undermined their claims for losses due to stigma. It could, and probably would, have been argued that if they had not taken steps to remediate rather than repair, or had not taken any steps to stop the damage due to the leaks, then they would have failed to mitigate their losses. However, under the circumstances, I will dismiss the claim for losses due to stigma.

16. GENERAL DAMAGES AND CONSEQUENTIAL LOSSES

16.1 In this section of my Determination I will consider claims for general damages and consequential losses under the following headings:

- General damages;
- Loss of rental;
- Visits to Auckland.

General Damages

16.2 Dr and Mrs Roborgh are each claiming $20,000.00 general damages for pain and suffering caused as a result of the defects in the dwelling. Mrs Roborgh told me that she and her husband were living in New Plymouth and had originally purchased the house with the intention of retiring to live in Auckland. They rented the house out to tenants in the meantime, but had experienced such an ongoing series of leaking problems that they had had to change their plans. I will let Mrs Roborgh summarise the situation in her own words:

> I have been involved in this case now for almost 8 years. Demolition and restoration has taken eight months (3rd July 2003 – 4th March 2004).
>
> i) It has been intolerable for our tenants for whom we have felt particularly bad.

ii) The cost has not only been huge in financial terms but in human terms we have experienced high levels of stress, financial hardship, disappointment, and frustration which has had a negative effect on my husband's health as we have watched the retirement savings we have worked so hard to achieve over the years dwindle away.

iii) In addition, these 8 years have taken a substantial toll on our resources – time, energy and money for which we seek compensation. I have spent many hundreds of hours attending to these matters.

16.3 Counsel for the Council submits that the property was purchased as an investment property and has been rented throughout, so that it is not appropriate to make any awards of general damages. I have not been given any authorities to support this submission, or any further explanation. I can see no reason why owners cannot make a claim for pain and suffering, simply because a property is purchased for investment purposes or because the owners have not lived in the particular house. The basic principles to be applied to a claim for general damages should not be altered by either of these factors, although the impact of any pain and suffering may be altered by the two factors.

16.4 I have been referred to awards for general damages that have been made by adjudicators in previous WHRS determinations, and the level of these awards. I am aware that a similar claim was considered by Adjudicators Carden and Gatley in their Determination on *Putman v Jenmark Homes Ltd & Ors* (WHRS Claim 26 – 10 February 2004). In paragraph 14.12 they said:

> The availability of general damages for pain and suffering, humiliation, distress and loss of enjoyment has been part of our law for some time. In the context of house construction there was $15,000.00 awarded to the plaintiffs in *Chase v de Groot* [1994] 1 NZLR 613. That was a case of defective foundations requiring complete demolition of the house following a fire. The recorded judgment does not include Tipping J's detailed consideration of issues of damages but in *Attorney-General v Niania* [1994] 3 NZLR 98 at page 113 l22 he refers to his earlier judgment in *Chase* and the fact that the award in that case (and another in 1987, *Dynes v Warren* (High Court, Christchurch, A242/84, 18 December 1987)) had been made after a detailed examination of a number of comparative authorities. On the basis of what he said there the authors of Todd, *Law of Torts in New Zealand* 3rd edition page 1184 said that his remarks indicated "these amounts [in *Chase* and *Dynes*] were considered to be modest". We do not read those words into His Honour's judgment in *Niania*. We were also referred to *Stevenson Precast Systems Limited v Kelland* (High Court, Auckland, CP 303-SD/01: Tompkins J; 9/8/01) and *Smyth v Bayleys Real Estate Limited* (1993) 5 TCLR 454.

16.5 The Owners cannot succeed with a claim that relies upon stress or anxiety caused by litigation, and the stress must be as a direct consequence of a breach of a duty of care, whether the claim is based in contract or in tort.

16.6 Having carefully considered the evidence I am satisfied that both Dr and Mrs Roborgh did suffer stress and anxiety as a result of gradually finding out that the dwelling was suffering from serious weathertightness problems. The extent of their problems with this house did not become apparent until probably early 2002, when they asked Mr Sheriff to look at the house. When they received the report from Joyce Group in September 2002 they were left in no doubt about the seriousness of the situation. They have not had to live in the house whilst it was being repaired and rectified, so that they have not personally had to cope with the daily dust, noise and lack of privacy that frequently accompanies these situations. They have had the worry of the uncertainty of firstly know knowing the extent of the problems, and then not knowing the way in which the problems would be solved.

16.7 I accept that any awards for general damages should be conservative. In both the *Chase* and *Dynes* cases (mentioned in *Putman* above), where the period of suffering was also over many months, both the plaintiffs were awarded $15,000.00. Some adjustment would be required to accommodate inflation, as *Chase* was in 1994 and *Dynes* in 1987. In *Putman* the adjudicator awarded Mrs Putman $15,000.00 and Mr Putman $5,000.00.

16.8 I have come to the view that both Dr and Mrs Roborgh are entitled to an award for general damages for the stress, anxiety, pain and suffering that has been caused as a direct consequence of the leaks. I would set the amount of damages at $3,000.00 for Dr Roborgh and $3,000.00 for Mrs Roborgh.

Loss of Rental

16.9 The Owners are claiming that as a result of the leaking problems, and the need to carry out substantial remedial work, they have suffered a loss in rental income. This loss was a rebate of $4,675.00 given to their tenant, being 50% of the rental paid whilst the building work was underway.

16.10 Counsel for the Council does not dispute the quantum, but does submit that claims for loss of rental are not within the jurisdiction of WHRS adjudicators. I

have already considered the matter of jurisdiction, in paragraph 5.7.1 above, and find that I am empowered by the WHRS Act to award consequential loss claims, such as loss of rental.

16.11 It is quite foreseeable that if the dwelling suffered from serious leaking problems, then tenants would either demand a discount or reduction for the inconvenience, or that tenants would move out. I would find that a reduction or loss in rental is a recoverable type of claim, provided that the loss can be proven in the normal way. I am satisfied that the Owners have proved their loss of $4,675.00.

16.12 I will allow the Owners' claim for the amount of $4,675.00.

Visits to Auckland

16.13 The Owners are claiming for reimbursement of $1,152.13 for the costs of travelling to Auckland on three occasions during the remedial work, to organise and check on the planning and progress of the building work.

16.14 There are two aspects that concern me about this claim. Firstly, the Owners had engaged an architect to carry out all the research and planning, obtain building consents, and arrange for the builder to have all necessary plans and instructions. They engaged a builder to organise and carry out all the remedial work. Strictly speaking, they did not have to visit the property, and the work would have been satisfactorily completed without their site attendance.

16.15 The other aspect of concern is the matter of foreseeability. It would not have been foreseeable that the owners of this property would be living in Wellington, and would need to travel to Auckland to oversee any remedial work. What would have happened if the Owners had decided to live in New York, or Moscow, rather than Wellington?

16.16 On balance, I am not persuaded that the Owners can succeed with this modest claim for reimbursement of their travel costs. I will dismiss the claim.

16.17 I have allowed the following claims for general damages and consequential losses:

General damages – Dr Roborgh	$ 3,000.00
General damages – Mrs Roborgh	3,000.00
Loss of rental	4,675.00
	$10,675.00

17. STEPHEN LAY

17.1 The Owners are claiming that Mr Lay, as the builder on the Ponsonby Gardens project, is liable to them for the defects in the work that caused the leaks. They say that his role was described in a memorandum from Mr Manning in February 1996 as follows:

- To efficiently manage the site;
- To take instructions from [Mr Christian] or whoever [Mr Christian] delegates;
- To ensure that the quality of the development is up to a $500,000 product;
- To ensure that all items on site comply with the plans and council regulations and any changes approved beforehand;
- To ensure a smooth transition from Taradale to the purchasers;
- To ensure a Code Compliance Certificate is got at the end;
- To bring up any ideas that may achieve the above result at a lesser cost.

17.2 The Owners say that Mr Lay was the "builder" in that it was he who was responsible for organising, managing and supervising the construction work on site. When questioned about his role, Mr Lay did not dispute that he was responsible for the scope of work as described by Mr Manning (above). However, there are a number of matters raised by Mr Casey on behalf of Mr Lay which need to be considered.

17.3 In response to the claims against Mr Lay, Mr Casey submitted that the Owners had no contractual relationship with Mr Lay, and did not enter into their purchase of the dwelling in reliance of anything that Mr Lay had said or had done. Therefore, if the Owners have any claims against Mr Lay, it must be in tort, and the Owners must prove that Mr Lay owed them a duty of care and (if so) he breached that duty.

17.4 The existence of a duty of care has been clearly established in New Zealand between builders and subsequent purchasers, as can be seen by reference to two reasonably recent court cases:

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

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

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

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

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

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

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

17.5 Mr Casey submits that Mr Lay was an employee of Taradale, as opposed to being an independent contractor. He says that an employee has a contract of service, as opposed to a contract for services and refers me to *TNT Worldwide Express Ltd v Cunningham* [1993] 2 NZLR 681 (CA) in support of this differentiation.

17.6 Mr Casey submits that three tests have been developed in the relevant and recent case law which provide guidance for the enquiry into whether a person is an employee or an independent contractor. These are:

- The control test – who was in control of what work was to be done, and the manner in which that work was done?

- The fundamental test, which may include:
  Did the worker provide his own equipment?
  Did he hire his own helpers?
  What degree of financial risk did he take?

> What degree of responsibility for investment and management did he have?
>
> Did he have any opportunity for profiting from sound management in the performance of his task?

- The integration test, or as Judge Goddard explained it in *Muollo v Rotaru* [1995] 2 ERNZ 414:

> This poses the question whether the (worker) was his own man, or whether he was part of the business organisation of the (putative employer).

17.7 There was no formal written contract between Mr Lay and Taradale, and the limited evidence indicated that Mr Lay was paid by Taradale Services Ltd, and not by Taradale Ponsonby Gardens Ltd. Therefore, this is not so much a matter of interpretation of a written contract, but an examination of the intentions of the parties and, with the benefit of hindsight, how the parties actually performed.

17.8 A letter of offer was sent to Mr Lay on 2 June 1995 from Mr Christian on Taradale Properties letterhead. The letter was headed "Ponsonby Gardens – 61-63 Vermont Street, Ponsonby" and read:

> We are delighted to confirm your appointment as site manager for the Taradale Properties Ltd development at the above address. This position will commence on 6 June 1995 and will be for a period of 28 weeks. Any extension or reduction to this period will be agreed to mutually by both parties. You will be required to work a minimum of 5 days per week and be available for extra days or hours as the job requires to keep things running to schedule on the site to meet the 28 week deadline. For carrying out the function of site manager you will be paid a weekly fee of $2,000 plus GST for which you will invoice Taradale Properties fortnightly. In addition Taradale will pay all charges incurred by you in the use of your mobile phone for this project.
>
> On all matters relating to the construction and the site you will report to Bruce Christian and all financial matters to Craig Stevenson. Craig will advise you on how he wants the ordering of materials, quotes and wages to be handled.
>
> I look forward to working with you again and hope it is the start of a long relationship for us all.

17.9 The control test is not a lot of help. Mr Lay was employed on the Ponsonby Gardens project only, and was paid a fixed amount per week for five days of work. It seems that he was free to work on other jobs (other than Taradale projects) as long as it did not impede his performance on Ponsonby Gardens.

He did not have any choice about what work he was to do, but he was given some freedom on how he was to carry out his work.

17.10 The fundamental test is more helpful. Mr Lay provided his own transport, and his site office, but his day-to-day job expenses were all paid by Taradale. He did not employ anyone else to help him do his job.

17.11 I cannot see that Mr Lay took any financial risk for the work that he was doing. He was not on a profit-sharing arrangement, although he had the risk of limited future work if he did not perform satisfactorily. There is evidence that Taradale tried to change his contract to include a bonus provision, but this was not accepted by Mr Lay. It is an interesting indication as to how Taradale saw Mr Lay's role.

17.12 The last question refers to the extent of integration. The evidence indicates that Mr Lay was on a contract for Ponsonby Gardens only, and it was expected to last for 28 weeks and finish in mid December 1995. The letter of offer suggests that if this project went as planned and Mr Lay performed satisfactorily, then he could look forward to another project after Ponsonby Gardens. This evidence indicates to me that Mr Lay was being invited to prove his worth on this project.

17.13 One final point relates to the taxation stance that Mr Lay took during this project with Taradale. He submitted Tax Invoices which provided his GST number, and showed GST being added to the net weekly amount of $2,000.00. This indicates that Mr Lay saw himself as an independent contractor being paid for services provided. I appreciate that tax status can only be an indicator, which may indicate the intention of the parties, and that it should not be seen as determinative.

17.14 It may be helpful to compare Mr Lay's situation with that of Mr David Gibbs, who was removed as the thirteenth party in this adjudication prior to the Hearing. Mr Gibbs was a carpenter who worked on the Ponsonby Gardens project. Mr Lay says that Mr Gibbs was in charge of the site. I am not convinced of that, but I find that the limited evidence about Mr Gibbs and his role suggested that he was the project working "foreman". He submitted documentation when he applied to be removed as a party, and this documentation showed him to be paid by Taradale Ponsonby Gardens Ltd as a

labour-only carpenter on wages with PAYE tax deductions. This is quite different from Mr Lay's method of employment and payment.

17.15 Counsel for the Council submit that it is irrelevant whether Mr Lay was an employee or an independent contractor, because this is a matter of personal liability. However, after considering all the evidence and submissions I am not persuaded that Mr Lay was an employee of Taradale, and I find that he was an independent contractor.

17.16 The next matter that I need to consider is whether Mr Lay was the "builder" and, if he was not the builder, did he owe a duty of care to the subsequent owners of the buildings?

17.17 Mr Lay was engaged by Taradale in about May 1995 for the Ponsonby Gardens project. His appointment was on the recommendation of Mr Christian, whom he has worked with for another property developer in Auckland. This other property developer, Mr Manson, gave evidence at the Hearing. He told me that Mr Lay had "built about twenty houses for us", and that Mr Lay was on a profit-sharing arrangement with Manson Developments.

17.18 The work on site started in early June 1995 with site development, and the buildings themselves got underway in the middle of August 1995. Mr Lay was paid $2,000.00 per week, plus GST, and his first invoice was made out to Taradale Properties for "my fee for supervision and management of construction work at Vermont St, Ponsonby, from 6-6-95 to …".

17.19 Based upon the evidence given to me, I find that Mr Lay was very much in charge of this building project, in that he arranged for the material supplies and subcontractors, and was responsible for making sure that the costs were reduced as much as practicable, and the work was completed as quickly as possible. This does not mean that he was cutting costs regardless of the outcome, but he was employed to reduce the costs wherever possible.

17.20 I think that Mr Lay greatly understated his knowledge of the building industry, and tried to convince me that he was simply providing financial control by obtaining quotes, controlling labour costs and liaising with the architect and other specialists. He said that the whole purpose of his involvement on the project was to provide co-ordination and to control costs.

17.21 When I asked Mr Lay a few basic questions about costing, budgets and cost control, his answers gave me a strong impression that his knowledge of cost control systems was extremely limited. He did not seem to have created a trade or elemental budget or a detailed construction programme. He could not have known if a particular subcontractor or supplier's price was within the budget, or not. He did not know how quickly (or slowly) the project was expected to advance. He did not seem to have any systems for planning, monitoring or reporting on cost, time or quality. It comes as no surprise to me to hear Mr Manning state that the Ponsonby Gardens project cost $1,000.000.00 more than he had expected, and incurred the Company in losses of more than $500,000.00.

17.22 I am satisfied that Mr Lay's role on this project was as close to being the "builder" as you are likely to find. He was responsible for ensuring the work complied with the Building Consent documents and "Council regulations" (for which I would substitute NZ Building Code). He was responsible for ensuring that a Code Compliance Certificate was issued at the end, which must assume construction in accordance with the NZ Building Code. It was his job to ensure that the buildings were built in such a way that they would not leak.

17.23 I find that Mr Lay was negligent in his organisation and supervision of the different contractors that were engaged for the construction work, and thereby was in breach of the duty to take care that he owed to the Owners. His negligence or breach led to water penetration and resultant damage. Therefore, he is liable to the Owners for the following damages:

Stucco, or plaster cladding	as para 14.10.2	$ 34,661.02
Weatherboards	as para 14.10.3	1,192.36
Door and window openings	as para 14.10.4	10,264.11
Decks	as para 14.10.5	24,684.76
Balustrades	as para 14.10.6	13,268.14
General damages and conseqential losses	as para 16.17	10,675.00
		$ 94,745.40

18. THE ARCHITECT

18.1 The Owners are claiming that the Architect, being responsible for the design, has caused losses through the deficiencies in the drawings, and he was negligent in a number of ways. The general allegations that were outlined by Mr Gray in his evidence were that:

- there were design deficiencies that contributed to the problems that were encountered during construction;
- there was insufficient detail in the plans provided;
- he should have ensured that his designs were adhered to, or notified Council when they were not.

18.2 Mr Campbell, on behalf of the Architect, submits that any duty of care that the Architect did owe to the subsequent purchasers of this dwelling must be firstly, limited to the tasks that the Architect was contracted to perform and secondly, limited to only certain types of loss. It is probably timely to remember that I am using the term "Architect" to describe either Jessop Townsend Ltd (JTL) or Mr Townsend. I will leave the question as to whether Mr Townsend has any personal liability until after my consideration of the liability of the Architect.

Architect's Contract

18.3 I was referred to the words of Richmond P in *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394.

> It is clear that a builder or architect cannot defend a claim in negligence made against him by a third person by saying that he was working under a contract for the owner of the land. He cannot say that the only duty which he owed was his contractual duty to the owner. Likewise he cannot say that the nature of his contractual duties to the owner sets a limit to the duty of care which he owes to third parties. As regards this latter point it is, for example, obvious that a builder who agreed to build a house in a manner which he knows or ought to know will prove a source of danger to third parties cannot say, in answer to a claim by third parties, that he did all that the owner of the land required him to do. Nevertheless the nature of the contractual duties may have considerable relevance in deciding whether or not the builder was negligent. In relation to a claim made against an architect, Windeyer J in *Voli v Inglewood Shire Council* (1963) 110 CLR 74 put the matter in the following way:

> "… neither the terms of the architect's engagement, nor the terms of the building contract, can operate to discharge the architect from a duty of care to persons who are strangers to those contracts. Nor can they directly determine what he must do to satisfy his duty to such persons. That duty is cast upon him by law, not because he made a contract, but because he entered upon the work. Nevertheless his contract with the building owner is not an irrelevant circumstance. It determines what was the task upon which he entered. If, for example, it was to design a stage to bear only some specified weight, he would not be liable for the consequences of someone thereafter negligently permitting a greater weight to be put upon it" (ibid, 85).

18.4 I accept that the contract is relevant to the extent of his duty of care to others, as this prescribed the tasks that he had been contracted to perform. So the next matter to consider is the contractual arrangements that the Architect had on this project. The first written agreement was dated 3 June 1994 with Mr Manning of Taradale Properties, and was a lump sum fee of $100,000.00 for full design, administration and observation. When I say "full" I am using a generalised description to indicate that the Architect would provide specified services (as ticked on the NZIA standard form) that would involve him from preliminary design to the end of the defects liability period.

18.5 The original scheme for this site was for twelve dwellings, but this was reduced to a ten unit scheme in late 1994. On 16 February 1995 the Architect wrote to Mr Manning to renegotiate the fees for a ten unit project, and this was converted into a written agreement on 7 March 1995. The key features in the scope of the services to be provided by the Architect were:

- Preliminary Design;
- Developed Design;
- Architectural documentation sufficient to obtain a building consent, and also sufficient detail for construction and tendering purposes including all significant details of the design;
- Liaison with and co-ordination of consultants;
- Contract observation, including periodic site visits, review of shop drawings, and provision of supplementary details during construction to amplify the contract documents;
- Practical completion, inspection and issuing notice.

The lump sum fee remained at $100,000.00.

18.6 The application for a Building Consent for the first five units was lodged by the Architect on 1 June 1995, and the Consent was eventually issued on 21 August. Work had started on site clearance before that date, so that building work proper started immediately on receipt of the Consent.

18.7 In September 1995 there were some amendments to the Architect's scope of work due to the fact that Taradale had decided not to prepare schedules of quantities. This meant that some detailed drawings would not be needed immediately, and could be prepared on an "as we go" basis. I would assume that this was a colloquialism for delaying anything that was not urgent, but it did not eliminate the need for the detailed drawings.

18.8 During October there was an exchange of letters between the Architect and Mr Manning. Due to costs being significantly over budget, Mr Manning wanted to reduce the Architect's scope of work (and fees) by omitting certain drawings needed for tendering and schedules of quantities, and by getting Mr Lay to sign off the units at completion. After discussions and some negotiations, Mr Manning wrote to the Architect on 25 October 1995:

> After much discussion and soul searching with Bruce [Christian] we have agreed that your effort to date in bringing this project together has been outstanding and we would like you to be involved in the project right through to its eventual conclusion.
>
> Even though with Steve Lay on site and him doing a lot more on site because of his experience, compared with possibly other construction companies who would be more reliant on an architect, it is important to have an overall design and feel to the place maintained through to conclusion.
>
> Therefore, the original quote will stand. Payment terms for the last section will be a third of item 2.4 ($30,000) on the 20 November 1995, a third on 20 December 1995 and the last third on 20 January 1996. With a final payment of $10,000 (item 2.5) once the project is completed and the purchasers have settled.

18.9 Mr Campbell submits for the Architect that the scope of work was reduced from mid October 1995, from full involvement to advising on aesthetic issues only. It is submitted that he was no longer responsible for preparing plans for tender or scheduling, signing off the units at completion, or for the supervision of the construction work. Several witnesses gave evidence about this, but I found that the memorandum written by Mr Manning on 9 February 1996 was the most helpful. He wrote:

> To clarify the structure set up to run this project, I would like to detail this below.
>
> . . . . .
>
> 2) *Peter Townsend is responsible for:*
>
> - All compliance of the plans, buildings and various consents;
> - Ensuring that the vision that he has for the development is in tune with market requirements.
> - Ensuring that all requirements of site personnel to build to the above specifications are supplied in adequate time to perform these tasks.
> - The commercial aspects of the development with respect to choice of materials and fittings etc, being as cost effective as possible.
> - Peter Townsend reports to Bruce Christian.

18.10 The Architect was eventually paid the lump sum fee of $100,000.00 as negotiated in the 7 March 1995 agreement. It does seem that he was not required to provide any extra drawings or documents that may have been required for tendering or preparing schedules of quantities. Mr Townsend told me that he was not required to participate in the day-to-day process of construction, and considered that he was only to be involved in aesthetic matters.

18.11 In the scope of work agreement the Architect was required to provide "architectural documentation … and also sufficient detail for construction and tendering purposes including all significant details of the design" (underlining is mine). The changes that led to Mr Manning instructing a reduced scope of work were:

- Maltby (the quantity surveyors) and Malcolm Brown of Paxton were no longer to be used on the Ponsonby Gardens project – and no schedules of quantities were to be prepared;

- Tenders were not called from Head Contractors, so that tender documentation was not required (for a main building contract);

- Mr Lay would be better placed to carry out completion and hand-over inspections.

18.12 Mr Campbell submits that the Architect prepared the documents for the Building Consent application, but was told not to prepare further documents for construction. I do not accept that this was the case. The Architect was told not to prepare documents for tendering or scheduling, but that did not include an

instruction to not prepare documents necessary for construction. I find that the Architect was engaged, and paid, to prepare all documents needed for the proper construction of the work.

Consent and Construction Drawings

18.13 One of the matters which concerned some of the witnesses was whether there was, or should be, any difference between drawings lodged for a building consent, and drawings needed on site for construction purposes.

18.14 Mr Gunman, a very experienced project manager, told me that the drawings he saw, that were submitted for the building consent, were inadequate to build from. In his experience, additional drawings and details were usually prepared after obtaining the building consent, and all drawings were then marked “for Construction:

18.15 Mr Johnson, who has been a registered architect for over thirty years, explained that many details (such as joinery fixtures, tile layouts, paint finishes and schedules of fittings) were not usually provided with an application for a building consent. These were prepared later in the process. Both he and Mr Gunman were surprised that no specification document had been provided either to the Council or for use in construction.

18.16 Mr Manson, who is predominantly involved in housing and residential developments, did not consider that there should be any real difference between Consent plans and construction plans. In his organisation only one set of documents is prepared, and it is suitable for both purposes.

18.17 Mr Lay told me that he was never aware that the drawings submitted for the building consent were not intended for construction. He was not aware that the Architect ever intended to prepare more detailed drawings. He built from the Council-approved set of drawings.

Building Consent Drawings

18.18 One of the claims being made against the Architect is that the drawings prepared for the building consent contained design deficiencies, or included insufficient detail.

18.19 I am not going to dwell long on this matter for the simple reason that the Owners were not able to produce any convincing testimony to show that there were design deficiencies in the drawings. The drawings contained ambiguities and inconsistencies, but none of these could be classified as design deficiencies.

18.20 I am not going to consider, at this point in my Determination whether the Council should have issued the building consent on these drawings, as that is a matter that will arise when I consider the liability of the Council.

Architect Liability

18.21 I have found that it was the Architect's job to provide sufficient details and documentation for construction. Several of the experts did not consider that the drawings prepared by the Architect were adequate for construction purposes.

- Mr Johnson thought that the drawings that he was shown were probably sufficient for construction, but the builder would need to be competent.

- Mr Gunman did not consider that the drawings were good enough for construction purposes, and he would not have tried to build from these plans.

- Mr Cook was of the opinion that the drawings should have been amplified by more specific details to ensure that the tradesmen knew what to build.

- Most of the experts were critical of the lack of a specification.

18.22 Mr Townsend says that it was his understanding that he was not required to provide any more documentation. He appeared to concede that more drawings than he had prepared for the building consent purposes should have been prepared for construction. But he did not prepare any, nor did he ask who was going to do this work.

18.23 He was critical of the use of Triple 'S' and said that he would never have agreed to its use. I do find it surprising that he never raised this matter with Taradale as he appears to have been present at many of the project meetings, and says that he visited the site at least ten times after the October exchange of letters.

It is difficult to accept that he would not have noticed the method of external cladding that was being used on all of the ten dwellings.

18.24 Mr Townsend did not quarrel with the list of responsibilities given by Mr Manning in his memorandum of 9 February 1996 (refer paragraph 18.9 above). He interpreted the first item as being applicable to the Resource Consent rather than the Building Consent. Once again, I am surprised, as a reading of the full memorandum leaves me in little doubt that Mr Manning was referring to the building **and** resource consents.

18.25 It is my conclusion that the Architect owed a duty of care to subsequent owners of this dwelling. He was in breach of this duty to provide adequate detail (or instruction) to ensure that the buildings would be built to the standards of the NZ Building Code. He failed to take steps to warn Taradale or the builders about the risks of using Triple 'S', of altering the construction details of the balustrades, and several other important factors.

Personal Liability

18.26 The Owners are claiming that Mr Townsend should be held to be personally liable in this adjudication. They say that none of the letters, drawings or other documents issued by Mr Townsend at that time made mention of a limited liability company, and that Mr Townsend acted in such a way that he had assumed personal responsibility for his work.

18.27 Mr Campbell says, on behalf of Mr Townsend, that the architectural services on the Ponsonby Gardens project were provided by the company Jessop Townsend Architects Ltd. In a Memorandum provided after the conclusion of the hearing, Mr Campbell explained that the company of Jessop Townsend Architects Ltd was incorporated in April 1994, and changed its name in March 1997 to Jessop Townsend Ltd. Therefore, when Ponsonby Gardens was being designed and constructed the company's name was Jessop Townsend Architects Limited.

18.28 I have already made reference to the fact that this company was removed from the Register on 1 September 2004, but based on the assurances of Mr Townsend and his Counsel, I am working on the assumption that Jessop Townsend Ltd is still a legally formed and registered company.

18.29 The original agreement for architectural services was drawn up as between Tim Manning of Taradale Properties, and Peter Townsend of Jessop Townsend. The amended, and final agreement also identified Peter Townsend of Jessop Townsend as the Architect. This Agreement, however, is signed by Mr Townsend against the stamped seal of "Jessop Townsend Architects Ltd".

18.30 The Ponsonby Gardens project was promoted to prospective purchasers in a brochure which explained that the project was:

> Designed by Peter Townsend of Jessop Townsend Architects, recognised for their innovative designs that are becoming well known throughout Auckland. The architectural theme created, flows throughout the development giving a modern feel yet still allowing the style and spirit of the surrounding older homes to be captured in the new buildings. Close detail has been given to indoor and outdoor living plus extra carparking for all units giving a double garage as well as a designated visitor carpark. This being one of the many features thoughtfully included by the architect.

And on the next page it said:

> Peter Townsend of Jessop Townsend Architects has taken classic architectural features and added his own hallmark touches of originality to produce an easy living, low maintenance executive home finished to the highest specifications.

18.31 Whilst it should be recognised that promotional material may not be the basis for a contractual relationship, it was an indicator to prospective purchasers that the project was professionally designed, and by whom it was designed.

18.32 The letterhead being used by the Architect from June 1994 to February 1996 is styled as "JESSOP TOWNSEND" with "architects" in lower case below the name. The letters are usually signed as "Peter Townsend, Architect". The drawings prepared for the building consent are shown with the name " ? JESSOP ? TOWNSEND ? ", with "Architects" underneath.

18.33 Based upon these facts, Counsel for other Respondents submit that Mr Townsend was clearly acting in his personal capacity. My attention has been drawn to ss.21 and 25 of the Companies Act 1993, which states that a limited liability company must use the word "limited" in its name, and must ensure that its proper name is clearly stated in every written communication and legal document.

18.34 The only occasion on which the correct company name is shown is next to Mr Townsend's signature on his agreement with Taradale. Mr Townsend does not qualify himself as signing as a director of this company, and there is no other evidence that Mr Townsend was acting, or told anyone else that he was acting, as a representative of a limited liability company.

18.35 It will not be necessary for me to consider the submissions based on the well-known case of *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA). I am persuaded by the evidence and the submissions from the other Respondents that Mr Townsend carried out these services in his personal capacity. The company may have existed, but Mr Townsend did not tell the other parties or the public at large that the company was providing the architectural services.

18.36 It must follow that all claims against the company of Jessop Townsend Ltd, the fourth respondent in this adjudication, will be dismissed.

18.37 I find that Mr Townsend as the Architect was negligent in the matters mentioned in paragraph 18.25 above, and thereby was in breach of the duty to take care that he owed to the Owners. His negligence led to water penetration and resultant damage, and he is liable to the Owners for the following damages:

Stucco, or plaster cladding	as para 14.10.2	$ 34,661.02
Weatherboards	as para 14.10.3	1,192.36
Door and window openings	as para 14.10.4	10,264.11
Decks	as para 14.10.5	4,684.76
Balustrades	as para 14.10.6	13,268.14
General damages and consequential losses	as para 16.17	10,675.00
		$ 74,745.40

I have reduced the damages against the decks to omit the membrane defects as these would not have been inspected by an architect on observation services. All the other defects should have been avoided if the Architect had completed his work thoroughly and diligently.

19. AUCKLAND CITY COUNCIL

19.1 The Owners are claiming that the Council was negligent in that it failed to carry out its statutory duties properly, and was in breach of its duty to subsequent owners to take reasonable care to ensure that the dwellings were built in accordance with the requirements of the Building Act 1991. Their claims are under the following main headings:

(i) that the Council issued a Building Consent on inadequate plans and without obtaining sufficient details about the proposed construction;

(ii) that the Council failed to undertake either enough inspections, or adequate inspections to check that the work was being carried out satisfactorily;

(iii) that the Council failed to notice changes from the approved drawings, or failed to make the builder obtain an amended building consent for the changes;

(iv) that the Council was negligent by issuing a Code Compliance Certificate under the circumstances.

19.2 The claims by the Owners against the Council must be in tort and based upon negligence. It was my understanding that it was now well established in New Zealand that both those who build houses, and those who inspect the building work, have a duty of care to both the building owners and to subsequent purchasers.

19.3 This has been established, not only by the cases that I have mentioned when considering Mr Lay's liability (see paragraph 17.4 above), but also by court cases such as:

- Cook P in *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, at p 519

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

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

> The standard of care in all cases of negligence is that of the reasonable man. The defendant, and indeed any other Council, is not an insurer and is not under any absolute duty of care. It must act both in the issue of the permit and inspection as a reasonable, prudent Council will do. The standard of care can depend on the degree and magnitude of the consequences which are likely to ensue. That may well require more care in the examination of foundations, a defect which can cause very substantial damage to a building. This as I have said is not a question of foundations but rather of the exterior finishing and materials.

19.4 However, Mr Harrison, on behalf of the Council, has raised a number of fundamental issues about whether the Council does, in fact, owe a duty of care to these Owners. His submissions are extensive and I will attempt to review them in a logical order.

19.5 It is submitted on behalf of the Council that the duty of care issues which arise in this case as regards the Council cannot be said to have been settled by previous authority. *Hamlin* for example, was settled under the previous regime of building byelaws, whereas the present case concerns the Building Act and the performance criteria of the Building Code.

19.6 One of the effects of this change, it is submitted, is that under the building bylaws the Council's job was to ensure that buildings were constructed in accordance with a mass of prescribed details, whereas under the Building Act the Council must grant a building consent if it "is satisfied on reasonable grounds that the provisions of the Building Code would me met, if the building work was properly completed in accordance with the plans and specifications submitted".

19.7 It is also submitted that whether, and to what extent, a duty of care should be imposed on the Council can only be determined after a consideration of the legal principles as they should be applied to the facts of a particular case. In the case of the Ponsonby Gardens project this was not a modest dwelling built by a builder with limited experience or supervision. The Council knew that both the developer (Taradale) and the Architect (Jessop Townsend) involved had a good reputation for sound work and successful developments. Therefore, the Council, when granting the Consent and conducting its inspections, was entitled to assume that the project would proceed to a high standard with ongoing architectural, and probably other professional involvement and supervision. Ponsonby Gardens was a quality development, in a good suburb, attracting

discerning if not relatively wealthy purchasers who could in general terms be expected to take steps to look after their own interests.

Does *Hamlin* Apply?

19.8 The reasons that it is submitted that the Owners cannot bring themselves within the category of the plaintiffs in *Hamlin* are:

(1) The construction of the claimants' dwellings did not take place against the backdrop that the Courts relied upon in their conclusion that for social policy reasons community reliance ought to be implied into the relationship between the Council and the Hamlins.

(2) The claimants were able to protect themselves contractually by virtue of the standard warranty in the sale and purchase agreement. Such contractual warranties were not in place in the standard sale and purchase agreement that the Hamlins signed.

(3) The claimants were able to protect themselves by obtaining a pre-purchase inspection. This can be compared to the common practice in place at the time the Hamlins purchased the property where the Courts noted that it had never been common practice for homeowners to obtain pre-purchase surveys of dwellings and certainly not a step that was anticipated a small domestic property owner would be able to obtain practically or financially.

(4) The majority of the alleged defects in the claimants' dwellings were patent whereas in the Hamlin dwelling they were latent. The Council should bear no responsibility for patent as opposed to latent defects. Most of the cases considered by the New Zealand Courts are concerned solely with the issue of latent as opposed to patent defects. A prime example is the list of authorities concerning houses with defective foundations. The Australian Courts have more recently considered the issue.

19.9 I will consider these reasons in the same order as they were submitted. Mr Harrison did not explain to me what the differences were between the backdrop in *Hamlin* and in Ponsonby Gardens, and I understand that *Hamlin* applied to

"homeowners" as a total group, and not to only a section of homeowners, whether it be a section based on wealth, gender, race or age.

19.10 I was not given evidence about standard sale and purchase agreements in 1972 (when Mr Hamlin purchased his house), so that any submission based upon a comparison with the Owners' sale and purchase agreement is difficult to assess. However, I would not have thought that this would be a strong reason for departing from *Hamlin*. Any purchaser can, and could have in 1972, insert clauses to protect themselves contractually. This should not alter the duty of care that the Council owes to the purchaser.

19.11 The submission about pre-purchase inspection, once again, was made against a shortage of evidence about the common practice in 1972, or in 1996, or in 2004. I do not recall any evidence which suggested that it was common practice to obtain such an inspection report when buying a new house in 1996, although Mr Gray did tell me that he would not have considered it usual to take a brand new car to the AA vehicle inspection station. I am not persuaded that the issue of pre-purchase inspection should change the fact that the Council owes this duty of care to the Owners.

19.12 The final reason is whether the fact that the defects in the Owners' dwelling were patent, as opposed to latent, should alter the situation. Counsel referred me to the recent Determination by Adjudicator Green in *Smith v Waitakere City Council* (WHRS Claim 277, 12 July 2004). A similar point was raised in that adjudication, although Adjudicator Green had the advantage of having the recent Australian authorities given to him. Starting at paragraph 169 in his Determination:

> [Counsel for the Council] submit that a Council officer should not be responsible for costs associated with patent (obvious at the time), as opposed to latent (hidden and not obvious at the time, but which develop later) defects, but accept that many of the cases considered by New Zealand courts are concerned solely with the issue of latent as opposed to patent defects and a prime example of which is the list of authorities concerning houses with defective foundations. Generally that is because of the application of the principle of caveat emptor, or buyer beware, in circumstances where a building defect is obvious upon inspection. In other words if a defect is plain to be seen it will be presumed that a purchaser of a property will have taken the defect into account when agreeing to pay the purchase price.
>
> Counsel advise that the Australian courts have considered the issue in *Zumpano & Anor v Montagnese & Anor* [1997] 2 VR 525 where a homeowner sued his builder in respect of

> losses to repair numerous defects in his home and the court gave consideration as to whether the decision in *Bryan v Maloney* (1995) 182 CLR 609, was restricted to latent defects and in addition whether it was restricted to defects that impacted upon the value of the home. (*Bryan v Maloney* was a landmark Australian case which marked the high water mark of the doctrine of reliance and its twin – assumption of liability – in establishing duty of care claims relating to economic loss in relation to negligent construction). The court held in *Zumpano* that the decision in *Bryan v Maloney* was clearly confined to latent defects.
>
> I am aware that in the more recent case of *Leonard Charles Goulding and Anor v Robert Raymond Kirby* [2002] NSWCA 393 the New South Wales Court of Appeal refused to grant leave to appeal the decision of Certoma AJ of the New South Wales District Court where the plaintiffs claimed damages of $100,000 for economic loss based on diminution in the value of the house by reason of the condition of the negligently effected paint work which had a cosmetic function. The Court found that the defect was small and correctable by re-painting albeit at a cost to the appellants, the factual circumstances of the case did not point to the appellants being unable to take reasonable steps for their own protection, and the Court should not attempt to extend *Bryan v Maloney* beyond cases of structural defects or defects that could not reasonably be discovered by inspection. It should be noted that the plaintiffs were aware that the house had a dampness problem at the time of purchase, they did not have a pest or building inspection report carried out before signing the contract, and one of the plaintiffs (the husband) was an experienced architect and principal of a home building company, and it was apparent from the evidence before the Court that he was aware of the problem with the paint at the time of purchase.
>
> It seems clear to me that the present case is clearly distinguishable from the Australian cases in a number of respects. Notably, the evidence in this case (as distinct from the factual circumstances in *Goulding v Kirb*y) has been that there was no damage (mould and degradation of plasterboard) or dampness evident in the subfloor, at the time of Mr Smith's inspections of the property (at the end of the summer) prior to purchase. I am satisfied that the defective drainage was a latent defect, and not a patent defect that was obvious to a vulnerable and unsophisticated purchaser such as Mr Smith, and therefore did not evoke the degree of caution that it might have done from someone with Goulding's expertise. Moreover, in both *Zumpano* and *Goulding*, the claims related to defects that did not affect the structural integrity of a dwelling and where there was no danger of physical damage or loss, or indefinite use of a dwelling.

19.13 The Ponsonby Gardens houses did not have patent or obvious defects when they were purchased in 1996. In that respect this case is similar to the situation in *Smith v Waitakere CC*, and I would adopt the reasoning of Adjudicator Green. We are talking about leaks, and there was absolutely no evidence to suggest that any of the purchasers knew the buildings were leaking in 1996. I conclude that I can see no reason to find that *Hamlin* should not apply to this present case.

Three Meade Street

19.14 Mr Harrison cited a recent decision by Venning J in *Three Meade Street Ltd v Rotorua District Council* (Auckland High Court, M37/02, 11 June 2004) as confirmation that simply because a house is defective it does not mean that a plaintiff (or claimant) is automatically afforded the protection of *Hamlin*. Mr Harrison pointed out that:

(i) Justice Venning noted that the starting point was to examine the ratio of *Hamlin* and the extent of its application. He identified out the particular social and historical context of home ownership in New Zealand that led to the imposition of a duty upon the Council in *Hamlin*.

(ii) Justice Venning went on to conclude that where the social context of *Hamlin* is not present it will be for the courts to determine whether a duty is owed or not. This will be decided on the basic principles of proximity and policy.

(iii) Justice Venning concluded that Parliament did not intend it to be a purpose of a CCC issued in accordance with Section 43 of the Act as a means of protecting a subsequent homeowner against economic loss (paragraph 62).

(iv) Likewise Justice Venning concluded that it is not part of the statutory scheme that by issuing a CCC that the Council were guaranteeing a building was free from defects that might otherwise cause economic loss to an owner (paragraph 64).

(v) He also concluded that a strict approach should be taken in this area of the law and that there should be no finding of liability upon the Council.

19.15 I had already been asked to consider the judgment of Venning J when I considered an application for removal from this adjudication made by the Council in July 2004. Whilst Mr Harrison's submissions in closing raise some different issues from those raised by the parties in the application for removal, I am not persuaded to change any of the conclusions that I reached in my Procedural Order No 10, which were:

1. The grounds for this application are that there is no basis in law for a claim or claims to lie against the Council. The application relies heavily upon the recent judgment of Venning J in *Three Meade Street Ltd v Whenua Glen Farms Ltd* (Auckland High Court, M37/02, 11 June 2004), where the Court found that the Council owed no duty of care to the owner of a motel in Rotorua.

2. It has been submitted by both the Claimants and the Third Respondent that an application for removal from an adjudication is the same, or the same principles should be applied, as for a strike out in Court. Whilst I would accept that the two types of application are very similar, and that similar principles should apply, the ultimate question that I must answer is whether it is fair and appropriate in all the circumstances to strike out the Council from these adjudications.

3. All parties appear to agree that when deciding whether a duty of care should be held to exist, the Courts have set down a two-stage approach as articulated by the Court of Appeal in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282. This two-stage test involves firstly considering the degree of proximity, and then the wider issue of other policy considerations which may tend to be either in favour or against the existence of a duty.

4. This is precisely the approach used by our Court of Appeal in *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, which was endorsed by the Privy Council [1996] 1 NZLR 513. However, Venning J decided that this was not authority for the proposition that a Council owes a duty of care to a commercial property owner to protect them against financial loss.

5. It is submitted for the Third Respondent that the *Three Meade Street* case was concerned with a commercial building, where the builder who was responsible for the construction was also the sole proprietor of the plaintiff company. Whereas, it is submitted, these adjudications concern residential buildings, where the Claimants had no association with any of the construction work or with the design, management, or development.

6. The submission made by Mr Gray on behalf of all of the Claimants is along similar lines but in much more detail.

7. It is submitted on behalf of the Council that the Ponsonby Gardens project is quite different to the traditional residential homes contemplated by the Court in *Hamlin*. Ponsonby Gardens, it is said, was developed by high profile and well known developers and, importantly, professionals were engaged to supervise and project manage the works. Furthermore, it is submitted that Ponsonby Gardens does not fall within the class of "less modest" homes contemplated by *Hamlin*, whilst the project organisation and "chain of command" was similar, if not identical to the development of commercial properties.

8. The *Three Meade Street* case clearly relates to "commercial property owners" and commercial or industrial construction work. Ponsonby Gardens is a cluster of ten dwellings. It may have been developed by a high profile and well known developer, but the same could be said about hundreds of houses built in New Zealand by group housing companies or franchised companies who advertise their wares on national television. These companies, I feel sure, would be upset if it were suggested that they used amateurs rather than professionals to design, supervise and manage their constructions.

9. In its submissions in reply, the Council says that it is not the use of the buildings that is determinative of the existence or otherwise of a duty of care, but the commercial relationships and "chains of command" that underpin commercial developments which negate the imposition of the duty. However, this does not appear to address the submissions made by the Claimants that the end users are residential home owners, and the method of construction, and the chains of command, do not alter this fundamental fact.

10. After careful consideration of all the submissions, I am not persuaded that the Council has made out a case for removal from these adjudications. Whilst the *Three Meade Street* judgment makes very interesting reading, I would accept the submission of the Third Respondent that the case will probably be distinguished from the situation in these adjudications. Ponsonby Gardens does not naturally fall within the definition of a commercial construction or commercial

buildings. It is a small group of semi-detached dwellings designed and used for residential purposes.

19.16 I think that it is quite clear from the reading of the judgment of Venning J that the question that he was being asked to answer in the *Three Meade Street* case was whether the Council owed a duty of care to a **commercial** property owner to protect them against financial loss. Venning J makes this apparent in paragraphs 22 and 30, and his wording in that latter paragraph seems to acknowledge that *Hamlin* was strong authority that a duty of care was automatically owed by Councils to residential homeowners.

19.17 It would be my conclusion that the *Three Meade Street* case must be distinguished from the situation in this adjudication.

The Building Consent

19.18 The Owners have claimed that the documentation that was submitted for building consent purposes was inadequate. They provided a list of the alleged defects, which was mainly indicating the absence of larger scale details on the drawings, but also included the absence of any specification documents, or producer statements.

19.19 They say that s.33 of the Building Act 1991 requires all applications for building consents to be accompanied by "such plans and specifications and other information as the [Council] reasonably requires". Council should not have even considered the application when insufficient information has been supplied.

19.20 The response from the Council to this claim is that s.34(3) of the Building Act says that "… the [Council] shall grant the consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application". Therefore, if the Owners are to succeed in their claim, it is submitted that the Owners would have to prove that no reasonable Council could have been satisfied that the provisions of the building code would be met.

19.21 I lean towards the reasoning of the Council on this matter. To prove that the Council had been negligent in issuing a building consent on the basis of the

drawings that were provided would require clear evidence of inadequacy as measured against the standards of the time. The experts disagreed about whether the drawings were adequate for building consent purposes. The drawings were not that good, but neither were they that bad or inadequate. The absence of a specification was surprising, but not completely unacceptable. It is possible to provide sufficient specification details on the drawings, and this would not be unusual for small residential projects.

19.22 I have already commented on the fact that the drawings submitted for the building consent contained ambiguities and inconsistencies, but nothing that I could describe as design deficiencies. The lack of details that have been pointed out by the Owners indicates a slack attitude by the Council officers who reviewed the drawings, and issued the building consent. But I am not satisfied that the Council has been shown to have been negligent in its issuing of the building consent for the reasons given above.

Duty to Inspect

19.23 It was the responsibility of the Council to carry out inspections of the work in progress, so that at the end of the construction work it was in a position to issue a Code Compliance Certificate. Mr Alexander gave evidence on the general structure and purpose of the particular inspections.

19.24 There does not seem to be a lot of disagreement between the parties in this adjudication that the Council is not expected to carry out the function of a clerk of works or a quality control supervisor. I detected no disagreement with the words of Henry J in *Lacey v Davidson* (Auckland High Court, A.546/65, 15 May 1986), as referred to by Mr Harrison:

> The duty is to take reasonable care in carrying out inspections of building work. It is important to bear in mind that the Council is neither a guarantor of the builder nor an insurer of the owner or occupier, the main purpose of the Council's power of control being to ensure the structural stability of the building. The duty cannot be elevated to that required, for example, of a supervising architect.

19.25 A territorial authority will not be held to be negligent if it carries out its inspections at such times, and with due diligence, so that it can say that it has reasonable grounds to conclude that the work that has been done has complied with the Building Code. It is not a matter of strict liability.

19.26 In April 1995 the Council introduced extra inspections for buildings that included stucco finishes. There were to be two inspections by the Council building inspectors. The first inspection was to inspect the rigid backing sheets, which would include checking to see that the sheets were properly fixed for bracing requirements (if appropriate). The second inspection was to be made prior to the first coat of plaster being applied, so that reinforcing mesh, control joint locations, perimeter flashings and the like could be observed.

19.27 Mr Alexander told me about these extra inspections and, according to the inspection records for the Ponsonby Gardens project, stucco inspections were carried out on the job by Council inspectors. Mr de Leur, Mr Cook and Mr Alexander told me what they would have expected a building inspector in 1995 and 1996 to have noticed during the inspections, as well as at the other inspections that took place during construction. I also heard evidence from Mr Holsted and Mr Gregersen, who were two of the inspectors who carried out inspections at Ponsonby Gardens whilst construction work was underway. I will now turn to consider the areas in which leaks have been found to have existed.

Stucco, or Plaster Cladding

19.28 The background details for this are given in section 7 of this Determination. The non-rigid backing with a ventilation cavity was changed to Triple ‘S’ and this was not amended on the building consent, nor was a new consent issued to reflect the change.

19.29 As I have already found that no damage can be seen to have been caused by this change, it is probably academic to consider whether the Council was negligent in its failure to either notice or record the change. However, it may indicate that the quality of the inspections on this project was not as high as it should have been.

19.30 The problems with the stucco were inadequate clearances at the base of the plaster, inadequate junctions between plaster and weatherboards, and the failure to flash or seal the exposed edges and joins of the Triple ‘S’. All of these matters were capable of being seen during one or other of the routine inspections made by the Council inspectors, and all of them should have been noticed, even judging by the standards in 1995-96.

19.31 The inadequate clearances were visible at the completion of the work and are measurable distances that do not require special tools or equipment to detect. For example, Triple 'S' technical information sheet showed a minimum of 150mm ground clearance. The junction between plaster and weatherboards was detailed on building consent drawing A.3.4.2, and the scriber, sealant and back flashing would have been visible at the stucco inspection, and the 10mm control gap would have been visible at completion.

19.32 The absence of effective cover strips and flashings at joins and edges of the Triple 'S' would have been visible at the pre-plaster or stucco inspection. I would have expected this aspect to have received special attention for the reason that a failure to get this right would have serious consequences. This is exactly the point made by Greig J in the *Stieller* case, which was that a higher standard of care should be applied to matters in which the consequences will be serious. Because the Council's inspectors have not been attentive enough, and the Triple 'S' was not properly protected, the consequences have contributed to the need to completely re-clad the external plastered walls.

Weatherboards

19.33 The problem with the weatherboards was that an inadequate gap was left between the bottom of the weatherboards and the deck surface, or the adjacent ground levels. These inadequate clearances were visible at the completion of the work, and should have been noticed by the Council's inspectors.

Window and Door Openings

19.34 It was my finding that the probable cause of leaks from around the windows was water entering at the sills because the plaster was taken up to the aluminium window flange with no slope to shed the water, and only a surface applied silicone seal.

19.35 Mr Alexander says that this was an acceptable method of installing windows in 1995, but Mr Cook disagrees. I have already traversed the evidence in section 9 of this Determination. If I accept the evidence from Mr Alexander, this means that I am accepting that the Council's inspectors were not familiar with BRANZ bulletins or manufacturers' technical literature, or simply allowing bad building practices to prevail. I prefer Mr Cook's evidence on this matter, and I find that this inadequate method of sealing around the sills of the windows would be visible either at the stucco inspection, or at completion. The Council's

inspectors should have noticed this problem and instructed the builders to correct the defective installation.

Decks

19.36 There were two, or maybe three, reasons for the problems and leaks from the decks. The first was an inadequate step-down between the deck level and the internal floor level. This was not clearly detailed on the building consent drawings, so it should have been checked more carefully by the Council's inspectors during construction. This defect would be visible at completion.

19.37 The second problem was the failure to lay the waterproof membrane properly so that the fibreglass was not properly embedded within the liquid membrane. This would not have been obvious to a building inspector, although it may have been detectable by an expert in waterproof membranes.

19.38 The third problem, which was only found when the remedial work was underway, was a workmanship problem around the outlets. This did not cause any further remedial work because it was rectified by the repairs to the membrane. Therefore, I assess that the damage caused by the workmanship problems were about 80% of the costs, or an amount of $20,000.00.

19.39 I would find that the damages caused by the inadequate step-down (that should have been noticed by the Council's inspectors) will be $24,684.76 less $20,000.00, or $4,684.76.

Balustrades

19.40 The reason for the leaks into the solid balustrades was the inadequately sealed handrail bracket fixings, and the flat topped balustrade wall with no cap flashing or under-flashing. The rear balustrade had a timber capping, but this was installed after the Completion Certificate had been issued.

19.41 Mr Alexander told me that BRANZ was silent on the issue of installing handrails through the top surface of balustrade walls, and that it was a widespread practice in 1995 to fix the handrail standards through the top of the balustrade wall. I accept his evidence that this was widespread practice, and was considered as satisfactory, in 1995. However, I am sure that it was not considered satisfactory to have absolutely no sealant in or around such a penetration.

19.42 When I asked Mr Holsted what he would have done in 1996 to check whether the handrail standards had been properly sealed, he answered that he would grab it and give it a good shake. He would rarely, if ever, ask the builder to remove it so that he could check the waterproofing of the penetration. Mr Smith told me that most of the handrails were able to be pulled out by hand, and that there were no signs of any seals or sealants. I conclude that the Council's inspector failed to check whether the penetrations made by these handrail standards had been sealed or waterproofed in an acceptable manner.

19.43 The flat-topped balustrade is slightly different. I would accept the expert evidence that says that this was considered in 1995 to be acceptable, because there was no way of checking that an adequate under-flashing or under-capping had been installed. However, the building consent drawings did show a hardwood capping rail along the top of the solid balustrades, and no changes to that detail were recorded as having been approved by the Council.

19.44 Mr Holsted was one of the inspectors with the Council at the time. He joined the Council as an inspector in the middle of September 1995, and carried out his first visit to the Ponsonby Gardens site on 1 November 1995. He signed off 21 inspections on this project out of a total of recorded inspections of 60. He told me that if any change from the building consent drawings was noticed on site he was under clear instructions to ask for a new consent, or an authorised revised consent. He repeated that answer when questioned by both Mr Harrison and Mr Casey, and strongly resisted the invitation to admit that many minor changes would have gone unrecorded in 1995-1996.

19.45 It is my conclusion that the Council should have required a revised detail from the builders when it was noticed that the top of these balustrades had been altered. If that revised detail had shown the work as it was built, without any protection over the Triple 'S', then I am sure that Council would not have approved the details. It is all a matter of taking reasonable steps to ensure that the work will comply with the Building Code. If the Council has no details, and cannot tell after the construction has been completed, how it was built, how can the Council claim that it took reasonable steps so that it could be satisfied on reasonable grounds that the building work complied with the Building Code? I find that this inaction was a breach of the duty of care that the Council owed to the owners of the house.

Summary

19.46 I find that the Council was negligent in the carrying out of its duties to inspect, as more fully explained in the preceding paragraphs, and negligent in its issuing of the Code Compliance Certificate, and thereby in breach of the duty to take care that it owed to the Owners. This negligence has led to water penetration and damage, to the extent that it is liable to the Owners for:

Stucco, or plaster cladding	as para 14.10.2	$ 34,661.02
Weatherboards	as para 14.10.3	1,192.36
Door and window openings	as para 14.10.4	10,264.11
Decks	as para 14.10.5	4,684.76
Balustrades	as para 14.10.6	13,268.14
General damages and consequential damages	as para 16.17	10,675.00
		$ 74,745.40

20. ARCHITECTURAL WATERPROOFING

20.1 The Owners are claiming that Architectural Waterproofing Ltd ("AWL") was negligent in that it had not adequately installed the waterproofing membrane to the decks. The membrane's failure to prevent water ingress as a result has been the cause of major decay in the associated areas. In considering the entire development, some decks were tiled and others were not, but they have all leaked and the common denominator has been the membrane laid by AWL. Regarding AWL the Owners submit:

(i) With their experience in the field, AWL should have noticed and brought to the attention of the builder any inadequacy of the falls, guttering or in the construction of the substrate.

(ii) They have subsequently failed to execute proper and tradesman-like repairs to the decks when they have carried out remedial works.

(iii) AWL owed a duty of care and should be responsible for the loss.

20.2 As mentioned earlier in this Determination, AWL was placed into liquidation on 14 September 2004, but leave was obtained from the High Court to continue these adjudications against AWL. The Company was represented at our three

preliminary conferences, but failed to file any Response to the adjudication claim, failed to file any witness briefs or evidence, failed to attend the Hearing, and did not file any submissions.

20.3 Sections 37 and 38 of the WHRS Act read:

> **37 When adjudicator's power not affected**
>
> The adjudicator's power to determine a claim is not affected by –
>
> (a) the failure of a respondent to serve a response on the claimant under section 28; or
>
> (b) the failure of any of the parties to –
>
> (i) make a submission or comment within the time allowed; or
>
> (ii) provide specified information within the time allowed; or
>
> (iii) comply with the adjudicator's call for a conference of the parties; or
>
> (iv) do any other thing that the adjudicator requests or directs.
>
> **38 Adjudicator may draw inferences and determine claim based on available information**
>
> If any failure of the kind referred to in section 37 occurs in an adjudication, the adjudicator may –
>
> (a) draw any inferences from that failure that he or she thinks fit; and
>
> (b) determine the claim on the basis of the information available to him or her; and
>
> (c) give any weight that he or she thinks fit to any information provided outside any period that he or she requested or directed.

20.4 Therefore, my power to determine the claims made against AWL is not affected by AWL's failure to participate in this adjudication in the manner that I have outlined above. It is a pity that I have not had the benefit of hearing evidence or arguments from AWL, but I must base my decision as fairly as I can on the information that has been made available to me.

20.5 Mr Alexander produced copies of documents that he had obtained during the inspection process (in which AWL did co-operate and participate). Included in these documents was a quotation from AWL for Jadixx Aquadex fibreglass reinforced acrylic waterproofing membrane (in lieu of Chevaline Dexx and Butynol) to flat roofs, decks and gutters for all ten units at Ponsonby Gardens. The quotation includes the following:

> 1) Aquadex is fully trafficable and therefore suitable for use on decks and roofs and may be tiled over if desired. Some ridging of membrane may occur at joints in

ply due to thermal movement. This may be minimised by gluing and screwing ply sheets which should be tightly butt-jointed.

2) Butynol (1mm) may be substituted if and where required at no extra cost.

20.6 I was also shown invoices submitted by AWL to Taradale Properties or Taradale Ponsonby Gardens Ltd, from 30 October 1995 to 28 February 1996 for all work in the quotation, and some extra costs for putting on an additional top coat of non-skid Aquadex. Furthermore, in the job costing sheets produced by Mr Manning for Ponsonby Gardens, there are entries to indicate that the invoices have been paid by Taradale Ponsonby Gardens Ltd, albeit considerably later than would have been expected.

20.7 I am satisfied that the waterproofing membrane was laid by AWL on the decks of Unit 9, and it was defective. I would also record that there is strong evidence to suggest that AWL was aware of these problems, and in April-June 2002 AWL and Taradale Developments offered to re-lay the waterproofing membrane on the decks of several of the units in Ponsonby Gardens at their own cost.

20.8 I find that AWL owed a duty of care to subsequent purchasers of the dwelling to carry out its work in such a way that it complied with the requirements of the NZ Building Code. AWL was negligent in that the waterproofing membrane was not properly applied, and in breach of its duty to take care because the membrane allowed water to leak into the building. This negligence or breach led to water penetration and resultant damage, and it is liable to the Owners for the repairs to the decks.

20.9 The amount of the damages that I will award to the Owners against AWL will be the $24,684.76 identified in paragraph 14.10.5 above and the general damages and consequential losses that I assessed in section 16 of this Determination. This amounts to:

Deck repair costs	$ 24,684.76
General damages & consequential losses	10,675.00
	$ 35,359.76

21 MR MANNING (as Eighth Respondent)

21.1 The Owners purchased Unit 8 from the Massey Trust in October 1996. Of course, they did not buy it from the actual Trust because a Trust cannot be the

proprietor of land, so it was purchased from the Trustees of the Massey Trust. The Owners say that they bought the property from Mr Tim Manning, who was at that time a trustee of that Trust.

21.2 When they were arranging to view the house prior to deciding to purchase, there was a leak through the ceiling of the dining room, and the planned "open day" was cancelled until the leak was repaired. As a result, the Owners put in an offer to buy with Special Condition 16, which read:

> The Vendor warrants to repair the leak above the dining room area and all necessary repair work to all ceilings, floors, walls, and floor coverings and paint finishes in a tradesmanlike manner to the standard of the existing dwelling on or before settlement date.

21.3 The sale and purchase agreement was signed by Mr Manning and the Owners with clause 16 included. Settlement took place on 8 November 1996. As I have already mentioned earlier in this Determination, the leak was not properly repaired and persisted until the Owners got in their own roofer in June 1999. They started proceedings in the Disputes Tribunal and eventually were awarded $7,500.00 against Mr Manning.

21.4 Mr Manning applied for a re-hearing on the grounds that he was not personally liable, as the property had been sold to the Owners by the Massey Trust, and the complex had been developed by Taradale Ponsonby Gardens Ltd. This matter was eventually settled when the Owners received the last part of the $7,500.00 in February 2001. The payment was enclosed in a letter signed by Tim Manning as a director of Taradale Ponsonby Gardens Ltd, on the letterhead of Taradale Properties.

21.5 The Owners have not made it clear why they are claiming that Mr Manning should be liable to them for the leaks. The roof leaks, which existed at the time of purchase, were fixed in 1999 and do not form part of the claims in this adjudication. In any event, if the Owners are bringing these claims as breaches of the sale and purchase agreement, then they are out of time. They would have needed to have started these adjudication proceedings prior to 8 November 2002 at the latest to come within the six-year limitation period.

21.6 The Owners have not raised any specific allegations of misrepresentations against Mr Manning (the vendor) personally, and it would appear to me that all their other claims are made against Mr Manning as the developer or builder of

Ponsonby Gardens. These claims will be considered in the next section of this Determination. I will dismiss the claims against Mr Manning as the eighth respondent in this adjudication.

22. MR MANNING (as Eleventh Respondent)

22.1 The Owners are claiming that Mr Manning was the single person who should be held responsible for the leaks (and other building defects) that existed in the Ponsonby Gardens houses. They claim that he owed a duty of care to all subsequent purchasers and owners, and that it was as a result of his negligence that these problems occurred.

22.2 It is submitted by the Owners that Mr Manning was the head of a series of companies known as "Taradale" that carried out substantial developments in the Auckland region. He was the driving force behind the Ponsonby Gardens development, with a very hands-on role, which included being involved personally.

22.3 The Owners say that Mr Manning was negligent in a number of ways, but predominantly in the way he set up the design and construction process at Ponsonby Gardens. They say that he owed the subsequent purchasers a duty of care, and that by his negligence he breached that duty of care.

22.4 The response to these claims by Mr Manning is that firstly, he was not negligent in any of his actions and secondly, he has no personal liability because he at all times was acting as a director of Taradale Ponsonby Gardens Ltd ("TPGL").

22.5 Mr Manning says that the entire project was developed and managed by TPGL. Based upon the evidence that I was given, I would find that this was generally correct, but it was not quite that simple. For example, the Architect was employed by Mr Manning of Taradale Properties Ltd, with no visible charge being made by that company to TPGL in the costing ledger; and the building consent was in the name of Taradale Properties Ltd. However, the majority of the work was clearly carried out in the name of TPGL, and TPGL was the vendor of all of the units involved in these adjudications.

22.6 I have already recited the general history of TPGL in section 3 of this determination, how it changed its name in July 1998, and was placed in liquidation in September 2003. I believe that I would have found that TPGL was

the company responsible for the Ponsonby Gardens development, and that I probably would have found that the Company was responsible for the building defects that I have found existed in these dwellings. It is academic, but it does go some way to explaining why the Owners have mounted these claims against Mr Manning, who was the only director of TPGL.

22.7 The next matter that I will consider is whether Mr Manning, as a director of TPGL (or any of the other Taradale companies) should be held to have a personal liability for the building defects. Counsel for Mr Manning submits that the law is that a director does not owe a duty of care to people who deal with the company, except in very exceptional circumstances. It is submitted that the director is deemed to be acting as the company and not on his own behalf, and unless some particularly unusual act or omission is committed by the director by which he can be seen to be accepting personal liability, then he owes no duty of care.

22.8 The leading authority on the matter of the liability of a company director for negligent misstatements is undoubtedly *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA), in which the head note reads:

> **Held:** An officer or servant of a company, no matter his status in the company, might in the course of activities on behalf of the company come under a personal duty to a third party, breach of which might entail personal liability. The test as to whether that liability had been incurred was whether there had been an assumption of a duty of care, actual or imputed. Liability depended on the facts, on the degree of implicit assumption of personal responsibility and the balancing of policy considerations. On the formation of his company, Mr Ivory had made it plain to all the world that limited liability was intended. His object would be undermined by imposing personal liability. There was no just and reasonable policy consideration for imposing an additional duty of care. Mr Ivory was not personally liable.
>
> ……
>
> [list of cited cases]
>
> ……..
>
> *Observations*: (i) (per Cooke P) Where damage to property or other economic loss is the basis of a claim it may be possible to sheet home personal responsibility for an intentional tort such as deceit or knowing conversion, and the individual defendant who is placed in a fiduciary position towards the plaintiff will be personally liable for the breach of that duty (see p 524 line 14).
>
> (ii) In relation to an obligation to give careful and skilful advice, the owner of a one-person company might assume personal responsibility. Something special was required to justify

> putting a case in that class. To attempt to define in advance what might be sufficiently special would be a contradiction in terms (see p 524 line 35).

22.9 Counsel for the Council says that *Trevor Ivory* has no relevance to a claim against a party that has caused damage to property because of negligent building work. Furthermore, it is submitted, the Court of Appeal has subsequently affirmed that assumption of responsibility is an objective test – *Rolls Royce NZ Ltd v Carter Hold Harvey Ltd.*

22.10 Mr Campbell, on behalf of Mr Townsend, was supportive of Mr Manning's arguments and pointed out that the *Trevor Ivory* approach has been considered and approved in several later cases that were not confined to the tort of negligent misstatement. I was referred to:

Anderson v Chilton (1993) 4 NZBLC 103,375; *Banfield v Johnson* (1994) 7 NZCLC 260,496; *Livingston v Bonifant* (1995) 7 NZCLC 260,657; *Laughland v Stevenson* (HC Auckland, CP 1114/91, 17 March 1995, Hillyer J); *Plypac Industries Ltd v Marsh* (1998) 8 NZCLC 261,713; *Perry Group Ltd v Pacific Software Technology Ltd* (HC Hamilton, CP 55/01, 2 August 2002); and *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 (CA), where an *obiter dictum* of Gault P and Tipping J treats that approach as one of general application (para 52):

> When a person is acting **for** the company it is easier to view his conduct as both his own and vicariously that of the company. When a person is acting **as** the company it is, as just noted, more difficult, at least in general terms, to regard the conduct as that of both the person so acting and the company.

22.11 On the other side of the argument is the judgment of Hardie Boys J in *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548. Mr Harrison referred me to p 595:

> The relevance of the degree of control which a director has over the operations of the company is that it provides a test of whether or not his personal carelessness may be likely to cause damage to a third party, so that he becomes subject to a duty of care. It is not the fact that he is a director that creates the control, but rather that the fact of control, however derived, may create the duty. There is therefore no essential difference in this respect between a director and a general manager or indeed a more humble employee of the company. Each is under a duty of care, both to those with whom he deals on the company's behalf and to those with whom the company deals in so far as that dealing is subject to his control.

22.12 In the *Morton* Case the directors were found to be liable in negligence in respect of certain matters in which they had been personally involved. This case was mentioned in *Trevor Ivory*, when both Cooke P and Hardie Boys J commented that *Morton* was a case where there had been an assumption of responsibility by the directors, which was quite consistent with their findings in *Trevor Ivory*.

22.13 I am not persuaded that I should move away from the clear findings of the Court of Appeal in *Trevor Ivory*. Mr Manning is entitled to succeed in his defence that he generally has no personal liability when acting as a director of one of his companies, unless it can be shown that there was an assumption of responsibility after a thorough examination of the facts of each particular situation.

22.14 The Owners say that there were many examples of Mr Manning having a personal involvement and exercising personal control of the Ponsonby Gardens project. I will list some of their examples:

- Mr Manning decided to use a small building company;
- He decided not to use a professional quantity surveyor/manager;
- He limited the Architect's services;
- He engaged Mr Lay, who was not capable of controlling the work;
- He encouraged cost cutting at the risk of durability;
- He created the wrong environment by focusing on cost savings and speed without quality controls.

22.15 In the face of this comprehensive "attack" on Mr Manning, Mr McCartney made some general submissions, which were:

> The claimants have alleged that Mr Manning "hid behind companies" to avoid liability. He has done no such thing. He has operated companies, and in particular TPGL, in an entirely responsible and appropriate manner. TPGL is a distinct legal entity from Mr Manning. Mr Manning is not liable for TPGL's obligations. The use of companies in commerce is considered to be desirable. It is for that purpose that we have a Companies Act.
>
> There is an element of the pot calling the kettle black here, because some of the claimants own their properties through trusts. The trusts, it can be inferred, are primarily employed for the purpose of asset protection. While that is quite legitimate, there is probably less commercial justification for it than there is for the proper use of a company to carry out a development of this type.

> There also seems to be an undercurrent to the claimants' case that Mr Manning made a lot of money from this development, to which he should not be entitled, given that the claimants have suffered financial loss. That is quite wrong. Firstly, Mr Manning never stood to make any profit personally, it would have been the profit of TPGL. Secondly, TPGL lost something in the region of $500,000 on the development, because the development ran well over budget (which begs the question as to how cost cutting is part of the picture at all).

22.16 Mr McCartney also submits that the only alleged act of negligence that can remotely be connected with Mr Manning was the use of Triple 'S' and the deletion of the drainage cavity. He says that Mr Manning was not an expert in construction and, quite reasonably, relied upon the advice that he got from Mr Lay, whom he engaged on the project for his building knowledge and skills. As for the general design and construction work, Mr Manning employed an experienced architect, a project manager, a site manager and a job foreman. He understood them to be competent to do the job properly.

22.17 There is no doubt in my mind that Mr Manning was personally "in contact" with the Ponsonby Gardens project. I am not convinced, however, that he actually ever worked at the coalface so to speak. He did not design the buildings, nor did he carry out any of the building work. He delegated most tasks to others. He may have encouraged his people to cut costs, time and corners, but he never instructed his people to build in contravention of the Building Code.

22.18 The important feature of the *Morton* case was that both George and Douglas Parker were found to have personal liability when their personal (and negligent) decisions resulted in the defects in the piling work. When they employed persons whom they could reasonably assume to be competent, the directors were not found to be liable, even though it was later discovered that the employees were not competent. Applying the same ratio that Hardie Boys J applied in *Morton*, I am not persuaded that Mr Manning actually crossed the line that would expose him to a finding of personal liability. I will give my brief reasoning.

22.19 The size of the building company that Mr Manning chose to use for Ponsonby Gardens has no direct bearing on performance. The number of people in his "management" team was reasonable for a project of this size. His decision not to use a quantity surveyor (Maltby) or a project manager (Paxton) would not be an unusual decision in the mid 1990's, although it would increase the risk of

cost and time overruns. Some may say that this was an unwise decision, but it cannot be classified as negligence.

22.20 I am not sure that Mr Manning actually reduced the Architect's services, because TPGL still paid the Architect the full $100,000.00 fee. I appreciate that Mr Townsend thought that he had been limited in his services, and the evidence does show that there was confusion during October 1995 as to what work the Architect was required to do, but this is insufficient to show that Mr Manning was negligent.

22.21 With the benefit of hindsight, I do think that Mr Manning's engagement of the services of Mr Lay was a mistake. However, in 1995, he relied upon Mr Christian's recommendation and possibly on what Mr Lay told Mr Manning himself. He was told that Mr Lay had worked "in a similar role" for Manson Developments. He would have been wise to obtain some feedback from Mr Manson, but he had the recommendation from Mr Christian who had the experience of working with Mr Lay at Manson Developments. His engagement of Mr Lay was not negligent.

22.22 The final matters are the allegations concerning cost cutting and creating the wrong environment. Cost cutting or cost control is not a sin, and can only be classified as negligence if the cost cutting is carried out with a reckless disregard for the consequences. For example, using a cheaper brand of paint may reduce the life of the painted surface, but this is simply a commercial trade-off. I am not convinced that Mr Manning personally instructed the use of Triple 'S', but even if he had done so, it was a reasonable call in 1995. The problem with the Triple 'S' was the way in which it was installed, and Mr Manning was not involved in its installation. In our society and under our laws, it is not an act of negligence to focus on profit.

23. BRUCE CHRISTIAN

23.1 The Owners are claiming that Mr Christian, as the project manager on the Ponsonby Gardens project, is liable to them for the defects in the work that caused the leaks. They say that his role was high in the chain of command, being second only to Mr Manning, and that his role was described in a memorandum from Mr Manning in February 1996 as follows:

- Ensuring the project is built under budget;
- Ensuring the project sells at the list prices;
- Ensuring a smooth liaison between architect and site personnel to ensure in conjunction with Craig Stevenson that the best terms and prices are achieved on construction;
- Issuance of titles in conjunction with Lauren;
- Essentially Bruce is the person who will report to myself and who will have the sole responsibility for this job's profitability and completion.

23.2 The Owners say that Mr Christian was the Project Manager who was responsible for making sure that the project was built on time, to budget, was sold for the best prices, and generally coordinating the whole project.

23.3 Mr Christian who, like the Owners, represented himself throughout this adjudication, put his response in straightforward terms. He says that the Owners have not proven in any way that he was responsible for the serious leaking problems in their home. Mr Lay was in complete control of the site and all construction activities, and Mr Christian never gave any direct instructions to Mr Lay on any aspect or detail relating to the construction of the houses.

23.4 Mr Christian told me that he was not a builder and never claimed to be a builder. He was working on other projects whilst Ponsonby Gardens was being built, seeking other development sites, getting plans prepared, and setting up future projects. He admits that he did keep a watching eye on progress and the finishing aesthetics as they would affect sales and marketing documentation. It was his job to make Ponsonby Gardens look attractive and sell for the best price.

23.5 Counsel for the other Respondents made brief submissions on the potential liability of Mr Christian. For example, Mr Harrison for the Council directed my attention to *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA), where it was held that:

> Contractors, architects and engineers are all subject to a duty to use reasonable care to prevent damage to persons whom they should reasonably expect to be affected by their work"

as per Richmond P at p 406; and on p 407:

> It is clear that a builder or architect cannot defend a claim in negligence made against him by a third person by saying that he was working under a contract for the owner of the land. He cannot say that the only duty which he owed was his contractual duty to the owner. Likewise he cannot say that the nature of his contractual duties to the owner sets a limit to the duty of care which he owes to third parties.

23.6 This ground has already been partially covered in my consideration of the Architect in this Determination, but Mr Christian was not an architect, nor an engineer, nor in his opinion was he a builder. He was a project manager. Mr Harrison submits that as Mr Christian's job was to ensure that the project was properly managed to its conclusion, which included ensuring that a Code Compliance Certificate was obtained, then Mr Christian must be jointly responsible with Mr Lay for ensuring compliance with the NZ Building Code.

23.7 I think that it is reasonable to conclude that project managers engaged on building projects must owe a duty of care to subsequent purchasers and owners, and must use reasonable care to prevent defects or damage occurring from their work. The extent of that duty of care may be limited by the scope of work that the project manager has been engaged to do.

23.8 Although Mr Christian did not raise the issue, I have considered whether he may have a reasonable claim to have been an "employee" of Taradale, rather than an independent contractor. The tests to be applied were traversed in section 17 of this Determination when I needed to consider whether Mr Lay was an employee or independent contractor.

23.9 Mr Christian produced invoices on the letterhead of Plus Properties Ltd for work done for Taradale properties between June 1994 and July 1996. They are all tax invoices for consultancy work on a number of projects, and show that Mr Christian worked a variable number of hours for Taradale in each week. I was not shown any letter of contract, or terms of engagement between Mr Christian and Taradale. However, based upon the information that I was shown, I find that Mr Christian was engaged as a consultant and independent contractor.

23.10 It is a defence raised by Mr Christian that he was employed by a company called "Plus Properties Ltd", and that if any liability should attach to his situation, then he says that it is the Company that should be called to account.

However, Mr Christian has provided no evidence to prove that this Company does exist, or that he was an employee of the Company, or whether he was a director of the Company.

23.11 The difficulty that Mr Christian faces with his submission is that there was absolutely no evidence to show that Mr Christian was acting as either an employee or a director of Plus Properties Ltd, or that anyone knew that he was anything other than Bruce Christian. When he was working with Taradale, it seems that he frequently signed letters as if he were an employee or executive of one or other of the Taradale companies. The only person who seems to have known about Plus Properties Ltd was Mr Manning, but all through his evidence Mr Manning constantly referred to Mr Christian personally. For example, when I asked Mr Manning how he could lose $1 million on a $2.5 million project, his answer was "I sacked Bruce Christian". He did not say that he sacked Plus Properties Ltd. Contrast this with Mr Malcolm Brown of Paxton Project Management Ltd, who Mr Manning (and most others) referred to as "Paxtons" rather than Mr Brown.

23.12 One of the basic premises of the *Trevor Ivory* judgment is that the involvement of the company is known to those dealing with the officers or servants of the company. Mr Ivory had made it known to those with whom he dealt that he was operating as an officer of a limited liability company. In Mr Christian's case, he acted as if he were a person, which would be interpreted by those with whom he was dealing to be an assumption of personal liability for his actions. I am not persuaded that Mr Christian can divert any liability that his actions may have attracted to the company.

23.13 Mr Casey, on behalf of Mr Lay, points out that Mr Christian was the person who had overall control over the Ponsonby Gardens project, attended every project meeting for which records have survived, and gave Mr Lay his instructions. He submits that it was probably Mr Christian who told Mr Townsend that he should not provide construction details.

23.14 Having decided that Mr Christian, as the project manager, owed a duty of care to the Owners, and having found that he cannot deflect that onus to Plus Properties Ltd, the next point to consider is whether Mr Christian breached his duty of care. Was he negligent and, if so, did his negligence cause the defects that existed in the Owners dwelling?

23.15 I accept that Mr Christian was not engaged full time on Ponsonby Gardens – but that does not lessen any responsibility that he had to properly perform his job. I also accept that he was not the "builder" – he was a project manager and coordinator. His role was of the type that used to have the slogan on the desk saying "the buck stops here". It was his task to bring the project to a successful conclusion – which I interpret as being financially successful for Taradale, together with a group of satisfied purchasers.

23.16 I accept the submission made by Mr Harrison that one of Mr Christian's important tasks was to ensure that the buildings were built to the required standards – not only those of the NZ Building Code, but also those of the standards predicted by the sales and marketing documents.

23.17 The Owners' dwelling was not built to the standards required by the NZ Building Code. There were leaks. Mr Christian must shoulder the burden of responsibility for not taking adequate steps to ensure that those under him achieved the required standards. I find that Mr Christian was negligent in his management of the project in that he failed to ensure that adequate steps were being taken to prevent the defects in the work, and thereby was in breach of the duty to take care that he owed to the Owners. Therefore, he is liable to the Owners for the following damages:

Stucco or plaster cladding	as para 14.10.2	$ 34,661.02
Weatherboards	as para 14.10.3	1,192.36
Door and window openings	as para 14.10.4	10,264.11
Decks	as para 14.10.5	24,684.76
Balustrades	as para 14.10.6	13,268.14
General damages and consequential losses	as para 16.17	10,675.00
		$ 94,745.40

24. CONTRIBUTORY NEGLIGENCE

24.1 In the Responses filed by the various respondents to the adjudication claims, some of the respondents raised issues of contributory negligence as affirmative defences.

24.2 I would presume that these defences would rely upon the provisions of the Contributory Negligence Act 1947, and in particular s.3(1) which states:

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

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

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

24.3 The Council says that the Owners purchased their unit from the Massey Trust in 1996 with knowledge that there were weathertight problems with the unit. With the knowledge that there was an ingress of water through the roof above the dining room, the Owners proceeded with the purchase on the strength of a condition in the agreement for sale and purchase warranting to repair that leak and undertake "all necessary repair work to all ceilings, floors, walls, floor coverings and paint finishes in a tradesmanlike manner to the standard of the existing dwelling on or before settlement date". The Owners did not obtain a building surveyor's report to confirm that any weathertight defects had been satisfactorily remedied prior to settlement of the purchase of the property.

24.4 Counsel for the Council has referred me to *Peters v Muir* [1996] DCR 205, where it is submitted that Judge Ryan reduced the damages awarded against the Council by one third, on the grounds that the purchaser failed to arrange for a pre-purchase inspection.

24.5 I am familiar with this case, which concerned a house built by a Mr Muir in 1978 in Tekapo. Miss Peters purchased the property in 1992, and then after she had moved in she applied for a building consent to install a new pot belly stove. As

a result of a visit by a building inspector, the building was found to be so badly built that it was structurally unsound, and was leaking badly. On the matter of contributory negligence, the Judge said:

> The council has pleaded contributory negligence and in support of that Mr James pointed to a number of matters. Miss Peters acknowledged that she had set out to become very familiar with the Tekapo property market. She inspected a number of properties, approximately 17. She has owned houses previously. She first made an offer to buy 33 Murray Place in or about May of 1991. At that time, although the asking price was $98,000, Miss Peter's offer was $60,000. She made further offers at that figure during the latter part of 1991. In early 1992, when the property was still listed at $98,000, she offered $65,000. Miss Peters had apparently heard a rumour in Tekapo that Mr and Mrs Muir were likely to accept an offer much lower than their stated asking price. All this goes to show that Miss Peters was not a naïve purchaser. She was well familiar with the property and she knew that it was going to require further work to be done to complete it. She had no reason to suppose, nor did she in fact believe, that she was purchasing a property which she should be entitled to regard as well finished and complete in all respects. Against this background it is urged for the council that so many of the defects were so obvious that even to a person not experienced in building there was sufficient to put them on notice and prompt further inquiry. It is clear that Miss Peters did not seek advice from any person competent to assess the actual soundness of the building. While I doubt if an aspiring purchaser could be said to be negligent in failing to make inquiry as to the state of foundations, such are the defects in, for example, the block-work, there are obvious gaps which one can see through at some points, lintels were sagging and bowing, a timber joist supporting the first floor structure, which joist is not covered up had been sawn part way through and consequently split along part of its length. This and so many other features were there to be seen. It is not that I take the view that Miss Peters, or any other purchaser not experienced in building work, should be able to reach particular conclusions as to all the defects, and it may have been that Miss Peters simply regarded these as being matters incidental to the fact that the basement area had never been finished. But at the very least the defects were sufficiently numerous and obvious as to, in my judgment, put a reasonable person upon inquiry. In failing to look further into the matters which must have been so obvious, then in my view Miss Peters has contributed in some degree to her own loss.

24.6 I do not find that this judgment is supportive of a general proposition that purchasers should have obtained pre-purchase inspection reports in 1992. Clearly, Miss Peters should have been alerted by what she saw, but I see no parallel with Unit 9 in Ponsonby Gardens. The Owners were aware that there was a leak, and they wrote a special condition into the sale and purchase agreement. No witnesses have told me that there were any signs that would tell a prudent purchaser that it was necessary to obtain a pre-purchase inspection for what amounted to being a new house.

24.7 The other case to which I was referred by Counsel for the Council was *Cinderella Holdings Ltd v Housing Corporation of New Zealand*, [1998] DCR 406, in which the court found that a purchaser failed to take the steps which a reasonably prudent purchaser would have been expected to have taken, and reduced the damages by 85%.

24.8 The case involved the purchase of a commercial office building in Napier, which was later discovered by the purchaser to have a highly toxic substance in some of the light fittings. It cost $94,000 to replace the light fittings. The possible danger to life arising out of the presence of the toxic substance was remote, and a danger only arose in the event of a fire. The key finding was that the purchaser did not take the steps that a reasonably prudent purchaser of a valuable building could have taken.

24.9 I am not persuaded that either of these cases is authority for the proposition that a purchaser of a new house in 1996 should have obtained a pre-purchase inspection report. The Council is suggesting that the Owners should have obtained an independent report to confirm that the leaks had been repaired, but I do not find that the Owners acted unreasonably under the circumstances.

24.10 The final case that I have been referred to is the Determination of Adjudicator Douglas in *McQuade v Young & Ors* (WHRS claim 119, 26 April 2004) in which a reduction of 33% was made on account of Mr McQuade's (the purchaser) experience in the construction industry. The adjudicator found that Mr McQuade had purchased the property during construction and had inspected it, and provided a list of uncompleted or defective work before agreeing to purchase the property.

24.11 I do not think that the *McQuade* decision is of relevance to this adjudication. The Owners in this adjudication have little experience in the construction industry, and both work in the medical or health care sector. They did not see the dwelling whilst it was being built, and agreed to purchase the property two months after the Council had issued the Code Compliance Certificate. It was, to all intents and purposes, a new house.

24.12 I do not find that the Council has made out a case for a reduction in the damages due to contributory negligence on the part of the Owners. I will dismiss this claim.

25. CONTRIBUTION BETWEEN RESPONDENTS

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

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

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

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

Stucco

25.4 The main burden of responsibility for the problems with the stucco must be borne by those who failed to carry out the installation of the Triple 'S' properly. This must mean that Mr Lay and Mr Christian will shoulder the main proportion of the responsibility. As Mr Lay was the person who was on site, I assess that his contribution should be in a ratio of 5:3 with Mr Christian. When setting this ratio I have carefully reviewed the influence that each party had, or should have had, on the performance of the work; and the contribution that each party made towards the defects that unfortunately occurred. It is a process of reducing levels of responsibility to a statistical formula. There is some case law that considers and sets percentage contributions between builder, engineer and territorial authorities, but there is not much case law that compares site managers with project managers or the like.

25.5 The Council should have picked up on this significant change to the backing of the external plaster, and if it had noticed the change it should have amended

the building consent and approved the replacement details. In any event, the Council's inspectors should have noticed that the work was not being done properly, because that is the main purpose of having inspections. I will set the Council's level of responsibility at less than that of the builder, but at no less than half of that allocated to Mr Lay.

25.6 Mr Townsend's contribution must be at a lower level than the Council's because his job was (at the most) only observation, as opposed to inspection. Although he was the designer and I have found that he failed to provide adequate detail or instructions, it was not his job to supervise construction. I will put Mr Townsend's contribution at slightly less, say 40% of the contribution allocated to the Council.

25.7 Therefore, the damages relating to the stucco, or plaster cladding, will be paid by the respondents as follows:

Mr Lay	43%	$ 14,904.23
The Council	22%	7,625.43
Mr Townsend	9%	3,119.49
Mr Christian	26%	9,011.87
		$ 34,661.02

Weatherboards

25.8 Once again the main burden of responsibility for the problems with the weatherboards must be borne by those who were responsible for the construction work, which was Mr Lay and Mr Christian. This was mainly caused by a lack of control over the persons who did the work on site, and I assess that Mr Lay's contribution should be in a ratio of 3:1 with Mr Christian. I have elected to use a different ratio than the 5:3 that I used on the stucco, because this was a defect that a reasonably vigilant site manager should have prevented from happening. It is the sort of problem that a project manager would be expected to notice and to have taken steps to avoid, but he would also be entitled to place reliance upon his site manager. Therefore there needs to be a slight shift in the contributions for accountability.

25.9 The defect was clearly visible at the time the Council carried out its inspections, and particularly the final inspection. It should not have been missed. I will set

the Council's level of responsibility at no less than half of that allocated to Mr Lay.

25.10 I will put Mr Townsend's contribution at 40% of the contribution allocated to the Council for the same reasons as those given in paragraph 25.6 above.

25.11 Therefore, the damages relating to the weatherboards will be paid by the Respondents as follows:

Mr Lay	49%	$ 584.25
The Council	25%	298.09
Mr Townsend	10%	119.24
Mr Christian	16%	190.78
		$ 1,192.36

Door and Window Openings

25.12 As I mentioned earlier in this Determination, it is difficult to isolate the problems with the window and door openings from the problems with the stucco itself. Having reviewed the situation, I can see no good reason to deviate from my earlier assessment of contribution on the stucco, so that I will use the same contributions.

25.13 Therefore, the damages relating to the door and window openings, will be paid by the Respondents as follows:

Mr Lay	43%	$ 4,413.56
The Council	22%	2,258.11
Mr Townsend	9%	923.77
Mr Christian	26%	2,668.67
		$ 10,264.11

Decks

25.14 There are two separate parts of the damages relating to the decks The first part is the amount that I have assessed as being $20,000.00, which is for what I will call the "application of the membrane" (refer para 19.38). This was a workmanship issue, which was not capable of being detected by a visual inspection of the sort that I would expect a building inspector to carry out.

25.15 Although Mr Lay and Mr Christian have been found to be liable for the faulty workmanship on the decks, the responsibility for supplying the correct materials, and installing the waterproof membrane should lie entirely with AWL. Mr Lay and Mr Christian are entitled to a 100% indemnity from AWL. In the event that AWL defaults in its payments to the Claimants, then I would assess that Mr Lay's contribution should be in the ratio of 3:1 with Mr Christian.

25.16 The second part of the decks concerns the step-down and the inadequate upstands at the perimeter of the decks. The main burden of responsibility for these problems must be borne by those who were responsible for the construction work, in this case, AWL, Mr Lay and Mr Christian. I assess the contributions as being in the ratio of 3:3:1.

25.17 These defects are similar to those with the weatherboards and I will follow the contributions that applied in that matter, so that Council's level of responsibility should be one half of that allocated to Mr Lay, and Mr Townsend at 40% of that allocated to the Council.

25.18 Therefore the damages relating to the decks will be paid by the Respondents as follows:

Mr Lay	33%	$ 1,545.97
The Council	17%	796.41
Architectural WL	33% + $20,000	21,545.97
Mr Townsend	6%	281.09
Mr Christian	11%	515.32
		$ 24,684.76

Balustrades

25.19 The problems with the balustrades could have been largely avoided if there had been a properly fixed hardwood handrail, as shown on some of the consent drawings. The responsibility for omitting this hardwood capping rail must lie mainly with Mr Lay, who must have known that this change had taken place, and must have approved the change. However, Mr Christian should not have allowed this change without taking suitable steps to ensure that it could be built properly without the timber rail. He must have noticed that the handrail had been omitted because it would have quite an impact on the appearance of the balustrades. I assess the contributions of Mr Lay and Mr Christian to be in the

ratio of 2:1. When setting this ratio, I considered that the balance should be similar to the stucco, but with Mr Lay's contribution being slightly more.

25.20 The Council should have picked up that a change had occurred, and that no suitable waterproofing details were included in the consent documents (or amended consent documents). The method of fixing and waterproofing around the handrail standards would not be easy to see after it was complete, but this is precisely the sort of detail that a reasonably diligent building inspector should investigate. The fact that no signs of sealant were found indicates to me that the inspectors either did not investigate, or they did not carry out the investigation properly. I will set the Council's level of responsibility at 60% of that allocated to Mr Lay, because the degree or extent of the negligence (as compared with that being borne by the site manager) should be slightly higher than the 50% set for the stucco, weatherboards and deck.

25.21 I will put Mr Townsend's contribution at 40% of the contribution allocated to the Council for the same reasons as given in paragraph 25.6 above.

25.22 Therefore, the damages relating to the balustrades will be paid by the Respondents as follows:

Mr Lay	43%	$ 5,705.30
The Council	26%	3,449.72
Mr Townsend	10%	1,326.81
Mr Christian	21%	2,786.31
		$ 13,268.14

General Damages and Consequential Losses

25.23 The contributions towards the amount of general damages and consequential losses that I have determined will be:

Mr Lay	$ 3,447.84
The Council	1,831.99
Architectural WL	2,735.84
Mr Townsend	732.71
Mr Christian	1,926.61
	$ 10,675.00

Summary

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

Mr Lay:	
Stucco, or plaster cladding	$14,904.23
Weatherboards	584.25
Door and window openings	4,413.56
Decks	1,545.97
Balustrades	5,705.30
General damages and consequential losses	3,447.84
Total	$30,601.15
Auckland City Council:	
Stucco, or plaster cladding	$ 7,625.43
Weatherboards	298.09
Door and window openings	2,258.11
Decks	796.41
Balustrades	3,449.72
General damages and consequential losses	1,831.99
Total	$16,259.75
Architectural Waterproofing Ltd	
Decks	21,545.97
General damages and consequential losses	2,735.84
Total	$24,281.81
Mr Townsend:	
Stucco, or plaster cladding	$ 3,119.49
Weatherboards	119.24
Door and window openings	923.77
Decks	281.09
Balustrades	1,326.81
General damages and consequential losses	732.71
Total	$ 6,503.11

Mr Christian:

Stucco, or plaster cladding	$ 9,011.87
Weatherboards	190.78
Door and window openings	2,668.67
Decks	515.32
Balustrades	2,786.31
General damages and consequential losses	1,926.61
Total	$17,099.56

26. COSTS

26.1 It is normal in adjudication proceedings under the WHRS Act that the parties will meet their own costs and expenses, whilst the WHRS meets the adjudicator's fees and expenses. However, under s.43(1) of the WHRS Act, an adjudicator may make a costs order under certain circumstances. Section 43 reads:

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

26.2 There are three categories of cost claims that I will need to consider in this adjudication:

(i) Claims by the Owners against all of the Respondents;

(ii) Claims by several of the Respondents against the Owners;

(iii) Claims by an earlier Respondent (the Building Industry Authority) who was struck out prior to the Hearing.

26.3 The first claim that I will consider is the claim for $3,600.00 for legal fees involved with the District Court proceedings that the Owners had already commenced prior to making their application to WHRS. Mr Gray told me that

the court proceedings were “transferred” to WHRS, but I am not sure whether this was a transfer pursuant to s.59 of the WHRS Act, or simply that the Owners discontinued the court proceedings.

26.4 It is outside my jurisdiction to make an award of costs that relate to the proceedings before another tribunal or court, as that would be usurping the authority of that tribunal or court. I cannot say that the Owners are not entitled to an award of costs, but I can say that I am not empowered to decide the matter. The Owners may need to make an application to the District Court to resolve this matter.

26.5 The second type of claims that I will consider are the claims for witness expenses, and for other expenses incurred in the preparation of the adjudication claim. I have been given no details of what these costs might be, or what they would be for.

26.6 The Owners have been generally successful in this adjudication, in that they have been awarded a substantial amount on account of their claims. I have dismissed many of the Respondents’ arguments on liability, but that does not automatically mean that the arguments were made in bad faith or without substantial merit. I am not persuaded that the Owners have been caused to incur costs or expenses, either by actions of bad faith or allegations that were without substantial merit. I will not award the Owners any of their costs or expenses in this adjudication.

26.7 Most of the Respondents have applied for costs as a part of their responses or submissions. Where I have found that a Respondent has a liability to the Owners, it probably goes without saying that I would normally see no justification in making an award of costs in favour of that Respondent. In this adjudication I have found that Mr Manning is not liable to the Owners, but I am not persuaded that the Owners’ claims were made in bad faith, or lacked substantial merit. I will not award any of the Respondents any of their costs or expenses in this adjudication.

26.8 An application for costs dated 22 December 2004 has been received by WHRS from Crown Law on behalf of the Building Industry Authority, for a costs order against the Council. I need to be certain that I have given all parties an opportunity to respond or comment on this application. Therefore, if any party

wishes to make submissions on this application, they must be made in writing and received by WHRS by noon on 25 March 2005. I will then give my ruling on this application in the form of a Supplementary Determination.

27. ORDERS

27.1 For the reasons set out in this Determination, I make the following orders.

27.2 Mr Lay is ordered to pay to the Owners the amount of $94.745.40. He is entitled to recover a contribution of up to $16,259.75 from the Council, or a contribution of up to $24,281.81 from AWL, or a contribution of up to $6,503.11 from Mr Townsend, or a contribution of up to $17,099.56 from Mr Christian, for any amount that he has paid more than $30,601.15 of the amount of $94,745.40 that he has paid to the Owners.

27.3 The Council is ordered to pay to the Owners the amount of $74,745.40. It is entitled to recover a contribution of up to $30,601.15 from Mr Lay, or a contribution of up to $4,281.81 from AWL, or a contribution of up to $6,503.11 from Mr Townsend, or a contribution of up to $17,099.56 from Mr Christian, for any amount that it has paid more than $16,259.75 of the amount of $74,745.40 that it has paid to the Owners.

27.4 AWL is ordered to pay to the Owners the amount of $35,359.76. It is entitled to recover a contribution of up to $4,281.81 from Mr Lay, or from the Council, or from Mr Townsend, or from Mr Christian, for any amount that it has paid more than $24,281.81 of the amount of $35,359.76 that it has paid to the Owners.

27.5 Mr Townsend is ordered to pay to the Owners the amount of $74,745.40. He is entitled to recover a contribution of up to $30,601.15 from Mr Lay, or a contribution of up to $16,259.75 from the Council, or a contribution of up to $4,281.81 from AWL, or a contribution of up to $17,099.56 from Mr Christian, for any amount that he has paid more than $6,503.11 of the amount of $74,745.40 that he has paid to the Owners.

27.6 Mr Christian is ordered to pay to the Owners the amount of $94,745.40. He is entitled to recover a contribution of up to $30,601.15 from Mr Lay, or a contribution of up to $16,259.75 from the Council, or a contribution of up to $24,281.81 from AWL, or a contribution of up to $6,503.11 from Mr Townsend,

for any amount that he has paid more than $17,099.56 of the amount of $94,745.40 that he has paid to the Owners.

27.7 As clarification of the above orders, if all the Respondents meet their obligations contained in these orders, it will result in the following payments to the Owners:

Mr Lay	$ 30,601.15
The Council	$ 16,259.75
AWL	$ 24,281.81
Mr Townsend	$ 6,503.11
Mr Christian	$ 17,099.56
	$ 94,745.39

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

27.9 Pursuant to s.41(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 this 11th day of March 2005.

A M R Dean
Adjudicator

792-00062determination