CLAIM NO: 00277

UNDER	**The Weathertight Homes Resolution Services Act 2002**
IN THE MATTER OF	**an adjudication**
BETWEEN	**SEAN SMITH**
	Claimant
AND	**WAITAKERE CITY COUNCIL**
	First respondent
	(Intituling continued next page)

Hearing:	30 May & 1 June 2004
Appearances:	Sean Smith in person as Claimant Susan Banbury & Georgina Grant for First Respondent Lawrence Ponniah for Second and Fourth Respondents
Determination:	12 July 2004

DETERMINATION

Solicitors:
Heaney & Co, Po Box 105391, Auckland
Corban Revell, PO Box , 21-180, Waitakere City

AND **TERENCE QUINN**

Second respondent

AND **GARTH YATES**

Third respondent

AND **TERENCE PATRICK QUINN and ELIZABETH ANNE QUINN and ANDREW MARK WILMOT SETON, AS TRUSTEES OF THE TP AND EA QUINN FAMILY TRUST**

Fourth respondents

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INTRODUCTION

[1] This is a claim concerning a “leaky building” as defined under s5 of the Weathertight Homes Resolution Services Act 2002 (“the Act”)

[2] The Claimant, Sean Smith is the owner of a dwellinghouse located at 57A West Coast Road, Glen Eden, Waitakere City (“ the property”) and it is Mr Smith’s dwelling which is the subject of these proceedings.

[3] The dwelling is not a new dwelling, rather it was transported from a property at 200 Old Titirangi Road, Titirangi, and re-established on the Claimant’s property, complete with new foundations, retaining walls, drainage, services, and various additions and alterations, including a basement carport.

[4] The First Respondent, the Waitakere City Council (“the Council”) was the Local Authority responsible for issuing the Building Consent and Code Compliance Certificate for the relocation and re-establishment of the Claimant’s dwelling.

[5] The Second respondent, Terence Quinn, arranged for and organised persons to undertake the relocation and re-establishment of the dwelling on the property.

[6] The Third respondent, Garth Yates, was the sole Director of Yates Drainage and General Contractors Limited (“Yates”), which company undertook the initial excavation of the site for the relocated dwelling and thereafter undertook all drainage work on the property, including the installation of drain coil and scoria backfill to the timber retaining walls. Yates Drainage and General Contractors Limited was struck off the register of companies on 23 September 2003.

[7] The Fourth respondents, Terence Patrick Quinn, Elizabeth Anne Quinn and Andrew Mark Wilmot Seton, as trustees of the TP and EA Quinn Family Trust, ("the Trust") were at all material times the owners of the property, and sold the property to the Claimant, Sean Smith, upon completion of the construction of the dwellinghouse.

MATERIAL FACTS

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

[9] In or about May 1998, Mr Quinn applied to the Council for a building consent and resource consent to move an older dwelling which was on a site at 200 Old Titirangi Road, Titirangi and relocate and re-establish the dwelling on a property at 57A West Coast Road, Glen Eden, in accordance with the plans and specifications prepared by Adams Associates Limited submitted with the application.

[10] The Council granted the Trust Resource Consent Number 981226 on 4 June 1998 to relocate the dwelling and construct a driveway with a gradient in excess of 1 in 5

[11] The Council approved the plans and specifications including an amended foundation design to bridge the Council sewer drain, and issued Building Consent Number 980020222 on 24 July 1998.

[12] Mr Quinn arranged for Terry Hansen Building Removals Limited to remove and relocate the dwelling, a builder, Craig Burnside, to carry out some general carpentry work to the dwelling and to build the timber retaining walls and walkway around the dwelling, and Yates to undertake

the bulk excavation and drainage work, including the drain coil and backfill to the retaining walls.

[13] Between 3 December 1998 and 10 February 1999 the Council undertook various inspections of the dwelling in the course of resiting and construction, including the foundations of the dwelling, the foundations of the retaining wall, the sewerage and stormwater connections from the dwelling to the public drainage system, and the cesspits and channel drains.

[14] A final building inspection of the dwelling was undertaken on 10 February 2004, by Graeme Turner, a Building Inspector for the Council, and a final plumbing and drainage inspection was also undertaken on 10 February 1999, by Mark Lazonby, a Plumbing and drainage inspector for the council.

[15] Mr Turner passed the relocation building works and confirmed that the conditions of the resource consent issued by the council had been met, Mr Lazonby approved and passed the plumbing and drainage work, and accordingly, a Code Compliance Certificate ("CCC") was issued by the Council on 3 March 1999 certifying that the building works complied with the provisions of the Building Act 1991.

[16] On 25 April 1999, Terence Patrick Quinn & Elizabeth Anne Quinn and Sean Smith executed a sale and purchase agreement for the sale of the property by the Trust, to Smith. [BN6]

[17] Pursuant to the terms of that agreement, the Trust warranted that the construction of the dwelling would comply with the provisions of the Building Act 1991. Pursuant to clause 6.1(9) in particular, the Trust

warranted that all obligations under the Building Act would be complied with "*at the settlement date*".

[18] The sale and purchase agreement also contained a special condition that provided that the purchaser (Mr Smith) had until 30 April 1999 to obtain a satisfactory report from a registered builder. If Mr Smith was, in good faith dissatisfied with any matter contained in the report, he was entitled to terminate the contract by notice in writing to the Trust or the Trust's solicitors, otherwise the agreement would become unconditional at 4.00pm on 30 April 1999.

[19] On 27 April 1999, Mr Smith obtained a Pre-purchase report from Approved Building Certifiers Limited ("ABC") which recorded that the property was generally in good condition and "good appearance" and recommended that a burglar alarm be installed, that insulation be installed in the ceiling, and that power points in the garage needed to be housed in waterproof boxes to ensure safe operation.

[20] On 30 April 1999, Mr Smith confirmed to the Trust that the Sale and Purchase Agreement was unconditional.

[21] The settlement date for the purchase of the property was 4 June 1999 and Mr Smith took possession of the property on or about that date.

[22] In or about late 1999, Mr Smith became concerned about the level of moisture in the sub-floor of the dwelling.

[23] Mr Smith's concerns lead him to commission a report by Paul Finlay of Waitakere Consulting Engineers Ltd, who advised him in August 2000, that there were a number of defects with the dwelling arising from it's construction in 1998/99.

[24] In or about August 2000, Mr Smith engaged John Balmer, a Building Surveyor trading under the name of Regional Building Surveyors, to provide an assessment of Paul Finlay's report and an estimate of the cost of repair. Mr Balmer advised Mr Smith that he estimated the cost of repair at $47,507.74 including lifting the dwelling to achieve the floor levels detailed on the building consent plans.

[25] In or about April/May 2001, Mr Smith commenced proceedings against ABC in the Disputes Tribunal on the ground that he contracted with ABC to complete a pre-purchase report based on a visual inspection of the property and there were a number of major faults with the property that should have been discovered by ABC.

[26] In July 2001, the Disputes Tribunal awarded damages to Mr Smith against ABC in the aggregate sum of $1,436.00 including experts' costs of $500.00

[27] In or about September/October 2002, Mr Smith commissioned a further report by Jim Morrison of Joyce Group Auckland Limited, Building Consultants, on the installation of the retaining wall and associated sub-floor drainage, plus other building matters, and to ascertain who may be responsible if sub-standard workmanship was found. Mr Morrison reported that the retaining wall and associated drainage had been inappropriately formed, that the amount of water generated under the house was affecting the health of the occupants, and that inappropriate mechanical connections and cut floor joists were affecting the structural integrity of the building. Mr Morrison concluded that the defects were evident by visual inspection, the builder and drainlayer had inappropriately built the retaining wall and drains in contravention of the

New Zealand Building Code ("NZBC"), and that the Council should not have issued a CCC.

[28] In September 2002, Mr Smith instituted proceedings in the Disputes Tribunal against the Council for the sum of $62,100

[29] On 18 October 2002, the Disputes Tribunal ordered that the proceedings be transferred to the District Court.

[30] The Weathertight Homes Resolution Service ("WHRS") was established when the Act came into force on 27 November 2002 and Mr Smith applied to use the service on 16 December 2002.

[31] On 17 June 2003 the WHRS Assessor, Pat O'Hagan issued a report concluding that the dwelling had undue dampness because of inadequate subsoil drainage behind the retaining wall, the failure to connect or divert the existing subsoil drain under the house, and inadequate sub-floor ventilation, and the cost of rectifying those matters amounted to $9,775.00

[32] Mr Smith's claim was determined by the WHRS to be an eligible claim under s7 of the Act, whereupon Mr Smith applied to the Waitakere District Court to provide a copy of the file held by the Court, to the WHRS, and the adjudication proceedings were commenced.

THE HEARING

[33] This matter was scheduled to be heard during the week commencing 17 May 2004. That hearing date was vacated and the hearing adjourned until 30 May 2004 upon the application of the First, Second and Fourth respondents. The Claimant consented to the adjournment and the matter

was heard at the Copthorne Harbourcity, Quay Street, Auckland on 30 May and 1 June 2004.

[34] The First, Second, and Fourth Respondents were represented by counsel at the hearing. The Claimant appeared in person.

[35] The Third Respondent, Garth Yates, failed or neglected to serve a written response to the adjudication claim pursuant to s28 of the Act or to serve a reply to any of the parties' written responses pursuant to my Procedural Orders dated 17 May 2004. Mr Yates did not attend the hearing, nor was he represented at the hearing.

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

[37] The witnesses (who all gave sworn evidence) in support of the claim were:

- Mr Sean Smith (Mr Smith is the Claimant in this matter)

[38] The witnesses (who all gave sworn evidence) to defend the claim for the First Respondent, the Waitakere City Council, were:

- Mr Graeme Turner (Mr Turner is a Building Compliance Officer employed by Waitakere City Council, and carried out inspections of the Claimant's dwelling during the course of, and on the completion of, the building work authorised pursuant to the resource and building consents obtained by the Trust)

- Mr Stephen Alexander (Mr Alexander is a Building Surveyor and principal of Alexander & Co, Building Surveyors and Dispute Resolution Consultants)

- Mr Ewan Higham (Mr Higham is the Team Leader – building Control for Franklin District Council) Mr Higham filed a witness statement but was not required to attend the hearing for cross-examination.

[39] The witnesses (who all gave sworn evidence) to defend the claim for the Second respondent, Mr Terence Quinn, and the Fourth Respondent, the Trust, were:

- Mr Terence Quinn (Mr Quinn is a trustee of the TP and EA Quinn Family Trust, and Mr Quinn arranged for the relocation and building work undertaken on the Claimant's property)

- Mr Craig Burnside (Mr Burnside is a Builder, and undertook general carpentry work on the relocated dwelling and constructed the pole retaining wall on the Claimants property)

- Ms Jan Quinn (Ms Quinn is the daughter of Terence and Elizabeth Quinn, trustees of the TP and EA Quinn Family Trust and Fourth respondents in these proceedings) Ms Quinn filed a witness statement but was not required to attend the hearing for cross-examination.

- Ms Linda Fretwell (Ms Fretwell is a friend of the Quinn Family) Ms Fretwell filed a witness statement but was not required to attend the hearing for cross-examination.

[40] Mr Andrew Seton, a trustee of the Trust and a witness to defend the claim for the Second respondent, Mr Terence Quinn, and the Fourth Respondent, the Trust, provided a written statement dated 28 May 2004 attesting to the role of Mr Terence Quinn in this matter, but was not required to attend the hearing for cross-examination.

[41] Pursuant to my Procedural Orders dated 24 June 2003, the parties were required to provide all supporting documents prior to the hearing, however, a number of further exhibits were produced during the hearing and where appropriate they are referred to in this determination as either [Bundle (No.)] or [Exhibit (No.)]

[42] I undertook a site visit and inspection of the Claimant's dwelling on the afternoon of 1 June 2004, in the presence of Mr Smith, Ms Grant, and Mr Ponniah.

[43] Following the close of the hearing, Mr O'Hagan amended his report at my request to address drainage related matters that were disclosed during the course of the site inspection, and Mr Smith, Ms Grant and Mr Ponniah presented helpful closing submissions, and submissions in reply, which I believe canvass all of the matters in dispute.

THE CLAIMS

[44] Mr Smith sought the sum of $47,507.74 based on the report prepared for him by John Balmer, of Regional Building Surveyors, when he filed his application to use the WHRS dated 16 December 2002.

[45] The WHRS Assessor, Mr O'Hagan estimated the cost of the work to remedy the excessive dampness within the dwelling and the wetness in the sub-floor area as $9,775.00 in his report dated 17 June 2003.

(Although it was not made clear in the report, we now understand from Mr O'Hagan that that sum was exclusive of GST)

[46] The Notice of Adjudication recorded that the sum originally sought in these proceedings by Mr Smith was $9,775.00

[47] During the course of the adjudication proceedings, Mr Smith amended his claim, and advised that he sought the sum of $85,957.74 including reimbursement for expert reports, loss of wages and stress in the aggregate amount of $28,675.00

[48] The First, Second, and Fourth respondents took issue with a number of the claims brought by Mr Smith on the ground that those claims did not meet the criteria for jurisdiction under the Act.

[49] I dealt with the matter of jurisdiction in Procedural Order No. 4 dated 27 February 2004, and summarised the position thus:-

> "…the jurisdiction of an adjudicator under the Act is constrained to determining the liability of any parties to the Claimant, the liability of any respondent to any other respondent, and remedies in relation to any liability so determined, only in respect of matters in relation to the cause, or consequence of, the penetration of a Claimant's dwellinghouse by water."

[50] I also advised the parties that whilst all of the facts necessary to make a considered determination in relation to the Claimant's claim were not before me at that time, it seemed that matters such as cut floor joists not spliced correctly and sub-floor beams joined incorrectly were matters that would almost certainly fall outside my jurisdiction.

[51] Mr Smith advised at the outset of the hearing that his claim in these proceedings was restricted to the amounts set out in the WHRS

Assessor's report for undertaking remedial work, namely $10,996.88 inclusive of GST, together with consultants' costs in the sum of $6,574.47, legal costs of $7,000.00 and (general damages in) the sum of $14,000 for lost wages, time lost to investigating and pursuing the claims, stress and printing costs.

[52] During the course of the hearing and the site inspection, various matters germane to the drainage works at issue in these proceedings were disclosed, and as a result of my directions, the WHRS Assessor amended both the scope of the work that he recommended was necessary, and the cost of that work. By facsimile dated 4 June 2004, Mr O'Hagan advised that the cost of undertaking the work he deemed necessary had reduced to $6,945.00 plus GST i.e. $7,813.13 inclusive of GST.

[53] Essentially Mr Smith now seeks the aggregate sum of $35,387.60 from the respondents because he claims the house is full of structural and drainage faults which do not meet the building code. That amount is calculated as follows:-

Cost of drainage behind retaining wall (incl GST)	$ 7,475.63
Cost of laying ground cover (incl GST)	$ 337.50
Waitakere Consulting Engineers Ltd (incl GST)	$ 5,899.47
Joyce Group Ltd (incl GST)	$ 675.00
Davies Lawyers (incl GST)	$ 7,000.00
General damages (Lost wages, time, stress & printing)	$14,000.00
Total amount of claim	$35,387.60

[54] Mr Smith was unrepresented in these proceedings and accordingly there have been no specific details provided by Mr Smith regarding his claims

against the respondents. Notwithstanding that situation which is commonplace in these matters, Counsel for the First, Second, and Fourth respondents have helpfully addressed the obligations of the respondents to the building process and the legal basis of any claims that Mr Smith may have against the respondents, and in essence they may be summarised as follows:-

- The Council owed obligations to the Claimant as a subsequent homeowner to ensure that when it carried out inspections of the dwelling during relocation, that they were carried out to a reasonable standard

- The Council owed obligations to the Claimant as a subsequent homeowner to ensure that it acted reasonably when it issued the CCC

- The Council owed a statutory obligation to the Claimant as a subsequent homeowner to ensure it performed its statutory duties under the Building Act to the requisite standard

- The Second and Fourth respondents owed a duty of care as builders/developers to the Claimant as a subsequent homeowner

- The Third respondent, Garth Yates, as the person who undertook drainage work for the second or fourth respondents owed a duty of care to the Claimant as a subsequent home owner

- The Fourth respondents, as trustees of the Trust, are liable to the Claimant for damages for breach of the contractual warranty at clause 6.1(9) of the sale and purchase agreement if the Claimant's dwelling does not comply with the Building Code.

THE DEFENCE FOR THE FIRST RESPONDENT (THE COUNCIL)

[55] The Council's primary submission is that the claim does not meet the criteria set out in section 7(2) of the Act and accordingly there is no jurisdiction to determine the claim.

[56] In the event that it is determined that jurisdiction does attach, the Council submits by way of defence to the claim:-

- The claim does not fit the special circumstances under which a Council owes common law obligations to a subsequent homeowner as a result of negligently carrying out an inspection of a dwelling during construction, i.e. the claim does not fall within the rationale of the Court of Appeal and Privy Council decisions of *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA*) and Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) ("the Hamlin decisions")

- The Council is under no duty to ensure absolute compliance with of the project with the Building Code

- The Council is not liable for any losses arising from the issue of the CCC

- The existence of statutory powers/obligations do not in themselves give rise to a claim for common law damages. The statutory framework simply provides a background against which the existence or otherwise of common law obligations will be judged

- The conduct of the Council's officers when performing their functions under the Building Act was not negligent

- The intermediate inspection undertaken by ABC for the Claimant broke the chain of causation flowing from any previous acts or omissions by the Council officers

- The issue of a LIM report by the Council has not caused any loss to the Claimant so as to entitle him to damages against the Council

- The Council disputes the quantum of the Claimants claim

- To lay responsibility at the Council's door in this case would be to push the parameters of the *Hamlin decisions* too far and to enable the floodgates to be opened which for policy reasons should not be the case

THE DEFENCE FOR THE SECOND RESPONDENT (TERENCE QUINN)

[57] Mr Quinn submits that the claim does not meet the criteria for eligibility set out in section 7(2) of the Act by reason that the complaints do not fall within the definition of a "leaky building" and accordingly there is no jurisdiction to determine the claim.

[58] Mr Quinn disputes that he was the owner, developer, or builder in respect of any work done at the property and that he has wrongly been included as a respondent in these proceedings.

[59] Mr Quinn claims that at all material times the property was owned by the Trust and that the Trust applied for and obtained the necessary consents for the building work and contracted with all parties involved in the relocation and construction works on the property.

[60] Mr Quinn claims that at all material times he attended to matters and was involved in any dealings with subcontractors or with the property as a trustee of the Trust and at all material times he was authorised by the other trustees to act on behalf of the trust

[61] Mr Quinn claims that he relied on the expertise of professionals and experienced tradespersons and the Council's inspections and approvals by its experienced inspectors in his role as Trustee

[62] Mr Quinn disputes the quantum of the claim

THE DEFENCE FOR THE THIRD RESPONDENT (GARTH YATES)

[63] Mr Yates has elected to take no part in these proceedings and accordingly, I have not had the benefit of hearing from him, save for a brief note addressed to the Case Manager advising inter alia, that he would not be attending the hearing, that Yates Drainage and General Contractors Limited was liquidated 3 years ago, and that all works done on site were approved by Council.

THE DEFENCE FOR THE FOURTH RESPONDENT (THE TRUST)

[64] The Trust's primary submission is that the claim does not meet the criteria for eligibility set out in section 7(2) of the Act by reason that the

complaints do not fall within the definition of a “leaky building” and accordingly there is no jurisdiction to determine the claim.

[65] The trust relied on the expertise of professionals and experienced tradespersons and the Council’s inspections and approvals by its experienced inspectors.

[66] The Trust disputes the quantum of the claim

THE DAMAGE TO THE CLAIMANT’S DWELLING

[67] In general terms, the extent of the damage to the Claimant’s dwelling alleged to have resulted from the dwellinghouse being a “leaky building” is set out in the report prepared by the WHRS Assessor, Mr O’Hagan, as confirmed by Mr Smith at the outset of the hearing. The others matters of complaint detailed in the engineering and building reports obtained by the Claimant and submitted as supporting documents in these proceedings, are no longer matters for my consideration.

[68] The alleged damage may therefore be summarised as follows:-

- Excessive dampness within the house
- Wetness in the sub-floor area

[69] The Council, Mr Quinn, and the Trust, dispute that damage has resulted to the Claimant’s dwelling from any leaking or water penetration. They say that the Claimant’s dwelling does not fall within the definition of a *“leaky building”* under the Act, the claim does not meet the criteria for

eligibility set out in section 7(2) of the Act, and therefore the WHRS does not have jurisdiction to adjudicate on this matter.

[70] It would seem implicit that the meaning to be attributed to *"damage to the dwelling"* referred to in section 7(2)(c) of the Act, must be its ordinary meaning, viz. physical harm that is caused to the dwelling.

[71] Mr O'Hagan, states at paragraph 5.2 of his report:-

> "**5.2 Damage**
>
> 5.2.1 The major problem currently being experienced is the excessive dampness within the house and the wetness in the sub-floor area.
>
> 5.2.2 If this problem is not fixed, then decay of the timber sub-floor framing will occur in the future."

[72] The evidence of Mr O'Hagan was that the only physical damage to the dwelling was in the wall linings of the wardrobe of the south bedroom where the wall linings were showing mould growth and the plasterboard lining sheet was soft and breaking away. (See Photo 6, pg. 16 of his report)

[73] I understand Mr Smith contends that mould had extensively covered the walls in the southern bedroom up until he had the room repainted and a ventilation system supplied and installed some time ago by the producers of a television program that featured his house. Accordingly neither Mr O'Hagan nor Mr Alexander were able to observe that extent of mould growth in the dwelling at the time they carried out their inspections.

[74] None of the experts were able to identify any evidence of timber decay anywhere in the dwelling. Mr Alexander stated that the flooring and the floor joists below the southern bedroom were in clean and dry condition, and that the moisture content of the timbers recorded by Mr O'Hagan:-

> "do not (and have not) bring about damage in a property such as this that has durable Rimu framing and heart Rimu flooring"
>
> [Alexander brief of evidence at para 33]

[75] It would seem to me therefore, that the only damage to the Claimant's dwelling disclosed by the experts' investigations in this matter is in relation to the plasterboard in the southern bedroom that is showing mould growth and is soft and breaking away.

[76] I accept that the plasterboard linings should not be in that condition and accordingly, I conclude that damage has occurred to the dwelling to that extent.

[77] Whilst the subfloor area has undoubtedly been, and remains in part, extremely wet, and that wetness could unequivocally be described as potentially causative of damage, it does not in my view constitute damage to the dwelling, per se.

THE CAUSE(S) OF THE DAMAGE TO THE CLAIMANT'S DWELLING

[78] Mr O'Hagan gave evidence that the cause of the mould growth and the soft and breaking wall linings in the wardrobe is excessive subfloor moisture resulting from a broken field tile drain and improper construction of the drainage behind the timber retaining wall that

surrounds the dwelling approximately 800mm outside of the building line on the western and southern sides of the dwelling.

[79] Mr Alexander's evidence was that the amount of mould present is common in a poorly ventilated house.

[80] At paragraph 31 of his brief of evidence, Mr Alexander states:

> "There is no evidence that water has entered the house from any point above floor level. The allegation made is that excessive humidity in the subfloor area has caused a raised moisture content in the structure of the house. Excessive subfloor humidity can cause damage to building elements but there is no evidence of that in this situation."

[81] At paragraph 38 of his brief of evidence, Mr Alexander reached the following conclusion:

> "[In conclusion], I have not identified any instance of water penetrating into the house as a result of its design, construction or alteration, or as a result of materials used in its construction or alteration."

[82] There is I think, a certain difficulty with reconciling the observations and the conclusion reached by Mr Alexander, because whilst I accept that it may be possible for mould to grow in parts of a dwelling where there is poor or inadequate ventilation, it will only grow where there is moisture present in sufficient quantities to sustain its growth, but moreover, the only reasonable explanation provided by the experts for the degradation of the plasterboard linings in the wardrobe can be absorption by the plasterboard linings of moisture. It is a matter of common knowledge in the construction industry, that plasterboard is a relatively stable material when subjected to the normal range of temperatures and humidity experienced in New Zealand construction, and under normal conditions of dry internal use, plasterboard meets the durability requirements of

NZBC B2 Durability. In this case however, the plasterboard linings in the southern bedroom have indisputably become soft and degraded, and mould growth has occurred, albeit it would seem, to a lesser extent since the installation of the ventilation system.

[83] To my mind, it seems rather too much of a coincidence that the southern bedroom of the dwelling where the mould and soft wall linings are manifest, is located directly above that area of the subfloor that has been, and still is despite the Claimant's attempts at drainage, saturated by surface water and ground water emanating from the broken field tile drain and the timber retaining walls and that area of the subfloor that is furthermost from any point of ventilation. i.e. where the greatest concentration of subfloor moisture is undoubtedly present.

[84] Therefore, I accept the explanation given by Mr O'Hagan for the cause of the mould growth and degradation of the wall linings in the southern bedroom (the damage to the dwelling) as convincing on balance, namely, excessive moisture emanating from the subfloor and caused by water flowing from the broken field tile drain and the timber retaining wall in the subfloor area.

[85] I note that Mr O'Hagan's explanation of the cause of the damage appears to fit well with Mr Alexander's understanding of the science of moisture migration recorded at paragraph 31 of his brief of evidence, although in this case, I believe Mr Alexander wrongly concluded that there "is no evidence of that [damage] in this situation" because the soft and degrading wallboard, and the mould growth, is in my view, sufficient evidence of damage caused by excessive [subfloor] moisture, there being no other convincing explanation provided by the experts for the dampness and degradation evident in the wallboard.

Summary of causes of damage to Claimant's dwelling

[86] After viewing the Claimant's property and considering the extensive evidence given in relation to this matter, I have come to the conclusion, that:

- Moisture is entering the Claimant's dwelling from the subfloor in the south western corner of the dwelling
- Water is entering the subfloor from a broken field tile drain
- Water is entering the subfloor from below and through the timber retaining walls
- There is inadequate subfloor ventilation in the south western corner of the dwelling to remove the excessive moisture emanating from the water that flows over and saturates the subfloor soils, and ponds in the subfloor area

JURISDICTION

[87] Of primacy to the respondents' defences in this matter are the overriding submissions that the Claimant's dwelling is not a *"leaky building"* and accordingly there is no jurisdiction for the WHRS to adjudicate and determine the claim.

[88] The Council submits that the Claimant's claim does not meet the criteria set out in section 7(2) of the Act and the Claimant's dwelling does not fall within the definition of a *"leaky building"* under the Act, no damage has resulted from any leaking or water penetration, and certainly not any

damage which was proven by the Claimant to the standard of the balance of probabilities as required.

[89] The Second and Fourth respondents submit that the WHRS does not have jurisdiction because the claims made by Sean Smith do not meet the eligibility criteria under section 7 of the Act by reason that the complaints do not fall within the definition of a *"leaky building"*

[90] Section 7 of the Act provides as follows:

> **"7 Criteria for eligibility of claims for mediation and adjudication services**
> (1) A claim may be dealt with under this Act only if-
> (a) It is a claim by the owner of the dwellinghouse concerned; and
> (b) It is an eligible claim in terms of subsection (2).
>
> (2) To be an eligible claim, a claim must, in the opinion of an evaluation panel, formed on the basis of an assessor's report, meet the following criteria:-
>
> (a) the dwellinghouse to which the claim relates must-
> (i) have been built; or
> (ii) have been subject to alterations that give rise to the claim -
> within the period of 10 years immediately preceding the date that an application is made to the chief executive under s9 (1); and
> (b) the dwellinghouse is a leaky building; and
> (c) damage to the dwellinghouse has resulted from the dwellinghouse being a leaky building.

[91] In section 5 of the Act, a "leaky building" is defined as follows:

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

[92] The issue of jurisdiction was raised early in these proceedings when the Claimant amended his claim to include all of the alleged defects

identified in the various experts' reports obtained by him from Waitakere Consulting Engineers Ltd, Joyce Group, and John Balmer.

[93] I dealt with the issue of jurisdiction as a preliminary matter in Procedural Order No.4 dated 27 February 2004, wherein I determined:

> "…the jurisdiction of an adjudicator under the Act is constrained to determining the liability of any respondents to the Claimant, the liability of any respondent to any other respondent, and remedies in relation to any liability so determined, only in respect of matters in relation to the cause or consequence of the penetration of the Claimant's dwellinghouse by water."

[94] It could fairly be said however, that that determination was directed more to determining whether or not the WHRS had jurisdiction to adjudicate claims in relation to general building defects and contractual matters, such as were raised by the Claimant in reliance on his experts' reports, rather than ascertaining what constitutes a *"leaky building"* for the purpose of meeting the criteria for eligibility of claims.

[95] A dwellinghouse is defined in the Section 5 of the Act as a building, apartment, flat, or unit within a building that is intended to have, as its principal use, occupation as a private residence, and includes any gate, garage, shed, or other structure that is an integral part of the building. Whilst that definition is directed at ensuring that owners of residential properties (as opposed to owner of commercial properties) are entitled to have claims for leaky buildings resolved pursuant to mediation or adjudication procedures under the Act, that definition does not address the nature of a dwellinghouse from a technical perspective. In my view, it would seem implicit for the purpose of addressing the technical aspects of claims brought under this Act, that a dwellinghouse should also be

described as the sum of all the building elements of which it is comprised.

[96] A building element is defined in the Building Code as any structural or non-structural component or assembly incorporated into or associated with a building, including fixtures, services, drains, permanent mechanical installations for access, glazing, partitions, ceilings and temporary supports. (See Clause A2 – Interpretation)

[97] Therefore, 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. i.e. *"a leaky building"* (See also the Determination by Adjudicator Dean in Claim 765: Miller – Hard) and that definition is synonymous with functional requirement E2.2 of the Building Code, which provides that "Buildings shall be constructed to provide adequate resistance to penetration by, and the accumulation of, moisture from outside."

[98] For a claim to meet the eligibility criterion under section 7(2)(c), damage to the dwellinghouse is required to have resulted from the dwellinghouse being a leaky building.

[99] There is a degree of circularity surrounding the meaning of damage to the dwellinghouse resulting from the dwellinghouse <u>being</u> a leaky

building i.e. the cause of the water penetration and the resultant damage caused by the water penetration, but it follows that the unplanned penetration of a building element by water is physical injury to the dwelling per se and is, I conclude, *"damage that has resulted from the dwellinghouse being a leaky building".* Accordingly, the eligibility criterion under s7(2)(c) is in my view met prima facie in every case of a *"leaky building"* and it is not necessary that evidence of present and immediate consequential damage is provided by a Claimant to establish eligibility of a claim – it is sufficient only to demonstrate that a dwellinghouse, the subject of a claim, is a *"leaky building"*

[100] Whilst a leaky building is defined in section 5 of the Act as a dwellinghouse into which water has penetrated, moisture is defined as tiny drops of water in the air, and it follows therefore that the terms *'water'*, and *'moisture'*, may be used interchangeably and that *'water penetration'* should be accorded as expansive a meaning as the Act makes that semantically possible, i.e. it is difficult to think of any reason for distinguishing between the terms *'water'* and *'moisture'* and I conclude that the term *'water penetration'* was intended to qualify both to the extent that claims under the Act may involve water penetration from above, or below a dwellinghouse.

[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.

[102] In this case, I have found that moisture has entered the Claimant's dwelling from the subfloor and caused mould growth and degradation of the wall linings in the southern bedroom. In the circumstances, it is my view that the Claimant has discharged the onus of showing that his dwelling is a leaky building, that damage has resulted from the

dwellinghouse being a leaky building, and therefore I am driven to conclude that the claim meets the eligibility criteria set out in section 7 (2) of the Act and there is jurisdiction to adjudicate and determine the claim.

THE REMEDIAL WORK

[103] I have already determined that the moisture entering the dwelling from the subfloor originates from the broken field tile drain and the timber retaining wall in the subfloor area. I am satisfied that that conclusion is so self evident from the photographs provided by the Assessor and Mr Smith, and from viewing the subfloor of the Claimants dwelling, that it does not warrant any further discussion or elaboration.

[104] The scope of the work recommended by Mr O'Hagan to remedy that situation was set out at page 9 of his report, but in essence that work included:

- Lowering the drain coil drain and replacing the drainage medium behind the timber retaining wall and connecting same to the stormwater system

- Diverting the field tile drain in the subfloor

- Covering the surface of the ground in the subfloor area with a suitable vapour barrier

[105] During the course of the hearing, it was agreed by the experts that the field tile drain will not need to be diverted as it lies adjacent to the nova coil drain behind the retaining wall and can simply be connected into that drain, and that no additional work was required to connect the proposed

new drainage work to the public stormwater drain, the presumption being that that work at least had already been properly undertaken.

[106] During the course of the site inspection it became apparent that the stormwater drainage on the northeastern corner of the dwelling had never been connected to the public stormwater drain although according to Mr O'Hagan's subsequent report prepared at my direction following the site inspection, the downpipes on the eastern side of the dwelling did appear to be connected to the drainage system. The matter is relevant to the scope and cost of the remedial work and to that extent, I requested Mr O'Hagan to prepare revised costings for the remedial work to take account of the changed site conditions which he did, and filed with the WHRS on 4 June 2004.

[107] Mr O'Hagan's costings for the revised scope of the remedial work total $6,945.00 plus GST

[108] Of those costings, the Council disputes the allowance of $1,000 plus GST made for reinstating the ground and sowing grass on the basis that there was no lawn to reinstate and submit the value of that work should be halved to reflect that.

[109] The Council also submits that as Mr Smith has already undertaken some excavation work behind the retaining wall himself, the allowance of $1,575 made for excavating the drain should be reduced to $1,000 plus GST.

[110] In reliance on Mr Smith's advice that water used to flow through the novacoil pipe before he excavated behind the southeastern portion of the retaining wall, Mr Ponniah submits that the retaining wall drainage was properly constructed and worked satisfactorily prior to Mr Smith's

interference and the only remedial work required in relation to that drainage was to connect the cesspit in the north eastern corner of the dwelling to the council drain at a cost of approximately $200

[111] I am not persuaded that the drainage behind the retaining wall was constructed adequately in accordance with any recognised standards (certainly no evidence was given of such), or in accordance with the plans submitted by Law Sue Consultants Ltd (B78). The fact that the drainage was improperly constructed was abundantly evident when viewing the wall during the site inspection and from the photographs produced by the Claimant during the course of the hearing, notably (Exhibit B: Photos 1 & 2) in which case the novacoil drain could be seen for almost its entire depth below the bottom horizontal timber board on the retaining wall and laying above the excavated ground level.

[112] The effect of that improperly placed drain coil is to allow virtually all ground and surface water collected from behind and above the retaining wall (which collection area is substantial given that the Claimant's property is located at the bottom of a very long and steep right-of-way) to discharge over the subfloor area of the dwelling instead of being collected and carried in the nova coil drain to an approved stormwater outlet as required pursuant to the specific design for the retaining wall, the Specification for Site Drainage work which specifically required site drainage to be constructed to prevent dampness under the building, not to cause it as in this case, NZS 3604 Prevention of Dampness – Fig.4.26, and most importantly to comply with the Building Code Functional Requirement Clause E2.2 which provides:

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

[113] I am satisfied that the work outlined by Mr O'Hagan in his amended report dated 4 June 2004 is the necessary and proper remedial work to be undertaken, although I accept in principle Ms Banbury's submission that some of the excavation work has already been carried out by the Claimant and is thus not now required to be undertaken, however I am satisfied that the justice of the matter will be served if I allow the whole amount of the excavation allowance claimed, rather than reducing that amount to reflect the incomplete work and compensating Mr Smith for his time expended on [investigating] that work under a claim for general damages. I accept that the Claimant did not historically have a lawn adjacent to the retaining wall and reduce the amount claimed for reinstatement by $100 which amount I am satisfied would adequately reflect the cost of sowing grass seed over that area.

[114] In conclusion, I accept that the remedial work proposed by Mr O'Hagan is the appropriate work to be undertaken to collect and redirect the water entering the subfloor from the field tile drain, to rectify the defective drainage behind the retaining wall, and to remedy the excessive moisture present in the subfloor, and I determine that the proper cost of that work is $6,845 plus GST, a total amount of $7,700.63

THE CLAIM FOR CONSULTANCY FEES, LEGAL COSTS, LOST WAGES AND STRESS

[115] The Claimant seeks to recover the costs he incurred engaging consultants to report on, and advise him in respect of, the construction of the dwellinghouse and development of the property, which costs may be summarised as follows:

- Waitakere Consulting Engineers Ltd $ 5,899.47
- Joyce Group Ltd $ 675.00

- Davies Law $ 5,691.12
- Auckland Property Legal Service Lawyers $ 225.00

$12,490.59

[116] In evidence, Mr Smith said he was forced to incur the costs of engaging experts and lawyers because the Council advised him firstly that an engineer's report was required in order to consider his complaints, and then secondly the council wanted to deal with a solicitor not the engineer. Mr Smith submits that the Council brought the additional costs on itself because it would not listen to either him or a builder in relation to his complaints concerning defective construction work on his property.

[117] The Claimant also seeks the sum of $14,000.00 as compensation for time that he has had to commit to investigating and resolving his claims over the years, lost wages, printing, and stress.

Consultants' costs

[118] Ms Banbury submits that only a proportion of the consultants fees should be recoverable because the experts engaged were clearly involved in assessing defects and issues unrelated to weathertightness issues.

[119] Mr Alexander opined that no more than 10% of the costs incurred related to weathertightness issues.

[120] I accept Ms Banbury's submissions on this matter as balanced and persuasive. I am in no doubt that Mr Smith was required to engage technical and legal advisers in order to pursue his claims against the Council, but much of the advice that he obtained was irrelevant to weathertightness issues, and I rather suspect, that Mr Smith's perception

of the magnitude of the problems he faced was vastly distorted by Mr Finlay's advice that the floor levels of the house and the garage needed to be raised – clearly that is not the case.

[121] Notwithstanding that position, I can only conclude that Mr Smith acted prudently and reasonably in seeking the expert advice that he did, and in seeking to negotiate a resolution to his complaints.

[122] Accordingly, I conclude that Mr smith should be entitled to recover those consultants costs on a pro rata basis according to the relevance of that advice to this jurisdiction and on the basis of the 10% assessment made by Mr Alexander, I find for the Claimant to the extent of $1,250.00

Lost wages and printing

[123] Mr Smith gave no actual breakdown as to how the sum of $14,000 claimed under this head was made up save for an amount of $252 that he claimed to have spent printing Paul Findlay's reports, but I have no direct evidence of that.

[124] Mr Smith claims that he has been required to take time off work to investigate and attend on these matters and has suffered stress as a result of his attempts to try and define and resolve his claims and in doing so, he and has approached lawyers, the Ombudsman, his local MP, The Mayor of Waitakere City Council, the New Lynn Ward Councillor, New Zealand Master Builders Federation, the Commerce Commission, the Consumers Institute, Auckland Master Builders Association, the Holmes Show, Fair Go, My House My Castle, Westpac Insurance, the Disputes Tribunal, and the District Court, all to little or no avail.

[125] I have already dealt with Mr Smith's claim in relation to investigating the drainage matters (undertaking excavation work) at paragraphs 113 and 114 supra and as I have no direct evidence of the claim for printing costs, I must conclude that that part of the claim fails.

Stress (General Damages)

[126] That leaves only the rather thorny question of general damages for stress and anxiety which is not quantified, but which I can reasonably conclude is for somewhat less than $14,000

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

[128] I am left in no doubt that the Claimant would have lost time from work which would have had an effect on his earnings, but because that loss has not been quantified in dollar terms, it is not an aspect of the claim that should be taken into account when considering general damages.

[129] I accept the Claimant's claim that he suffered stress and anxiety as a result of his house being a leaky building as persuasive on balance, and in the context of a long line of New Zealand property cases where awards for distress and anxiety have been made including inter alia, *Stieller v Porirua City Council* [1986] 1 NZLR 84(CA), *Rollands v Collow*

[1992] 1 NZLR 178*, Chase v De Groot* [1994] 1 NZLR 613, *A-G v Niania* [1994] 3 NZLR106 at 113, *Stevenson Precast Systems Ltd v Kelland* (High Court Auckland, CP 303-SD/01, it is my view that the Claimant should be able to recover distress damages from a respondent found liable for breach of contract, or breach of the duty of care, to the extent of $2,000 in this matter. I note that a detailed examination of the authorities to which I have referred, discloses that the approach of the courts has generally been to award a modest amount for distress damages to compensate the stress and anxiety brought about by the breach, and not the anxiety brought about by the litigation itself.

L IABILITY FOR DAMAGE TO THE CLAIMANT'S DWELLING

[130] The Claimant contends that all of the respondents are in some way liable for the losses he has suffered.

[131] In essence, Mr Smith claims that he is a "victim" having purchased his first house and property from the Trust, that Terry Quinn and Garth Yates buried rubbish behind the retaining wall instead of providing proper drainage medium and covered up, or did not disclose the existence of a broken field tile drain under the house, and that the Council inadequately performed its functions under the Building Act and should not have issued a code compliance certificate for the building and drainage work undertaken on the property.

The liability of the First respondent, the Council

[132] The Claimant, the second respondent, and the Fourth respondents claim that at all material times the Council owed them a duty of care to exercise all due and proper care and skill in the exercise of its statutory and supervisory functions under the Building Act 1991.

[133] The Council is a duly incorporated Local Authority and is the Territorial Authority responsible for the administration and enforcement of the Building Act 1991 in the Waitakere region, within which the Claimant's dwelling is located.

[134] The Council's functions, duties, and obligations under the Building Act 1991, relevant to this matter include, inter alia:

- Process building consent applications (s24(b))

  The Territorial Authority must only grant the building consent if satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with plans and specifications submitted with the application (s34(3))

- Inspect building work (s76(1)(a))

  Inspection is defined as "the taking of all reasonable steps to ensure….that any building work is being done in accordance with the building consent…

- Enforce the provisions of the Act and the Regulations made under it (s24(e))

  The building code is the First Schedule to the Building Regulations 1992

- Issue Code Compliance certificates (s24(f))

A Territorial Authority may only issue a code compliance certificate if it is satisfied on reasonable grounds that the building work to which the certificate relates complies with the Building Code and the building consent (s43(3))

[135] There is no contractual relationship between the Council and the Claimant, therefore any liability that the council may have to the Claimant for the damage and the losses that he has suffered as a result of his home being a leaky building may only be in tort, that is to say, for breach of the duty of care that a Council owes a subsequent homeowner when discharging its functions and duties under the Building Act 1991.

[136] Following a long line of authorities, the law is now well settled in New Zealand that a Council owes a duty of care when carrying out inspections of a dwelling during construction, and that position was confirmed in *Hamlin v Invercargill City Council* [1994] 3 NZLR 513:-

> "It was settled law that Councils were liable to house owners and subsequent owners for defects caused or contributed to by building inspector's negligence."

[137] The duty of care owed by a council in carrying out inspections of building works during construction is that of a reasonably prudent building inspector.

> "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 reasonably prudent Council would 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 in which can cause very substantial damage to a building."
>
> *Stieller v Porirua City Council* (1983) NZLR 628

[138] Notwithstanding that the common law imposes a duty of care on Councils when performing duties and functions under the Building Act 1991, a Council building inspector is clearly not a Clerk of Works and the scope of duty imposed upon Council building inspectors is accordingly less than that imposed upon a clerk of works:

> " A local Authority is not an insurer, nor is it required to supply to a building owner the services of an architect, an engineer or a clerk of works."
>
> *Sloper v WH Murray Ltd & Maniapoto CC*, HC Dunedin, A31/85 22 Nov. Hardie Boys J.

[139] The duty of care imposed upon Council building inspectors does not extend to identifying defects within the building works which are unable to be picked up during a visual inspection. This principle was confirmed by the High Court in *Stieller* where it was alleged the Council inspector was negligent for failing to identify the omission of metal flashings concealed behind the exterior cladding timbers:-

> "Before leaving this part of the matter I should refer to some further item of claim made by the plaintiffs but upon which their claim fails. They are as follows:
>
> Failure to provide continuous metal flashings for the internal angles behind the exterior cladding. It seems from the hose test that this is a defect in the corners of the wall at the southern end of the patio deck but I am not satisfied that there is any such defect in other internal angles. It is at all events not a matter upon which the Council or its officers were negligent either in issue of the permit or in the inspection. It is a matter of detail which the Council ought not to be expected to discover or indeed which can be discoverable on any proper inspection by the building inspector "
>
> *Stieller v Porirua City Council* (1983) NZLR 628

[140] The extent of a Council inspector's duty does not extend to include an obligation to identify defects in the building works that cannot be detected without a testing programme being undertaken. In *Otago Cheese Company Ltd v Nick Stoop Builders Ltd*, CP18089 the High Court was considering the situation where no inspection of the

foundation was carried out prior to the concrete pour. The Court held as follows:-

> "I do not consider that any inspection of the sort which a building inspector could reasonably be expected to have undertaken would have made any difference. There is no question that the builder faithfully constructed the foundation and the building in accordance with the engineer's plans and specifications. No visual inspection without a testing programme would have disclosed to the inspector that the compacted fill was a layer of peat and organic material. If there was a failure to inspect I do not consider that any such failure was causative of the damage which subsequently occurred."
>
> *Otago Cheese Company Ltd v Nick Stoop Builders Ltd*, CP18089

Did the Council exercise the requisite standard of care in this case?

[141] In short Ms Banbury and Ms Grant submit that the Council carried out an appropriate number of inspections having regard to the scope and nature of the work covered by the building consent, that the number and timing of the inspections (the inspection regime) was consistent with what other councils were doing at that time, that the council officers carried out those inspections with suitable care and skill, and that the Council acted reasonably when it issued the code compliance certificate in reliance on its inspections and its assessment of the work undertaken on the Claimant's property.

The Code Compliance Certificate as evidence of absolute compliance with the Building Code

[142] Ms Banbury and Ms Grant argued that it would be improper to impose an obligation upon a local authority to ensure that it carried out an adequate number of inspections during construction to ensure absolute compliance of a project with the Building Code and that the Hamlin decisions are not authority for this.

[143] Any argument that a local authority is under any obligation to ensure or guarantee absolute compliance of a project with the Building Code can, I think, be readily disposed of by reference to section 43(3) of the Building Act which imposes on a territorial authority an obligation to issue a code compliance certificate if it is satisfied on reasonable grounds that the building work complies with the building code and the building consent. (Emphasis added). It follows therefore that the certificate cannot be a contractual warranty or guarantee in circumstances where the territorial authority is only required to be satisfied on reasonable grounds that the building work is compliant. What will be critical to determining whether a Council discharged its duty of care when issuing a code compliance certificate will be an objective assessment of the reasonableness of the Council's approach and conduct directed at determining whether the building work at issue complies with the building code and the building consent.

The inspection regime

[144] I do not propose to traverse all of the arguments made in relation to the number of inspections undertaken by the Council. It is suffice to say however, that any contention that the Council was impeded from carrying out sufficient inspections to satisfy itself that the building work at issue complied with the building code and the building consent by reason of cost, or resource, will receive scant regard. When the Court of Appeal addressed similar issues in *Stieller v Porirua CC the* matter was summarily dealt with at page 94 where the Court held:-

> "A further point made on behalf of the Council by Mr Hancock was that the standard code did not make inspections by the Council mandatory at the stage where the exterior of the house was being clad.…Mr Hancock said the judge had failed to take into account that it might be common practice for the local authority to make no inspections at all at certain stages and yet it might be fixed with liability for work done thereafter. The short answer to this submission is that the

> Council's fee for the building permit is intended to include it's charges for making inspections in the course of construction, and it does not limit these in numbers or by stages."
>
> *Stieller v Porirua City Council* (1983) NZLR 628

[145] It can readily be concluded in this case also, that the number and duration of the Councils inspections were matters solely at the Council's discretion and the number and duration of the inspections were not limited in any way by cost, policy, or legislation.

[146] Ms Banbury and Ms Grant submitted that there are important and significant policy reasons for opposing the imposition by this tribunal of a duty upon the Council to carry out any further inspections to ensure absolute compliance with the Building Code. It would seem to me that there are two distinct issues rolled up in that submission. Firstly, as I have stated at para.142 supra, the code compliance certificate is not a contractual warranty or guarantee, it is a certificate evidencing the Council's consideration that the work at issue complies with the building code and the building consent based on reasonable grounds, and secondly, the number and timing of the inspections required and undertaken by the Council, will be to a large extent, a measure of the care and skill exercised by the council directed at determining whether the building work at issue complies with the building code and the building consent.

[147] In this case however, I accept the evidence of Mr Alexander and Mr Turner that the inspection regime required by the Council as a condition of the building consent was appropriate for the nature of the work in respect of which the building consent was issued, namely the relocation of an existing dwelling, and I am drawn to the conclusion that the Council's inspectors should have been able to determine that the

building and drainage work undertaken on the property complied with the building code and the building consent within the ambit of the inspections required and undertaken.

[148] Therefore, having concluded that the broken field tile drain under the subfloor and the inadequate and improper construction of the drainage behind the retaining wall have lead to excessive moisture in the subfloor and caused the mould growth and degradation of the wall linings in the southern bedroom, the real issue to be confronted is whether or not the council's inspectors exercised due care and skill when carrying out their inspections of the building and drainage work and whether it was reasonable for the Council to issue a code compliance certificate in the circumstances. Following the decision in *Askin v Knox* [1989] 1 NZLR 284, a council officer's conduct will be judged against the knowledge and practice at the time at which the negligent act/omission is claimed to have taken place, and will be judged against the conduct of other Council officers.

[149] In relation to the broken field tile drain in the subfloor, I accept the evidence of Mr Alexander and Mr Turner that unless the matter was brought to the attention of the Council directly, no reasonably diligent and careful building inspector could be expected to be aware of its existence. There is no evidence that the existence of the drain was ever brought to the attention of the Council and accordingly the Council's inspectors could not be considered to have been negligent by virtue of not having observed the broken pipe and/or having issued a code compliance certificate in the circumstances.

[150] I do not find Mr Turner's evidence that it would have been impossible to observe the defects now complained of in relation to the retaining wall drainage during any of the inspections, compelling.

[151] The incorrectly positioned and ineffective draincoil is obvious and readily viewed laying on the surface of the finished ground below the bottom rail of the timber retaining wall and as Mr Alexander confirmed in evidence, the inspector should also have observed the absence of any silt trap into which the novacoil drain was required to discharge prior to entering the sealed drainage system.

[152] It also became apparent during the course of the site inspection that the cesspit on the northeastern corner of the dwelling had never been connected to any drainage system. In the circumstances, it is difficult to reconcile the inspector's notations on the field sheet that the sewage and stormwater connection from the dwelling to the public system was acceptable and in accordance with the code and that he had received an as-built drainage plan from Garth Yates [See Turner brief of evidence paragraph 14] (the implication being that the drainage work was undertaken in accordance with that plan) with the physical evidence of the incomplete and defective drainage which must have been apparent and obvious to the inspector also.

Reliance on drainlayer's qualifications/expertise

[153] Ms Banbury and Ms Grant submit that in approving/passing the drainage work, the council was entitled to rely upon the fact that the drainage work in question was carried out by a registered drainlayer as approved by the BIA in its recent edict (See: The Casebook at tab 4)

[154] The 'edict' to which counsel refer was an article in BIA News No.137 November/December 2003 and was originally issued to all territorial authorities on November 27 as an update following at last one council implementing a policy of declining to issue code compliance certificates ("CCC") for properties with monolithic claddings that do not have cavities

behind them and the purpose of the update was to clarify for councils the requirements of the Building Act with regard to the issue of a CCC and emphasised why a building specific approach is required. The update advised that whether there are reasonable grounds for issuing a CCC will vary from building to building and included a number of aspects that a council could take into account in order to be satisfied that building work complies with the Building Code. Those aspects that may be taken into account include:-

- The council's own inspections
- Inspections by the owner's engineer, usually reported to the council in the form of a 'producer statement'
- The skill and experience of the person who actually did the work
- A producer statement, perhaps from the builder or the person who actually did the work. Factors to take into account regarding producer statements include:
  (a) Whether the person making the statement can be sure that the work was properly done
  (b) Whether the person who made the statement can actually be relied on
  (c) Any other relevant matter

[155] The BIA advised that if a council does not have reasonable grounds for being satisfied that the building complies with the Building Code, it must refuse to issue a CCC.

[156] Whilst it was submitted that the Council relied on the skill and expertise of the registered drainlayer and therefore was entitled to assume that the drainage work was properly carried out in compliance with the code, there was no evidence that the Council had any particular knowledge of Mr Yates' skill and experience. I am not persuaded that the Council

actually turned its mind to this issue at the time it conducted its various inspections, or when it issued the CCC in reliance on its own inspections; there is certainly no evidence to that effect before me. I accept that where a council purposefully directs its mind to considering the various aspects listed by the BIA as comprising grounds for being reasonably satisfied that work complies with the building code in the absence of direct observation/inspection, that conduct would constitute an exercise of reasonable care and skill. However, I am not persuaded that merely assuming work complies with the Building Code on the basis that it was undertaken by a registered tradesman for example is conduct that constitutes the exercise of reasonable care and skill and falls well short in my view of any objective test of being satisfied on reasonable grounds. If indeed registration was of itself a sufficient ground for approving work, self-certification would be the order of the day and the purpose of independent inspection and certification by council officers would be rendered nugatory.

[157] Consequently, I consider the reliance, if any, placed by the Council on Mr Yates registration as a drainlayer to conclude that the drainage work complied with the Building Code was both misplaced and misconceived.

The issue by the Council of the Code Compliance Certificate

[158] Ms Banbury and Ms Grant submit that, in reliance on the authority of the Court of Appeal decision in *Attorney-General v N. Carter & Anor* (CA72/02 Unreported, Court of Appeal, 13 March 2003, and pursuant to a Memorandum filed on 16 June 2004, the recent decision by Venning J in *Three Meade Street Limited & Anor v Rotorua District Council & Ors* (High Court Auckland, M37/02, 11 June 2004) that it is not just, fair, or reasonable to impose upon the Council an obligation to safeguard the Claimant against economic loss as a result of his relying on the CCC

because Courts in New Zealand have shown an unwillingness to impose upon an authority created by statute for issuing certificates relating to property, when such certificates relate to health and safety.

[159] Against that, Mr Ponniah, submits that in the *Attorney-General v Carter* decision, it appears the purpose for the issue of the certificate related solely to the safety and seaworthiness of a ship which was why the Court found the Ministry did not assume responsibility for economic harm, and the circumstances and the legislative environment in the *Attorney-General v Carter* case, is different to the New Zealand Building Inspector line of cases. In *Attorney-General v Carter* Tipping J stated at paragraph 35:-

> "We agree with Mrs Fee that the New Zealand building Inspector cases are sui generis"

That is to say, the building inspector cases are unique or one of a kind. Mr Ponniah submits that the Council's argument and reliance on the authority of *Attorney-General v Carter* is flawed and the *Attorney-General v Carter* case cannot be relied upon to set aside the line of authorities in New Zealand which have established the unique character of the Council Building Inspector situation, the duty of care and the resultant liability, particularly following the Court of Appeal decision in *Invercargill City Council v Hamlin* whereby a policy decision was made to depart from the English authorities.

[160] In the Court of Appeal, in *Invercargill City Council v Hamlin,* Richardson J stated that the common law of New Zealand should reflect the kind of society we are and meet the needs of our society.

[161] The long line of authorities from *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, *Stieller v Porirua City Council* [1986] 1 NZLR 84, *Chase v de Groot* [1994] 1 NZLR 613, *Lester v White* [1992] 2 NZLR 483, *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) (endorsed by the privy Council) all acknowledge the special circumstances of New Zealand society's reliance on private home ownership for wellbeing in social and economic terms. This is because in New Zealand there has been a relationship of reliance by home owners on councils to ensure compliance with the Building Code and full recognition of that by local authorities, and accordingly, a council was liable for any loss, including economic loss that was sustained in the event of a breach by a council of the duty of care.

[162] In *Hamlin* at para 34 page 526, Richardson J stated:

> "The Building Act 1991 followed a decade of research and study which culminated in the 1990 Report of the Building Industry Commission to the Minister of Internal affairs 'Reform of Building Controls'. In volume 1 para 2.14 (p25) the Commission noted:
>
> > "People have certain expectations of the buildings they use, whether that use is public or private. Because buildings may pose a threat to the safety, health, or wellbeing in social and economic terms, people seek assurance through some form of control that all buildings meet certain requirements to safeguard them from risk."

[163] There is no evidence that New Zealand society's expectations, needs, or its reliance on councils to safeguard individual persons economic and social wellbeing from the risk of acquiring a substandard dwelling have changed in the intervening period to the extent that there should be a policy decision to depart from the existing line of authority. As Mr Ponniah submitted, the issue of a CCC is much wider and is more comprehensive and permanent certification relating to the functionality

and durability of the construction of a building, than the certificate for survey issued in the *Attorney-General v Carter* case, which certificate was valid only for a short period and was more akin to a building's Annual Certificate of Fitness issued in respect of matters of health and safety.

[164] An essential distinguishing feature of *Three Meade Street Limited & Anor v Rotorua District Council & Ors* (High Court Auckland, M37/02, 11 June 2004) is that the case concerned the developer, builder and owner of a commercial building, as distinct from a residential dwelling.

[165] The authorities cited by Ms Banbury and Ms Grant do not in my view assist the Council and *Attorney-General v Carter* and *Meade Street* are quite different and able to be distinguished from the facts and the underlying policy considerations germane to the present case.

[166] I am satisfied that the Claimant in this matter exemplifies the very person who by virtue of the distinctive and longstanding features of the New Zealand housing scene is placed in a relationship of reliance on councils to ensure compliance with the Building Code and to whom a Council accordingly assumes responsibility when issuing a Code Compliance Certificate.

Existence of statutory obligations

[167] Counsel for the Council submit that a negligent exercise of the "positive obligations" imposed on the Council pursuant to sections 34, 43, and 76 of the Building Act 1991, being the provisions relating to the issue of building consents, the issue of code compliance certificates, and the power to enter onto property to inspect building work, will not in itself give rise to a claim for common law damages, and the statutory

framework simply provides a background against which the existence or otherwise of common law obligations will be judged.

[168] Following the line of authorities referred to in para. 161 supra, it is settled law in New Zealand that a council owes a duty of care to homeowners and subsequent owners to exercise reasonable care and skill when performing its functions, duties and obligations under the Building Act 1991, and accordingly councils will be liable for defects caused or contributed to by building inspectors' negligence.

Extent of the Council's obligations – patent or latent defects

[169] Ms Banbury and Ms Grant 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.

[170] 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.

[171] 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.

[172] 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 Kirby*) 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.

Causation and remoteness of damage

[173] For the Claimant to recover against the Council, the Council's conduct must be causative of the loss suffered by the Claimant.

[174] In *Sew Hoy & Sons Ltd v Coopers & Lybrand*, the Court recently considered the test for causation. In that case, Henry J held a plaintiff must establish in a commonsense practical way the loss claimed was attributable to the breach of duty (at 403). In emphasising the causal connection, Thomas J summarised the issue of causation in the following terms:-

> "The basic question remains whether there is a causal connection between the defendant's default and the plaintiff's loss…the answer to this question will not be resolved by the application of a formula but by the application of a Judge's common sense. The Judge needs to stand back from the case, examine the facts closely, and then decide whether there is a causal link between the default and the loss in issue which can be identified and supported by reasoned argument" (408-409)
>
> *Sew Hoy & Sons Ltd v Coopers & Lybrand* [1996] 1 NZLR 392

[175] Counsel for the Council submit that the inspection undertaken by ABC may impact upon the existence of any duties owed by the Council and

may snap the chain of causation or may support a finding of contributory negligence against the Claimant. Counsel referred me to a number of cases as authorities from which the principles can be taken, that when applied to the circumstances of this case, must at best negate the existence of any duties owed between the parties or at worst result in a significant contributory negligence finding. Those cases include:-

- *Jull v Wilson and Horton & Anor* [1968] 89, in which case the court held that the possibility of an intermediate examination is relevant not only to causation but also to proximity between the plaintiff and a third party charged with negligence

- *Bowen & Anor v Paramount Builders (Hamilton) Limited & Anor* [1977] 1 NZLR 394, page 412 and 413 per Richmond P, in which case the court held there must be a strong reasonable expectation on behalf of the defendant that an intermediate examination will take place to negate the existence of a duty of care or the chain of causation

- *Proprietors Units Plan & Ors v Jiniess Pty Limited & Ors* [2000] NTSC 89, in which case the Court determined that the plaintiffs specific knowledge of potential problems with the building was sufficient to displace any reliance that she may otherwise have had upon the defendant engineers

- *Peters v Muir* [1996] DCR 205, in which case the court found that the defects in the dwelling were such as to put a reasonable person on notice and the plaintiff's failure to arrange for a pre-purchase inspection would reflect itself in a finding of 33% contributory negligence

- *Cinderella Holdings limited v Housing Corporation of New Zealand* [1998] DCR 406, in which case the court found that the plaintiff was negligent in the way in which it proceeded to purchase the building and failed to take steps which a reasonably prudent purchaser of a valuable building could have been expected to take when it carried an informal pre-purchase survey of the building

[176] The authorities cited by Ms Banbury and Ms Grant are sufficiently different and are able to be distinguished from the facts of this case. There is no evidence that there was a strong reasonable expectation on behalf of the Council that an intermediate examination of the dwelling would take place, there is no evidence that pre-purchase inspections a common occurrence in New Zealand, there is no evidence that the Claimant had specific knowledge of the problems with the building at issue in these proceedings, there were no defects in the dwelling such as to put the Claimant on notice to arrange for a pre-purchase inspection, notwithstanding which, the Claimant did arrange for pre-purchase inspection prior to purchasing the dwelling.

[177] It is common ground that the pre-purchase inspection undertaken for the Claimant by ABC failed to disclose a number of defects in relation to the dwelling generally, but insofar as these proceedings are concerned, that inspection did not disclose any defects in relation to the retaining wall drainage.

[178] In subsequent proceedings brought by the Claimant in the Disputes Tribunal, the Referee concluded inter alia, that Mr Steve King of ABC could not have been expected to discover the inadequate drainage material behind the retaining wall. It would seem that the Referee did not have the same evidence that is before me, because, based on the

evidence in these proceedings, I am drawn to the conclusion that the inspection of the drainage work on the property was undertaken negligently by ABC and the absence of a silt trap and the exposed nature of the draincoil below the retaining wall should have been observed by Mr King and were sufficient to evoke caution and concern on his part.

[179] In the circumstances, I find that the Claimant, by the conduct of his consultant ABC, has contributed to his loss by the negligent inspection of the drainage prior to the purchase of the property, at which time, had the defective drainage been identified, the contract could have been avoided, or the purchase price altered to take account of the defect.

[180] The Council has pleaded contributory negligence as a defence. A Claimant who sues another person for harm that he or she has suffered, yet who has failed to take reasonable care in looking after his or her own interests and in that respect has contributed to his or her own loss, may to the extent that the court finds just and equitable, have any damages awarded reduced (apportioned) to reflect the Claimant's share in the responsibility of the harm and damage suffered in accordance with the Contributory Negligence Act 1947. Section 3 contains the substance of the Act and provides as follows:-

> "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."

[181] Accordingly, whilst I find that the Council breached the duty of care that it owed to the Claimant by negligently inspecting and approving the

building and drainage work, and in respect of which the Claimant has suffered loss in the sum of $10,950.63, calculated as follows:

Cost of remedial work	$ 7,700.63
Consultants costs	$ 1,250.00
General damages	$ 2,000.00
Total	$10,950.63

I find that the Claimant has contributed to his own loss to the extent of 20% and reduce the amount that the Council is liable to pay the Claimant to $8,760.50 to reflect the Claimant's share in the responsibility for the damage.

The liability of the Second respondent, Terence Quinn

[182] Terence Quinn is the Second respondent in these proceedings in his personal capacity.

[183] Mr Quinn disputes that he was either the owner, the builder, or the developer in respect of any work done at the property despite the majority of the invoices for labour and materials expended on the works being addressed to him personally.

[184] Mr Quinn claims that at all material times, the property was owned by the Trust, that the Trust contracted with all parties involved in the relocation and construction works at the property, that his dealings with the property were in his capacity as a trustee for and on behalf of the Trust, and that the Trust sold the property to Mr Smith.

[185] In a written statement dated 28 May 2004, and prepared expressly for the purpose of these proceedings, Mr Seton, a Barrister and Solicitor and a co trustee of the Trust, along with Mr and Mrs Quinn, stated that at all times, Mr Terence Quinn was instructed to act on behalf of the Trust by both himself and Elizabeth Quinn as trustees in regard to any dealings involving property or entry into contracts. Mr Seton's evidence was not challenged.

[186] In the circumstances I am satisfied that the evidence establishes overwhelmingly that the Trust was the developer and vendor of the property and that Mr Quinn's dealing with the property were undertaken on behalf of the Trust with the concurrence of the other trustees, and accordingly any liability that he may have for the damage in this matter will be in the capacity of a trustee of the Trust.

The liability of the Third respondent, Garth Yates.

[187] Despite Mr Yates failure to participate in these proceedings, I am satisfied the evidence establishes that Yates Drainage and General Contractors Limited contracted with the Trust to undertake the initial excavation of the property and all drainage work on the property.

[188] The evidence of Mr Quinn and Mr Burnside was that Mr Garth Yates personally undertook all of the drainage and excavation work that is in question in these proceedings.

[189] Counsel for the Council submit that there is ample authority for the proposition that company directors owe duties for physical work they personally carry out, and rely on *Morton v Douglas Homes Limited* [1984] 2 NZLR and *Gardiner v Howley (1995) ANZ CONVR 521* (HC117/92, 17 May 1994, HC Auckland, Temm J) as authorities.

[190] Counsel refer in particular to *Morton v Douglas Homes Limited* [1984] 2 NZLR at page 595, paragraph 30, where Hardie Boys J stated:-

> "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 will 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 insofar as that dealing is subject to his control."

[191] The leading authority on the personal liability of company directors who cause harm while acting on behalf of a company or while carrying out the responsibilities of a company is the Court of Appeal decision in *Trevor Ivory Limited v Anderson* [1992] 2 NZLR 516 in which case, the plaintiffs, who were raspberry growers entered into a contract with Trevor Ivory Ltd for the provision of agricultural consultancy services. Trevor Ivory, the major shareholder and managing director of the company gave negligent advice to the plaintiff raspberry growers in relation to spraying grass growing among the raspberries which resulted in the raspberries being killed by the recommended herbicide.

[192] The plaintiffs succeeded against the company but not against Trevor Ivory personally, and the Court found that it should avoid imposing on the owner of a one-man company, a personal duty of care which would erode the limited liability and separate identity principles, unless the company officer assumed personal liability for the conduct in question, because when he formed the company, he made it plain to the world that limited liability was intended in the absence of special circumstances,

and there needed to be clear evidence that Mr Ivory was not simply acting as the company performing its contractual obligations.

[193] There has been no evidence presented to me in this case of any special circumstances that would lead me to conclude that Mr Yates assumed liability, expressly or impliedly, for the work undertaken on the property – the company was contracted to undertake the work, the work was charged for on company invoices, and the monies were paid to the company.

[194] In the absence of any evidence that Mr Yates personally assumed responsibility for the drainage and excavation work undertaken at the property, I am unable to accept in this case, that Mr Yates owed a duty of care to the parties that would support a finding of personal liability for the damage and the claim against Garth Yates fails.

The liability of the Fourth respondents, Terence Patrick Quinn, Elizabeth Anne Quinn and Andrew Mark Wilmot Seton, as trustees of the TP and EA Quinn Family Trust

[195] A trust does not offer the same protection for personal liability as a limited liability company does, and absent any clause in the Deed of Trust (See doc.4 in the Second and Fourth respondent's bundle) limiting the liability of the trustees, the trustees will be personally liable in their capacity as trustees on behalf of the Trust. The matter was addressed recently in the Napier High Court in *Jenssen v Hawkes Bay Regional Council* (unreported, Napier High Court, B35/02, 29 May 2002, per Master Gendall:-

> "It is clear that trustees of inter vivos trusts act for those trusts in a personal capacity. As such, trustees are personally liable for actions undertaken in their name by the trust except in circumstances where a

> limitation of liability clause is agreed to contractually, typically by third parties who for example make loans or rent premises to the trust."

[196] The Claimant's claim against the fourth respondents is both in contract and in tort.

[197] The alleged tortious liability arises out of the allegation that the Trust was the developer of the property and owed the Claimant a duty of care as purchaser of the property.

[198] The alleged contractual liability arises out of the warranties contained in the Sale and Purchase Agreement.

Liability as vendors

[199] The vendors of the property were the fourth respondents as trustees of the TP and EA Quinn Family Trust as confirmed by the copy of the agreement for sale and purchase included at Document 6 in the Second and Fourth respondents' bundle of documents. The agreement is dated 25 April 1999, and included the following contractual warranty at clause 6.1(9):

> "All obligations imposed on the vendor under the Building Act 1991 ("Act") shall be fully complied with at settlement date…"

[200] Counsel for the Council referred me to the Court of Appeal decision in *Riddell v Porteous* [1999] 1 NZLR 1 and submitted that the liability of the of Riddell to Bagley, is identical to the liability of the trustees to the Claimant based on the vendor warranty in the agreement for sale and purchase.

[201] In that case Mr and Mrs Riddell contracted Mr Porteous to undertake construction of a house on their property. Riddell had no great knowledge of building or construction techniques. The Council were responsible for the building permit. Following the construction of the house the Riddells' sold the property to Mr and Mrs Bagley who some time later discovered that the deck had rotted.

[202] The Bagleys were successful in claiming damages from the Riddells based on the same vendor warranty in the agreement for sale and purchase, albeit an earlier edition of the standard agreement.

[203] I accept that the decision of the Court of Appeal is authority for the proposition that a vendor will be liable to a purchaser for a breach of warranty that building work undertaken by the vendor complies with the Building Act 1991.

[204] As I have already concluded that the drainage (building) work does not comply with the Building Code, it follows that the Claimant has established a prima facie case that the Trust was in breach of the vendor warranty in the Sale and Purchase Agreement, and accordingly I find Terence Patrick Quinn, Elizabeth Anne Quinn, and Andrew Mark Wilmot Seton, as trustees of the TP and EA Quinn Family Trust, jointly and severally liable to the Claimant for damages in the sum of $10,950.63, reduced to $8,760.50 to reflect the Claimant’s share in the responsibility for the damage for the reasons set out in paragraphs 177-179 supra (See also *Mouat v Clark Boyce* [1992] 2 NZLR 559 at 564-565 (CA) per Cooke P, re application of the Contributory Negligence Act 1947 in claims in tort, contract and equity)

Liability as developers

[205] The law is well settled in New Zealand, that those who own/build/develop properties owe a non-delegable duty of care to subsequent purchasers, and Counsel for the Council cited the following commonly referred to cases, as authorities for that proposition:- *Morton v Douglas Homes Limited* [1984] 2 NZLR 548, *Mt Albert Borough Council v Johnson* (CA) [1979] 2 NZLR 234, *Riddell v Porteous* [1999] 1 NZLR 1. The non-delegable duty on the owner/builder/developer is not merely to take reasonable care for the safety of others, it generates a special responsibility or duty to see that care is taken by others, for example by an agent, or independently employed contractors, such as Yates in this case. Non-delegable duties need not be discharged by the employer personally, but liability rests with the employer if their discharge involves negligently inflicted harm or damage.

[206] The evidence of Mr Quinn establishes clearly that the property was owned at all material times by the Trust, that the Trust applied for and obtained Resource Consent for the development of the property, that the Trust applied for and obtained the building consent for the relocation of the dwelling onto the property, and that the Trust contracted with all parties involved in the relocation and construction works at the property.

[207] For all intents and purposes I am satisfied that the evidence establishes unequivocally that the Trust was the developer of the property and by application of the principles illustrated in the authorities cited (supra), I find that the Trust owed the Claimant a duty of care, as the purchaser of the property the trust developed, the Trust breached that duty of care by constructing, or permitting to be constructed, defective building and drainage works, and by reason of the said breaches, the Claimant has suffered loss and damage to his property for which the trust is liable.

[208] Accordingly, I find Terence Patrick Quinn, Elizabeth Anne Quinn, and Andrew Mark Wilmot Seton, as trustees of the TP and EA Quinn Family Trust, breached the duty of care they owed to the Claimant, and accordingly I find them jointly and severally liable to the Claimant for damages in the sum of $10,950.63, reduced to $8,760.50 to reflect the Claimant's share in the responsibility for the damage for the reasons set out in paragraphs 177-179 supra.

CONTRIBUTION

[209] Ms Banbury and Ms Grant submit that the Council is not liable to the Trust on the grounds, firstly, that the Trust is liable to the Claimant for breach of warranty which is a contractual claim and the trust is not entitled to any indemnity from the Council as concurrent tortfeasors, and secondly, there was no reliance on the Council's actions in inspecting the property and issuing the CCC on the part of the Trust so as to entitle the trustees to a contribution or indemnity in this matter.

[210] I do not find the Council's argument that the Trust placed no reliance on the Council's conduct, as persuasive or compelling in the circumstances, and prefer on balance, Mr Ponniah's submission, that in giving the warranty in clause 6.1(9) of the sale and purchase agreement, the Trust had knowledge of, and relied on, the Council's CCC that all work had been completed in accordance with the Building Code.

[211] I understand the Council submits that the maximum the Claimant can recover from the Council is 20% of any damages for which the Council is held liable, and that the Trust should be 80% liable in reliance on the decision in *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA)

[212] Mr Ponniah submits that the difference between the *Mount Albert Borough Council v Johnson* case and the facts in these proceedings is that the Trust did not carry out any building works whatsoever, and based on the reliance placed by the Trust on the Council, the Council should be held 100% liable if any liability is found by virtue of a breach of duty by the Council's inspectors or by way of joint tortfeasor liability to the Trust as concurrent tortfeasors, pursuant to s17(1)(c) of the Law reform Act 1936.

[213] I have found that the Council breached the duty of care that it owed to the Claimant, and accordingly the Council is a tortfeasor or wrongdoer.

[214] I have also found that the trustees breached the duty of care they owed to the Claimant and accordingly, they are also (joint) tortfeasors.

[215] It follows that the Council and the trustees are concurrent tortfeasors because they are responsible for different torts (i.e. negligent construction on the part of the trustees and negligent inspection on the part of the Council) that have combined to produce the same damage giving rise to concurrent liability. Concurrent liability arises where there is a coincidence of separate acts which by their conjoined effect cause damage (*Allison v KPMG Peat Marwick* [2000] 1 NZLR 560 at 584 (CA))

> "Joint or concurrent tortfeasors are each liable in full for the entire loss…. Actual satisfaction of the full amount by one tortfeasor discharges claims against other tortfeasors whether joint or concurrent, because there is no loss left to compensate."
>
> [Todd, The law of Torts in New Zealand, 3rd Ed., page 1144]

[216] For the reasons set out in this determination, and based on the principles enunciated in *Todd* (supra), the Council and the trustees are

concurrent tortfeasors and are jointly liable in full for the entire loss suffered by the Claimant.

[217] Notwithstanding that position, any tortfeasor is entitled to claim a contribution from any other tortfeasor pursuant to s17 of the Law Reform Act 1936, in respect of the amount to which it would otherwise be liable.

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

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

[219] The liability of the trustees and the Council for contribution arises because all four respondents are tortfeasors, Terence Patrick Quinn, Elizabeth Anne Quinn, and Andrew Mark Wilmot Seton, as trustees of the TP and EA Quinn Family Trust, are joint tortfeasors on the one hand, and are concurrently liable with the Council on the other hand, in respect of the same damage.

[220] Notwithstanding that the trustees are concurrently liable to the Claimant in contract and tort, the Council's action for contribution can be maintained.

[221] The approach to be taken in assessing a claim for contribution is provided in s17(2) of the Law Reform Act 1936. It says in essence, that the amount of contribution recoverable shall be such as may be found by the Court to be just and equitable having regard to the relevant responsibilities of the parties for the damage.

[222] 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.

[223] As in *Mount Albert Borough Council v Johnson* supra, primacy for the damage must lay with the trustees in this case as the owners/builders/developers of the Claimant's property whose responsibility it was, to carry out, or to have carried out, the building works in accordance with the building code and the building consent. It was a condition of the building consent that the building work was to be undertaken in accordance with the plans and specifications so as to comply with the Building Code and the observance of that requirement was the trustees' primary responsibility.

[224] The Council's role, on the other hand is essentially supervisory and to that extent I consider that it's role should be significantly less than that of the principal author(s) of the damage.

[225] Having considered the matter carefully, I see no compelling reason to depart from the general principle in this case, and accordingly the Council is entitled to an order that the trustees jointly, bear 80% of the total amount to which the Claimant would otherwise be entitled to obtain from the Council in damages pursuant to this determination.

COSTS

[226] Mr Ponniah submits that in the event the Second and Fourth respondents are successful, they seek costs against the Claimant and/or against the Council.

[227] The power to award costs is addressed at clause 43 of the Act, which provides:-

> **43 Costs of adjudication proceedings**
>
> (1) An adjudicator may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if the adjudicator considers that the party has caused those costs and expenses to be incurred unnecessarily by-
>
> (a) bad faith on the part of that party; or
> (b) allegations or objections by that party that are without substantial merit
>
> (2) If the adjudicator does not make a determination under subsection (1) the parties must meet their own costs and expenses.

[228] I think it is fair to summarise the legal position by saying that an adjudicator has a limited discretion to award costs which should be exercised judicially, not capriciously.

[229] I have carefully considered the Second respondent's claim in principle, (because no actual sum has been claimed to date) and, whilst I am only too conscious that this has been a most unpleasant and expensive saga for Mr Quinn, the Trust relied heavily on Mr Quinn's evidence and there was no substantial duplication that I could see. I am not persuaded that the Claimant or the Council has necessarily acted in bad faith, or that its case was without substantial merit such that an award of costs against the Claimant or the Council would be appropriate in this case

[230] I therefore find that the parties shall bear their own costs in this matter.

CONCLUSION AND ORDERS

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

[a] The Council (the First respondent) is in breach of the duty of care owed to Mr Smith (the Claimant) and is liable in damages for the loss caused by that breach in the sum of $8,760.50

[b] Terence Patrick Quinn, Elizabeth Anne Quinn, and Andrew Mark Wilmot Seton, as trustees of the TP and EA Quinn Family Trust (the Fourth respondents) are in breach of contract and are jointly and severally liable to Mr Smith (the Claimant) in damages for the loss caused by that breach in the sum of $8,760.50

[c] Terence Patrick Quinn, Elizabeth Anne Quinn, and Andrew Mark Wilmot Seton, as trustees of the TP and EA Quinn Family Trust, (the Fourth respondents) are in breach of the duty of care owed to Mr Smith (the Claimant) and are jointly and severally liable to Mr Smith in damages for the loss caused by that breach in the sum of $8,760.50

[d] As a result of the breaches of the duty of care referred to in [a] and [c] above, Terence Patrick Quinn, Elizabeth Anne Quinn, and Andrew Mark Wilmot Seton, as trustees of the TP and EA Quinn Family Trust on the one hand, and the Council, on the other, are concurrent tortfeasors

[e] As between Terence Patrick Quinn, Elizabeth Anne Quinn, and Andrew Mark Wilmot Seton, as trustees of the TP and EA Quinn Family Trust on the one hand, and the Council, on the other, the Council is entitled to a contribution from Terence Patrick Quinn, Elizabeth Anne Quinn, and Andrew Mark Wilmot Seton, as trustees of the TP and EA Quinn Family Trust jointly and severally, for 80% of the same loss that each has been found liable for, being an amount of $7,008.40

[f] As between the Council on the one hand, and Terence Patrick Quinn, Elizabeth Anne Quinn, and Andrew Mark Wilmot Seton, as trustees of the TP and EA Quinn Family Trust, on the other, Terence Patrick Quinn, Elizabeth Anne Quinn, and Andrew Mark Wilmot Seton are entitled to a contribution from the council for 20% of the same loss that each has been found liable for, being an amount of $1,752.10

Therefore, I make the following orders:-

(1) Terence Patrick Quinn, Elizabeth Anne Quinn, and Andrew Mark Wilmot Seton, and the Council, are jointly and severally liable to pay Mr Smith the sum of $8,760.50

(s42(1))

(2) The Council is entitled to a contribution of $7,008.40 from Terence Patrick Quinn, Elizabeth Anne Quinn, and Andrew Mark Wilmot Seton, jointly and severally, being 80% of the sum to which the Council has been found liable for breach of the duty of care, in the event that the Council should pay Mr Smith that sum

(s29(2)(a))

(3) Terence Patrick Quinn, Elizabeth Anne Quinn, and Andrew Mark Wilmot Seton, are entitled jointly or severally, to a contribution of $1,752.10 from the Council, being 20% of the sum to which Terence Patrick Quinn, Elizabeth Anne Quinn, and Andrew Mark Wilmot Seton, have been found liable for breach of the duty of care, in the event that Terence Patrick Quinn, Elizabeth Anne Quinn, and Andrew Mark Wilmot Seton, or any one of them individually, should pay Mr Smith that sum

(s29(2)(a))

(4) The parties shall bear their own costs in this matter

(s43)

Dated this 12th day of July 2004

_____

JOHN GREEN
ADJUDICATOR

STATEMENT OF CONSEQUENCES

IMPORTANT

Statement of consequences for a respondent if the respondent takes no steps in relation to an application to enforce the adjudicator's determination.

If the adjudicator's determination states that a party to the adjudication is to make a payment, and that party takes no step to pay the amount determined by the adjudicator, the determination may be enforced as an order of the District Court including, the recovery from the party ordered to make the payment of the unpaid portion of the amount, and any applicable interest and costs entitlement arising from enforcement.