BETWEEN	**BODY CORPORATE 85927 – 38 ROXBOROUGH STREET** Claimants
AND	**WELLINGTON CITY COUNCIL** First Respondent
AND	**CRAIG ALAN STEWART** Second Respondent
AND	**DAVID EDWARD STEWART** Third Respondent
AND	**ROB BONNER** Fourth Respondent
AND	**CAS MANAGEMENT LTD** Fifth Respondent
AND	**DESIGN NETWORK KAPITI LTD (Removed)** Sixth Respondent
AND	**MARK STEVENS** Seventh Respondent
AND	**JOHN WALTER** Eighth Respondent
AND	**ALCHEMIS COATINGS LTD** Ninth Respondent
AND	**AHI ROOFING LTD** Tenth Respondent
AND	**PHILLIP JAMES STEWART** Eleventh Respondent

Hearing:	5 August 2009 & 2 September 2009
Final Submissions Received:	23 September 2009
Appearances:	Mr Thomas Wutzler, WHRS Assessor Mr Andrew Davie & Ms Brown, Counsel for the third and fourth Respondents Mr John Adam, expert for the fifth respondent Mr Graham Brown, representative for the seventh respondent Mr Murray Proffitt, expert for the seventh respondent Mr Aaron Walter, representative for the eighth respondent
Decision:	10 May 2010

FINAL DETERMINATION
Adjudicator: C Ruthe

CONTENTS

I – PRELIMINARY MATTERS

Introduction

1. This claim was brought by the owners of units in a multi unit development in inner city Wellington. The units leaked. Most respondents agreed they leaked and settled with the claimants. Two parties denied liability.

2. The leaks have been remedied. Total remediation costs amounted to $770,910. All the parties agreed that the quantum in dispute at this hearing was the sum of $120,908 being remediation costs less the settlement sum rounded to $650,000.

3. Further, the parties agreed a holistic approach should be taken treating the damages sought as a global amount and not making apportionments to individual units. This course has been adopted

The Parties

4. The claimants are :

Unit 1	Suzanne Kay Johnston
Unit 2	Ruth Harrison and Jan Marie Scown
Unit 3	Paul Frederick Rea, Heather Margaret Rea and Geoffrey Alwyn Rea
Unit 4	Christine Antoinette Morrison & John MacWilliam Morrison
Unit 5	Richard Allen Dawe and Joan Zillah Dawe
Unit 6	Jordan Dean Joseph Laird and Rachael Catharine Walkinton
Unit 7	Mark Thomas Spring and Joanne Christine Spring
Units 8 & 8A	Jen Tzee Choong, Jen Ju Choong and Geok Eng Lim

5. The respondents are:

First Respondent	Wellington City Council:
Second Respondent	Mr Craig Stewart: a director of CAS Management Ltd
Third Respondent Mr	David Stewart: a director CAS Management Ltd.
Fourth Respondent	Mr Rob Bonner:
Fifth Respondent	CAS Management Ltd: the development company
Sixth Respondent	Design Network Kapiti Ltd: designer (Removed)
Seventh Respondent	Mark Stevens: designer,
Eighth Respondent	John Walter: plasterer and director of WDW Ltd (in liquidation), a plastering and cladding company WDW.
Ninth Respondent	Alchemis Coatings Ltd: cladding system manufacturer.
Tenth Respondent	AHI Roofing Ltd/Carter Holt Harvey Ltd: roofer
Eleventh Respondent	Mr Phillip James Stewart:

Partial Settlement

6. Mr R Bonner, Mr P Stewart, CAS Management Limited, Mr C A Stewart, AHI Roofing Limited/Carter Holt Harvey Limited and Wellington City Council reached a partial settlement with the claimants for $652,002 with a denial of liability. The apportionment of responsibility between the parties remains confidential.

7. The decision in *Petrou v Weathertight Homes Resolution Service* sets out the law applicable in relation to claims that have been assigned, or more properly referred to as subrogated. Randerson J held at [27] and [28] that rights of subrogation, vested by operation of

law, enables another party to continue on in a claim in the shoes of the claimants.

8. Clause 13 of the settlement agreement in this claim provided that the existing proceedings remain alive for the purposes of continuing action against the non-settling parties, namely Mr Walter and Mr Stevens. Following *Petrou*[1] this determination has therefore proceeded on the basis of subrogation.

9. Clause 15 of the Agreement provided that the second, third and fifth respondent would be treated as one party. This has been adopted for the purposes of this determination with the party name of CAS Management Limited (CAS).

10. As a result, the remaining respondent parties are the seventh and eighth respondents. These respondents accepted this was a leaky complex, however their contention was they had no liability for any of the leaks.

Experts

11. The experts gave their evidence as a panel comprising of the WHRS Assessor, Mr Thomas Wutzler, Mr John Adam for CAS, and Mr Proffitt for Mr Stevens.

12. Mr Wutzler had prepared an addendum report dated 5 May 2009. This report identified the matters remaining in dispute subsequent to partial settlement as including defective plastering and membrane installation. Mr Wutzler said the addendum report had to be read in conjunction with the nine original reports. The defects are discussed in the context of alleged liability of the remaining parties.

[1] HC Auckland, CIV 2009-404-1533 (24 November 2009), Randerson J.

13. The remaining respondents accepted that this was a leaky building. Their contention was that they have no personal liability for any of the leaks.

II ISSUES

14. The issues to be decided are:

- Did Mr Stevens personally contract with CAS, or was the contract with CAS with his company?
- What are the design defects that caused the leaks?
- Did Mr Stevens breach the duty of care owed to the claimants by providing deficient designs that have contributed to the dwelling leaking?
- Did WDW Ltd breach its duty of care by failing to apply the fibre wrap and deck painting system carelessly and in an unworkman like manner? If yes, did this result in damage?
- Was a duty of care owed by Mr Walter personally?

III – CLAIM IN NEGLIGENCE AGAINST MR STEVENS

Was a Duty of Care owed by Mr Stevens?

15. At the commencement of the hearing the claimants were alleging Mr Stevens was a company director who due to the degree of his control over Design Network Kapiti Ltd and the extent of his input into the designs and plans owed a duty of care to the claimants.

16. During the course of the evidence it emerged that the central fact to be determined was, who were the contracting parties - Design Network Limited and CAS or Mr Stevens trading as Design Network and CAS.

17. For the reasons set out below the Tribunal considers the original contract for design was with Mr Stevens. Thus there is no need to consider the alternative claim of his alleged liability as director, of Design Network Kapiti Ltd, or Design Network Limited,

18. Mr Stewart said that at all times CAS dealt with Mr Stevens. He said proof that CAS was dealing with Mark Stevens personally was confirmed by the fax sent by CAS Design Network dated 27 June 1997 was addressed to Mark Stevens.

19. Mr Stevens in evidence agreed Mr David Stewart of CAS visited his offices at Paraparaumu and discussed the concept plans for the proposed development. Mr Stewart said he went to Design Network at the Paraparaumu offices on more than one occasion. He went on to say in his statement:

> "Aside from the fact that I find it very surprising Mr Stevens states that he did not check or supervise the work of his draftsmen, who apparently drew up the architectural plans, it was clear from my meetings with Mr Stevens that he was the one with whom I was to deal in relation to all of the plans prepared for the project. I can advise that I have never met Mr Greig Haywood who Mr Stevens alleges drew up the architectural plans."

20. Is the quotation from Design Network addressed to Mr Stewart of CAS Developments dated 24 June 1997[2] is significant. The letterhead reads "Design Network". It is addressed to CAS Developments at their P O Box number and sets out a quotation described as "an estimated quote" for $22,700.for architectural services for the proposed unit development at Roxburgh Street and concludes:

> "I hope you find the pricing satisfactory and I look forward to working with you while on this project. Regards Mark Stevens."

21. First the letterhead on the quote was not that of Design Network Limited but Design Network. Second it was sent by Mark Stevens. Mr Stevens does not identify himself as a company director

[2] Document no. 16 in the Bundle of Documents.

nor does he mention the company. Further Mr Stevens uses the pronoun 'I'.

22. Another document using the letterhead of Design Network dated 26 June 1997 and addressed to CAS set out a work program makes no reference to of Design Network Limited or Design Network Kapiti Limited. Having heard and considered the evidence I conclude the contract was with Mr Stevens personally.

23. Concerning the work undertaken Mr Stevens says that he only did the concept drawings and not those that were completed for the purposes of obtaining a building consent and filed with the Council. He says those drawings that were produced were undertaken by Mr Haywood. Mr Haywood was an employee. Mr Stevens had a responsibility to supervise Mr Haywood's work. Mr Stevens was ultimately responsible.

24. Failure to Provide Specifications and Failure to Provide Adequate Specifications

25. The claimants made three major claims against the designer. First, the drawings themselves were defective in that they gave insufficient detail in certain aspects of the design. Secondly, the designer failed to provide specifications. Thirdly, the specifications, such as they were, were inadequate.

26. These proceedings are not pleadings based. The allegations against the designer are in effect:

i. Inadequate guidance on clearances in relation to parapet cap flashings - p53 of Wutzler report
ii. Inadequate detailing in relation to balustrade footing – p54 of Wutzler report and p46 of the Orchiston report.

iii. Lack of provision for drainage – p55 of Wutzler report (this relates to two units only).

iv. Lack of detailing of waterproof membrane – p55 of Wutzler report.

v. Lack of detailing re parapets tops.

27. The other design details that were criticised for inadequacy were not so deficient that a competent builder and construction team could not have erected weathertight units.

28. Mr Stevens argued he did not provide the specifications. However it is noted that the quote of 24 June 1997 (referred to above), specifically refers to “Contract Documents – Schedules, Specifications and Tender Documentation (if required)”.

29. It is uncontested specifications were required. Mr Stevens suggested CAS had used generic specifications which Mr Stevens firm had provided on a previous job. He said his firm had done approximately twenty three jobs for CAS. He opined that as a cost saving measure CAS staff photocopied and appended previous specifications. This evidence was not challenged.

30. It transpired that the allegation of a failure to supply adequate specifications for the cladding system proposed by Mr Stevens was not a relevant issue because the developer used as different system to that specified by Mr Stevens.

Design Defects and Leaks

The Legal Test re Negligence in Preparation of Plans

31. The approach to be adopted when considering whether a designer has breached his duty of care by failing to provide insufficient

detail was set out in *Body Corporate 188529 v North Shore City Council (Sunset Terraces)*[3] where Heath J held that if the building could be built by a reasonable builder who would have access to the manufacturers' specifications no greater detail would be required to achieve a workmanlike result. This was upheld on appeal in *Sunset Terraces*[4] where Baragwanath J said:

> [121] I agree with the Judge. No purpose would be served by requiring a designer to incur the cost of providing detail not reasonably necessary for the task. There being no carelessness it is unnecessary to discuss the leading authorities *Voli v Inglewood Shire Council* and *Bowen* which impose liability on a negligent designer whose carelessness causes loss.

32. William Young P was of like mind stating:

> [152] An architect or engineer can only fairly be expected to provide services as contracted for by the developer. The actual involvement of the architect or engineer might be quite limited. The scope of the contract is, of course, highly relevant where tortious liability of architects or engineers is alleged because there are problems in imposing a duty of care which is more exacting than the contractual duty.

Evidence on Insufficient Detailing

33. Mr John Adam, a civil engineering consultant and director of Structon Group Limited architects and engineers gave evidence for CAS on the matter of design detailing. He said that there were aspects of the drawings that it would inevitably lead to leaks. He referred to Drawing 10A, detail 2 which showed no method as to how the horizontal joints between the EPS parapet capping and the roofing membrane were to be sealed. His opinion was that the detail the fixing of the EPS to the top plate would cause the puncturing of the membrane resulting in moisture ingress.

34. He was also critical of the plan and Drawing No 3A which failed to mention any falls in the gutter and the failure to stipulate a minimum fall of 1.5degrees as required. On Drawing 11A detail 6, he noted that the detail showing a metal capping on the upstand failed to show how

[3] [2008] 3 NZLR 479 (HC).
[4] [2010] NZCA 64 (CA).

it could be fixed and any fixings in this location would have resulted in penetration of membrane leading to moisture ingress.

35. Mr Proffitt is a building surveyor not an architect. The point of his evidence was to draw attention to the number of discrepancies between the designs and the work as executed including a change of the cladding system, and the use of an alternative to butynol. The manufacturers' specifications for these products were sufficient. This was accepted as correct. This evidence did not address the central issue of whether specific detailing was required due to complexity in the plans

36. At the hearing, Mr Wutzler confirmed /reiterated that there was no detail on how to fix the balustrade through the membrane surface. He was asked whether the missing detail would affect the integrity of the membrane surface once it had been penetrated by the balustrade. Mr Wutzler agreed that it would. Mr Adam, the expert for the claimant, said there should have been a robust detailing to ensure no penetration through the fixings (see notes of evidence at page 16).

37. Mr Profitt said he fully acknowledged that the top mounted handrails and balustrades were a risky feature from a weathertightness point of view but noted it was then common to top mount the balustrades whereas today they are face mounted. He went on to say:-

> "what it does lack is, and I acknowledge this, that it has a lack of instruction on how it might be sealed and my understanding was that the original intention was to use a proprietary balustrade system."

Mr Profit's view was that this was a minimal significance.

38. Mr Wutzler stated the plans did not provide adequate detailing for the protection of the majority of the parapets in relation to all of the apartments causing damage. Mr Profit agreed that this lack of detail would not be done today. Mr Adam described it as a horrible detail.

> "… [W]e agreed that on the face of it the details for those parapet tops on the plans are less than adequate. I'd put it that way." (Notes of evidence page 33).

Experts' Consensus

39. Having heard expert evidence to this point the hearing was adjourned to enable parties to discuss possible settlement, and Mr Wutzler suggested the opportunity be taken for the experts (namely himself, Mr Adams and Mr Proffitt) to confer amongst themselves to consider the extent of damage that was attributable to defects in the plans. The Tribunal saw this as a sensible course to adopt and in accord with the statutory obligations to be cost effective and time efficient. It was a version of the "experts' conference", with lawyers absent all parties consented to this course.

40. Mr Wutzler reported that the expert's consensus view was that the design detailing was insufficient, even at the time the drawings were prepared, to build weathertight structures due to the complexity of certain aspects of the plans. This resulted defects which actually caused leaks or contributed them. There was inadequate detailing in relation to balustrade footings, drainage at and lack of detailing for of protection to the parapets.

41. The Tribunal accepts the experts' consensus view. Due to the complexity of the design a reasonable builder could not have carried out the work in a workmanlike manner without greater detail in the plans. The architect in Sunset Terraces was not liable for plans described to be "skeletal" in nature because a reasonable builder could have carried out the work in a workmanlike and weathertight manner. Mr Stevens is liable because the complexity of the design required further detailing to enable a builder to construct weathertight units.)

42. Mr Stevens submitted that if insulcad or butynol had been used as originally specified in the designs the designs would have

been adequate. The tribunal agrees with the experts that the extra detailing would have been required even if insulcad or butynol had been used as originally specified in the designs.

IV CLAIM IN NEGLIGENCE AGAINST MR WALTER

43. WDW Ltd (struck off) (referred to as 'WDW") was contracted to afffix and seal the cladding. CAS had contracted with WDW for a number of years. It is accepted WDW was a well established company with a good reputation in the industry. WDW was a well regarded company and especially so by CAS, Mr Mark Stewart stating in his evidence that WDW was its preferred plastering applicator and was the only company to quote for this particular job. The company has been struck off. Mr Walter is being pursued as a director and personally. The claimants now say he is liable because :

i. He submitted a quote [5] under his name.
ii. The quote included the statement "*We guarantee all materials shall be applied in accordance to manufacturer specifications*". The use of the plural pronoun "we" indicated personal liability.
iii. The claimants dealt solely with Mr Walter.
iv. Whenever Mr David Stewart attended at the site Mr Walter was present.
v. Mr David Stewart witnessed Mr Walter supervising various employees and working.
vi. Mr Walter's admission he did the top coat on some decks".
vii. Mr Walter's regularly dropped workers at the site.
viii. Mr Walter was the only director of WDW Limited who was involved at the site.

[5] see Agreed Bundle, page 34 ("AB34").

44. The claimant's argued that Mr Walter owes a duty of care ,citing the decisions in *Morton v Douglas Homes Limited* [1994] 2 NZLR at 595, and in *Body Corporate No.188273 v Leuschke Group Architects Limited* (28 September 2007) HC Auckland, CIV 2004-404-203, Harrison J.

45. CAS is one of the major residential development companies in Wellington. WDW was a well regarded company and especially so by CAS. I hold the contract was between CAS (CAS Management Ltd) and WDW. The quote was on WDW letterhead, not from Mr Walter personally. The use of the plural "we" is consistent with the quote coming from the company. If it was Mr Walter making the quote one would have expected him to use the personal pronoun. The quotation was accepted by CAS Management Limited in a fax dated 22 October 1997, the fact it addressed it to WDW not WDW Ltd cannot be interpreted as CAS was contracting with Mr. Walter. . All the invoices the Tribunal has seen were from WDW.

46. Without making a finding on director liability at this point the Tribunal proceeds on the basis that if WDW is held to have been negligent Mr Walter did some work on the site and would be potentially liable in negligence.

Mr Walter as Clerks of Works

47. The Claimants ran a further argument that Mr Walter was liable as clerk of works or project manager. The Tribunal does not consider there is any evidence to support the contention Mr Walter's role was that of a project manager. It is accepted there can be more than one project manager in relation to any one project. However his company was a subcontractor and only had responsibility for the work he was contracted to do. He has no liability for the workmanship of other contractors.

Faulty System

48. There were major problems with the polystyrene/plastering/coating system, variously described as “fibre wrap, Alchemis or Spongemaster. An acrylic cement texture coat was applied to the polystyrene sheets (The system is referred to in this decision as Alchemis)

49. Mr Wutzler noted a most unusual phenomenon in that the texture coating over the polystyrene cladding was blistering in places on some elevations. He therefore had samples taken and sent for analysis to try and identify the cause of the blistering. The suspected but unproven cause was white leveling compound believed to contain cellulose. The compound was subject to further testing. There was no definitive answer.

50. Mr Wutzler described the cladding as a pre-coated vapour barrier system. An unidentified incompatibility in materials between the pre-coated vapour barrier and the plaster resulted in the plaster delaminating. Mr Wutzler said the product had been withdrawn from the market, and he had been unable to get any information on the product.

51. Mr Walter said that the manufacturer of the substrate coating system, Alchemis Coatings Ltd, had told him that he was not to have any waterproofing membrane applied to it as it had already been pre-applied at the factory.

52. Mr Walter is an experienced tradesman having spent over 50 years employed in painting, decorating and related trades. CAS respected his workmanship. The evidence indicates Mr. Walter was a careful tradesman who invested time in getting training in the application of this new product from the manufacturer, Alchemis Coatings Limited. Mr Walter said the product was applied in

accordance with the instructions given by Alchemis Coatings Limited. Mr Walter said WDW used the product in good faith and believed it was fit for its purpose and that it was of a proper standard and quality. The tribunal accepts his evidence.

53. Mr Wutzler concluded that the plaster system prematurely failed. No one contested this. Mr Walter said 'it broke down terribly bad."

54. It is alleged Mr Walter was negligent in his application of the membrane. Reliance was placed on instances itemized in Wutzler's report showing defective membrane application. The defects are not challenged:

55. Mr Walter agreed no continuous membrane was applied because Alchemis Coatings Ltd had told him that he was not to apply any waterproofing membrane. The Tribunal accepts Mr Walter's evidence that he relied, as he was entitled to rely, upon the manufacturer's directions not to use a separate membrane.

56. Mr Wutzler was asked if it would be reasonable for a tradesman to accept the advice of a manufacturer not to apply a separate membrane. He added:

> "I guess my experience at the time [is] you relied more heavily on what you were told and that if it's a pre-coated cladding system of pre-coated polystyrene sheets in theory, you can rely on the coating on the sheet probably for its waterproof integrity. The problem will [arise] in the junctions and how they are dealt with."

57. Mr Wutzler evidence that the joins were particularly vulnerable in such a system due to the edges and cuts made in sheets to fit the cladding to the framing not being coated with the water repellant coating. There is no evidence to suggest this was known to any of the parties. I have no doubt CAS would not have specified the product if it was aware of its fundamental faults. Further, it would be unreasonable

to expect an applicator to have foreseen the problems relating to the sealing of the polystyrene cladding.

58. It is accepted WDW relied on the manufacturer's instructions and had every reason to believe that the manufacturer had the specialist knowledge in the functioning of its product. WDW It took every reasonable step to make its workers familiar with the product and its coating system in accordance with best trade practice.

59. Mr Walter said if he was at fault he would have righted it. In more than 20 years of texture coating he had never previously seen such degeneration and disintegration of a coating product as he evidenced in the Roxburgh Street units. The Tribunal accepts this evidence.

Who Specified the System?

60. Who was responsible for the specification of the Alchemis system? The answer is crucial because if the product system itself is the cause of the disintegration and subsequent leaking of the cladding and membrane failure then questions of carelessness in application fade away.

61. On the matter of materials, Mr Walter stated the company initially quoted to do the cladding work in insulclad. Mr Walter said the company was then requested to "trim back" the quotation and was requested to do a quotation using a cheaper product, Alchemis. Mr Walter was a credible witness. He was not cross examined on this point.

62. His evidence is corroborated by a facsimile from CAS dated 22 October 1997 requesting a quotation for spray finished fibre wrap, trowel finish fibre wrap, wall decks, flat roof areas, all eaves and

miscellaneous areas. CAS' knowledge of product was reflected in the evidence given by Mr Stewart.

63. For the developer CAS Mr David Stewart said he was the director of this development with overall responsibility for this project. No issue was taken with this evidence. I find the developer sought the quotation of the Alchemis system and CAS specified the Alchemis product, not WDW. It was used at the behest of the developer.

64. The system proved unsuitable and not to be weathertight. There has been no negligence on the part of WDW or Mr Walter. Even if there was an element of negligence by Mr. Walter in the way of careless workmanship it would not have added to the damage caused by an inherently faulty product. The claim against Mr Walter is dismissed.

V – QUANTUM

65. There is no issue as to the cost incurred in the remediation, being $770,910. All the parties agreed the quantum in dispute at this hearing was the sum of $120,108.00 being remediation costs less the settlement sum rounded to $650,000.

66. The three experts were asked what they considered the extent of damage attributable to the design defects. They each had knowledge of building matters and the interrelationship with various elements in the construction process.

67. Their consensus opinion was that the loss caused by inadequate detailing of balustrade footings would be properly reflected in an award of $10,000. The loss for lack of protection re drainage at $3,500, and lack of detailing for protection to the parapets at $12,500.

The tribunal, having considered all the relevant evidence and material concludes damages should be set at $26,000.

68. This is not a case where it is appropriate to make a finding of joint and several liabilities. Mr Stevens has been precluded from any "cross claim" against the settling parties. Further, the parties' experts agreed as to the appropriate extent of damage.

VI - CONCLUSION AND ORDERS

69. The claimants claim is proved to the extent of $26,000.00. For the reasons set out in this determination, the following orders are made:

- The seventh respondent Mark Stevens, having liability is ordered to pay the claimants the sum of $26,000.00 forthwith.

- The claim against the eighth respondent Mr Walter is dismissed.

70. As the claimants settled their claims against the first, second, third, fourth, fifth, and tenth respondents prior to the hearing, and there are no cross-claims against those respondents, the claims against them are dismissed.

71. No interest has been sought

Dated at Wellington this 10th day of May 2010

C B Ruthe
Adjudicator