CLAIM NO: 0300

UNDER The Weathertight Homes Resolution Services Act 2002

IN THE MATTER of an adjudication

BETWEEN **ROSALIE JANE THEOBALD** and **DAVID KEITH THEOBALD**

Claimants

AND **SCOTT COULTER** and **KAREN COULTER**

First Respondents

AND **BAY BUILDING CERTIFIERS LIMITED**

Second Respondent

AND No Third Respondent, the Tauranga District Council having been struck out

AND **RAY MARKLEW** trading as **MODERN TEXTURES**

Fourth Respondent

AND No Fifth Respondent, Antoon G L'Ami trading as L'Ami Design & Draughting having been struck out

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DETERMINATION OF ADJUDICATOR
(Dated 10th June 2005)

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1. BACKGROUND

1.1 The Claimants lodged a claim under the Weathertight Homes Resolution Services Act 2002 ("the WHRS Act"). The claim was deemed to be an eligible claim under the WHRS Act. The Claimants filed a Notice of Adjudication under s.26 of the WHRS Act on 8 November 2004.

1.2 I was assigned the role of adjudicator to act for this claim. A preliminary conference was arranged to be held in Tauranga on 26 November 2004 for the purpose of setting down a procedure and timetable to be followed in this adjudication.

1.3 I have been required to issue seven Procedural Orders to assist in the preparations for the Hearing, and monitor the progress of these preparations. Although these Procedural Orders are not a part of this Determination, they are mentioned because some of the matters covered by these Orders will need to be referred to in this Determination.

1.4 A Hearing was held which started at 10.00 am on 22 March 2005 in the Conference Room of the Harbour City Motor Inn, and continued on the following two days. Mr and Mrs Theobald were represented by Mr Glenn Dixon, barrister; Mr and Mrs Coulter were represented by Mr Nathan Smith of Sharp Tudhope; Bay Building Certifiers Ltd was represented by Mr Roger Bruce; Mr Marklew represented himself, and Mr L'Ami was represented by Ms Vanessa Hamm of Holland Beckett. Mr Ford, who was the Weathertight Homes Resolution Service ("WHRS") assessor who inspected the building in May 2003, attended the hearing at my request to answer questions about his Report. I conducted a site inspection at 1.00 pm on 24 March 2005 to see for myself the areas of concern.

1.5 All the parties that attended the hearing were given the opportunity to present their submissions and evidence and to ask questions of all the witnesses. Evidence was given under oath or affirmation by the following:

- Antoon L'Ami, the designer of the house, called by the adjudicator;
- Gail Harris, the real estate salesperson who handled the sale of the house to the Claimants, called by the Claimants;

- Peter Courtney, a plasterer who had given a quotation for the remedial work, called by the Claimants;
- Rose Theobald, one of the Claimants;
- Joseph Tito, a plasterer who had been asked for a quote for remedial work, called by Bay Building Certifiers;
- Maurice Stickland, a witness as to facts, called by Bay Building Certifiers;
- David Theobald, the other Claimant;
- Steve Ford, the WHRS assessor, called by the adjudicator;
- Rodney Faulkner, area manager for Plaster Systems Ltd, called by Bay Building Certifiers;
- Karen Coulter, one of the previous owners of the property;
- Scott Coulter, the other previous owner;
- Tracy Haar, a witness as to facts, called by the Coulters;
- Mike Morrison, a witness as to facts, called by the Coulters;
- Ray Marklew, the Fourth Respondent.

1.6 Before the hearing was closed the parties were asked if they had any further submissions to make and all responded in the negative. All parties were invited to file written closing submissions by 1 April and written replies by 8 April 2005. This timetable was confirmed in my Procedural Order No 8 so that any parties not present at the hearing would be aware of my invitation.

2. THE PARTIES

2.1 The Claimants in this case are Mr and Mrs Theobald. I am going to refer to them as “the Owners”. They purchased the house and property at 80 Sovereign Drive, Papamoa in August 2002.

2.2 The First Respondents are Mr and Mrs Coulter, who had the house built as a new dwelling between March and September 1999. They sold the property to the Owners in August 2002.

2.3 The second Respondent is Bay Building Certifiers Ltd, which was the company that reviewed the application for a building consent and carried out the necessary inspections during construction prior to issuing the Code Compliance Certificate on 3 September 1999. I will refer to this company as "the Certifiers".

2.4 The Fourth Respondent is Mr Marklew, who was the person who supplied the materials and carried out the installation of the exterior cladding on the house.

2.5 The Fifth Respondent is Mr L'Ami, the architect who designed the house and prepared the documents for the building consent.

2.6 At the beginning of the hearing the Owners stated that they had no claim against Mr L'Ami. This had not been made clear to me until I received their Reply on 11 March 2005 as they had not raised any objections to the joinder of Mr L'Ami (refer to Procedural Order No 4 issued on 20 December 2004), and had not supported his application for removal (refer to Procedural Order No 6 issued on 18 February 2005). However, in the light of this information, I advised the parties that I would treat this as an application to remove Mr L'Ami as a party to the adjudication pursuant to s.34 of the WHRS Act.

2.7 It is normal for all the other parties to be given the opportunity to make submissions either in support or in opposition of such applications. Therefore, I asked all the parties for their views and was told that there were no objections, provided that the Owners withdrew any claims against the remaining parties for alleged deficiencies in the drawings.

2.8 I considered this application in the light of the above factors and decided that, if the claimants wanted to withdraw their claims against a party, then this request should not be denied without very good reasons. Adjudication is primarily about the claims of the claimants against individual respondents and the adjudicator has a mandatory obligation to determine each of these claims. As a subsidiary issue, the adjudicator has a discretionary power to determine cross-

claims between respondents. If the Owners do not want to continue with their claims against the architect, then they have elected to bear by themselves any share of liability that may have been found against the architect or his drawings. Therefore, I considered it fair and reasonable under the circumstances to allow the application, and I ordered that Mr L'Ami be struck out as a party to this adjudication.

3. CHRONOLOGY

3.1 I think that it would be helpful to provide a brief history of the events that have led up to this adjudication.

- 26 March 1999 Building Consent issued to the Coulters;
- 21 August 1999 Coulters move into the new house;
- 3 September 1999 Code Compliance Certificate issued;
- February 2002 Coulters put their house on the market;
- 24 May 2002 The Theobalds' first visit to the house;
- 6 June 2002 Theobalds make an offer of $520,000;
- 11 June 2002 Offer accepted by the Coulters;
- 3 August 2002 Theobalds make a pre-purchase inspection;
- 29 August 2002 Settlement day;
- 9 January 2003 Theobalds lodge claim with WHRS;
- 15 July 2003 WHRS Assessor's report completed;
- 29 August 2003 Theobalds told that their claim was eligible;
- 8 November 2004 Theobalds elect to go to adjudication.

4. THE CLAIMS

4.1 The claims being made by the Owners are generally the defects identified by the WHRS Assessor in his Report dated 15 July 2003, plus some other claims made in the further details of claim submitted on 7 December 2004. The quantification of the claims was clarified by Mr Dixon when he made his opening address at the Hearing. The claims can be summarised as follows:

1.	Revised cost of plastering repairs, as the quotation from Palace Plasterers	$ 54,900.00	
	Add GST	6,862.50	$ 61,762.50

2	Other costs		
	Scaffolding	$ 1,500.00	
	Remove and replace downpipes	250.00	
	Protect gardens	250.00	
	Remove and replace shutters	200.00	
	Remove and replace fencing	150.00	
	Fit membrane to planter box	250.00	
	Replace rotten soffit to entry	1,500.00	
	Flashings on the pergola ribbon board	395.00	
	Rubbish removal	885.00	
	Add GST	672.50	6,052.50
3.	Contingency fee for replacing interior wall linings and other work to make good	$ 15,000.00	
	Add GST	1,875.00	16,875.00
4.	General damages		10,000.00
5.	Legal costs		5,000.00
6.	Repairs and valuation reports		1,400.00
	TOTAL CLAIMS		$101,090.00

4.2 The claims against the Coulters are based on breach of clause 6.2(5) of the Sale and Purchase Agreement, which was the warranty that all building work carried out by the vendors complied with the provisions of the Building Act. The Owners have raised the alternative claim against the Coulters based on negligence, saying that as owners and builder of the house they owed a duty of care to subsequent owners, and that they are in breach of that duty by failing to ensure that the work complied with the requirements of the Building Code.

4.3 The claims against the Certifiers and Mr Marklew are in tort and based on allegations of negligence. The Owners say that the Certifiers, by issuing a Code Compliance Certificate when the house had not been built in accordance with the requirements of the Building Code, were negligent and should be held accountable for failing to ensure that the work had been properly completed. They say that Mr Marklew owed a duty of care to subsequent purchasers of the house to carry out the plastering work in accordance with the Building Code.

5. FACTUAL ANALYSIS OF CLAIMS

5.1 In this section of my Determination I will consider each heading of claim, making findings on the probable cause of any leaks, and then considering the appropriate remedial work and its costs.

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

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

5.3 The Assessor had identified that there were leaks into the building at the following points:

- Left hand side of the laundry window;
- Corner framing in south-east of laundry;
- Soffit to right side of front door;
- Eastern side of chimney to lounge fireplace.

5.4 At the beginning of the hearing I asked the Assessor to return to the house to carry out further investigations in some specific areas. I invited all parties to make known to the Assessor if there were any particular areas that they would want looked at, so that we would have as much useful and relevant technical evidence as possible. The Owners' permission was obtained to carry out some destructive testing and Mr Theobald was kind enough to lend the Assessor a number of useful tools.

5.5 The following areas were investigated by the Assessor, who conducted some destructive testing by cutting out sections of the external cladding and he took a good number of photographs.

- External corner in south-east of laundry (positions 1, 2 and 3);
- External corner in south-east of bathroom (position 4);
- West side of window in bedroom 3 (position 5);
- South side window on west wall of bedroom 1 (position 6);
- External corner in north-west of Bedroom 1 (position 7);
- Wall light by front door (position 8);
- Parapet above west end of window in gym (position 9);
- High-level windows on east wall of family room (position 10);
- East side of lounge fireplace (position 11);
- Above east end of window in dining room (position 12);
- Water stains in ceiling of bedroom 4.

5.6 These investigations have highlighted that the potential problem areas can be reduced to a list of seven items, which are as follows:

1. Finish at base of wall cladding;
2. Installation of flashings around the windows;
3. Finishing to top of parapets;
4. Plaster finish to external corners;
5. Meshing to decorative bands;
6. Kick-outs at base of abutment flashings;
7. Leaks into ceiling of bedroom 4.

5.7 **Finish at Base of Wall Cladding**

5.7.1 The WHRS Assessor was critical of the method of finishing the base of the exterior cladding, as it was butt-jointed onto the concrete foundation. In his report, the assessor stated that this was not a recommended method of construction as moisture can wick up through the bottom of the cladding, thereby affecting the timber framing.

5.7.2 In support of his comments he referred to the BRANZ *Exterior Insulation and Finishing Systems* booklet (Appendix C in his report) and the moisture readings that he took at this house.

5.7.3 In response to this criticism, several experts have pointed out that both Insulclad and Fosroc systems have approved details that allow EIFS systems to have a flush finish at the base of claddings. These details include a plastic Z or U channel at least 100mm above an adjacent

paved surface to create a break in the polystyrene and avoid wicking up from ground level.

5.7.4 Having inspected this dwelling, I am not convinced that the flush joint at the base of the cladding is causing any moisture penetration into this dwelling. It is a detail that does need to be carefully constructed, but based upon the inspection holes that were cut by the Assessor, the detail does not always appear to have been constructed with the recommended PVC separation mouldings. However, it is not leaking and provided that the Owners maintain the ground levels at the proper distance below the floor levels, this detail will probably never be the source of any leaks.

5.7.5 This was not a design defect, as was initially suggested. It is not a defect that is causing moisture penetration. Therefore, as it is not the cause of a building leak, I will not be considering this aspect of the construction any further in my Determination.

5.8 **Installation of Flashings at Windows**

5.8.1 The WHRS Assessor had noted in his report that most window sills in the house were cracked along the joint between the jamb flashing and sill flashings. After carrying out further tests he has uncovered the cause of the problem, which appears to be the way in which these two flashings have been joined.

5.8.2 Most, if not all, of the windows in the house have been fitted with head, jamb and sill flashings. These PVC flashings appear to be of the profile that is recommended in the trade literature and details published by Insulclad and Rockcote. The problem on this house is that the sill flashing seems to have been butted up to the jamb flashing and, in some cases, stopped short of the jamb flashing. All of the experts agreed that this was not the correct way to install the sill flashings.

5.8.3 There is evidence that moisture is penetrating because of this problem and I am satisfied that several of the windows do leak at this point. There is little evidence to show that these leaks have caused any damage to the house other than localised cracking and some damp framing. The house was not constructed with untreated timber, and it is

unlikely that any of the timber framing will need to be replaced as a result of these leaks.

5.8.4 I accept the evidence of the experts that the problem can be rectified by inserting corner soakers in the bottom corners of all windows. There are 24 windows that will need to be rectified, and I will need to consider the cost of this work when I review all the repair costs.

5.9 **Finish to Top of Parapets**

5.9.1 The finish to the top of the parapets was mentioned in the WHRS Assessor's report, and the other experts who have inspected the house agree that the top of the parapets had not been properly finished when the house was constructed.

5.9.2 There has been some criticism of the drawings, which do not show in any detail how it was intended to finish the parapets. I have looked at the building consent drawings and do not find them to be deficient. They do not give a lot of detail, but they rely upon the exterior cladding being of an approved type, and installed in accordance with the technical details supplied by the manufacturers. All recognised EIFS systems have details showing how to weatherproof the tops of parapets and solid balustrades. These details existed well before 1999, when this house was built.

5.9.3 I have found that there has been some confusion amongst the witnesses and evidence between the horizontal tops of the parapets and the horizontal top surface of the adjacent decorative mouldings. Some of the experts were of the opinion that the tops of both should be capped with sloping caps, but others considered that the decorative mouldings only needed a plaster and paint finish.

5.9.4 Mr Marklew suggested that the cracking that was apparent along the parapets could have been caused by the Owners, or tradesmen, walking along the top of the parapets. I think that foot traffic has caused some damage, but has not altered the fact that the tops of the parapets had never been properly completed.

5.9.5 Water has been leaking into this house from the tops of the parapets, and I am satisfied that many of the damp spots that have been identified in this house have been caused by the inadequate protection installed along the tops of the parapets.

5.9.6 The Owners have restricted the amount of damage by applying some waterproofing compound on the parapets. Mr Faulkner told me that the top should be reconstructed so that it had a positive slope to the side, and should have double mesh and plaster over the PVC edge angles. In his opinion, the top of the decorative mouldings should also have this treatment.

5.9.7 It was suggested that a metal capping should have been installed, or should now be fitted as a part of the rectification work. Whilst I may have a personal preference for a metal capping, this does not mean that the Coulters should have had one fitted, or that it is now necessary. Neither Insulclad nor Rockcote required metal cappings. Mr Marklew says that he had recommended Butynol to the Coulters, but they had insisted that the plastered polystyrene was adequate.

5.9.8 Having considered all the evidence, I find that the parapet cappings were not properly finished, as they clearly had not been completely meshed, and some had not been painted. They all need to be rebuilt in accordance with the Insulclad technical detail. There is about 48m of parapet, and I will return to consider the cost of this work when I review all repair costs.

5.10 **Plaster Finish to External Corners**

5.10.1 One of the most visible signs of the deterioration of the plaster coating has been caused by the plaster losing adhesion with the PVC corner angles and window flashings. This is why the Owners feel that their house is “falling apart”. It starts with a small hair crack, which gradually gets worse, until a section of plaster breaks away from the smooth surface of the PVC.

5.10.2 I am satisfied that some small leaks have developed as a result of this “delamination”. Water is getting into the building, although there is no evidence of serious damage at this stage. However, the building does

leak, and this should not have happened. I do not accept that normal maintenance would prevent this delamination.

5.10.3 The cause of this problem is the absence of the mesh around the external corners or over the window-sills. It does appear that a smooth PVC angle was used on all external corners, and this would not be the type of angle recommended for use by the reputable manufacturers. This has exacerbated the problem as the plaster has nothing to key into – so it will delaminate.

5.10.4 The remedial work will entail breaking away the plaster from these angles and reconstructing the corners and sills. I will return to consider the costs when I review all repair costs.

5.11 **Meshing to Decorative Bands**

5.11.1 There are a number of decorative bands applied on the exterior of this house. There are mouldings underneath some of the larger windows. There are projecting cornice mouldings and entablature mouldings around parapets and under eaves, and some mouldings around posts and columns.

5.11.2 These decorative bands or mouldings are polystyrene, which is simply glued to the EIFS panels and then texture-plastered and painted. Mr Marklew accepts that these were not meshed as recommended by the manufacturers, and told me that he did not know at that time that other plasterers always applied a mesh in the plaster to all decorative mouldings, or purchased pre-meshed mouldings.

5.11.3 Both Mr Faulkner and Mr Courtney told me that these bands and mouldings had been glued on wall panels that had already been meshed and plastered. Neither of them considered that the absence of the mesh on the decorative bands or mouldings was causing water to enter the building. The absence of mesh was not causing leaks.

5.11.4 This adjudication is about leaks, and has no jurisdiction to consider claims about defects that do not cause leaks or moisture penetration into dwellings. I accept that the failure to apply mesh to the decorative bands may well not be in accordance with good trade practice, but as

there is no evidence that leaks have resulted, I am not empowered to consider the claims any further. Therefore, this particular claim will not be allowed.

5.12 **Kick-outs at Abutment Flashings**

5.12.1 There are two areas that have obvious leaks, but the WHRS Assessor was uncertain about the cause of the leaks. One of these was beside the fireplace in the lounge, and the other was adjacent to the front door.

5.12.2 Mr Faulkner was of the opinion that the leak by the fireplace was probably caused by the absence of a kick-out at the bottom of the abutment flashing. This means that water running down the edge of the roof does not all go into the eaves gutter, and is channelled down the back of the cladding. I think that Mr Faulkner is right. Furthermore, I think that this is probably the cause of the water tracking into the light fitting by the front door.

5.12.3 These two leaks can be rectified quite easily, as kick-out flashings are relatively easy to fit and inexpensive. However, there may be some consequential damage to repair, so the repair costs must include checking the condition of the wall framing and replacing any rotten members. As with the other leaks, I will return to consider the costs when I review all repair costs.

5.13 **Ceiling in Bedroom 4**

5.13.1 The Owners are claiming that there are leaks from the flat Butynol roof over Bedroom 4, which are obvious because of the water stains on the ceiling. These stains were not noticed by the WHRS Assessor when he visited in May 2003, and no mention is made of them in his report.

5.13.2 These water stains were not mentioned in the witness statements filed by the Owners for this adjudication, and were not mentioned by Mr Dixon in his opening submissions. The first time that the Owners mentioned the water stains was when I was preparing a list of investigative work for Mr Ford, and Mrs Theobald asked if Mr Ford could look at these stains and investigate the cause of the leaks.

5.13.3 It is my understanding that these stains have only recently been noticed, and that the Owners have tried to find out what has caused them. The Respondents were not happy to have this extra matter thrown into the ring at such a late stage. However, as I pointed out to the parties, the purpose of this adjudication was to resolve all claims relating to leaks in this dwelling, and I would appreciate their co-operation – albeit at such short notice.

5.13.4 Mr Ford, the WHRS Assessor, could not see any obvious reason why water would be getting into the ceiling space beneath this flat roof. I looked at the roof, and the water stains, but I could not detect an obvious cause of the problem. Mr Marklew and the Coulters both suggested that leaks could easily have been caused by foot traffic over this roof, and pointed to some solar water pipes that had recently been placed on the roof by the Owners.

5.13.5 The burden of proof is upon the Owners to prove their claims, and I am not satisfied that they have been able to show that defective roofing is the cause of the leak. It could be leaks from the parapet, tracking across ceiling framing, in which case the leaks will be rectified when the parapet is repaired; or it could have been caused by persons walking around on the roof, in which case it is a problem caused by the Owners themselves. I am not going to speculate. I am going to dismiss the claim for further remedial work on the grounds that it has not been proven.

6. REPAIR COSTS

6.1 I have been given a variety of prices and costings for the remedial work. Firstly, the WHRS Assessor was of the opinion that the entire house needed to be re-clad with a new exterior cladding system. His estimate for all this work, including replacing any rotted timber, all margins and GST, was $38,542.00. This estimate was prepared in July 2003.

6.2 The Owners obtained several quotations, but the one upon which they have based these claims is from Palace Plasterers Ltd for a total of $61,762.50, but this was for a re-mesh and repair job, rather than a total re-clad. Mr Courtney (who owns Palace Plasterers) had quoted $84,263.00 for a re-clad, and this did not include several costs – such as scaffold and timber repairs.

6.3 Mr Marklew told me that he had quoted $18,900 + GST to do the complete new job in 1999, and I was shown another quote of $22,800 + GST to do the same job at that time.

6.4 Mr and Mrs Coulter produced two quotations, of $28,600 and $34,771 (both exclusive of GST) for the exterior cladding as if it were a new house. However, neither of these quotes could be questioned as the authors were not present to give evidence.

6.5 Mr Faulkner, who would probably be one of the persons who would have the best idea of marketplace prices for Insulclad product, gave me prices from their standard pricing guide. He considered that in 1999 the external cladding should have cost about $34,000 to $36,000, whereas today's rates would arrive at a total cost of $40,000. In his view, a re-mesh and repair job should cost about $28,000.

6.6 I prefer the evidence of Mr Faulkner on the matter of the probable costs. His costings are reasonably consistent with my own understanding of the probable costs of this work, and as they are inclusive of margins and GST, they will not require further adjustment. I think that Mr Courtney has included a higher than reasonable "risk" allowance; whilst Mr Marklew has demonstrated very clearly that he had given the Coulters a 'no-frills' price, which probably indicated that he had not allowed for all work needed to comply with Insulclad or Rockcote recommendations.

6.7 **Window Flashings** I was told by Mr Faulkner that it would cost $225 per window to install corner soakers, plus the cost to repaint the walls in the immediate vicinity of the window-sills. Repainting is a matter that will need to be addressed as a whole, so I will put that aside for one moment. Therefore, the probable cost to insert corner soakers to windows that should have them is 24 @ $225 = $5,400.00.

6.8 **The finish to the top of the parapets** Mr Faulkner's estimate to cover the parapets was $1,350.00 plus GST. However, this was for a metal capping, and I have found that the parapets need to be rebuilt in accordance with the Insulclad technical details. This would cost about $48 per metre, so that the

probable cost to rebuild the parapet cappings would be 48.2m @ $48 = $2,313.00 (inclusive of GST).

6.9 **Meshing of the external corners and sills** Mr Faulkner was the only person to give me an opinion of the probable cost, which he said was about $14 per lineal metre. There are 48 metres of external angle, and 30.2 metres of sill, so that this means that the repair costs would be 78.2m @ $14 = $1,095.00 (inclusive of GST).

6.10 **Kick-outs** The last item of repair or remedial work is the installation of the kick-outs at the lower end of the abutment flashing, so that water is directed into the eaves gutter. No one gave me any costings on this work, which would involve a tradesman for about half a day. Therefore, I will set the probable cost of this work as being $200.00.

6.11 **Repainting** It is never easy to repaint parts of the outside of a dwelling and not be able to see where the walls have been repainted. Therefore, I would accept that the Owners will probably prefer to repaint the whole of the exterior of the house, rather than have a patched-up job.

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

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

6.13 I propose to adopt the logic of Fisher J and apply it, as best as I can, to the situation on this dwelling. It appears from the evidence that the total cost of repainting the exterior cladding would be in the order of $7,020 (260m² @ $27). The amount of repainting that has been caused as a direct result of the repairs is about 65m², which is a cost of $1,755.00.

6.14 This house was last painted in 1999. It is accepted in the building industry that exterior paint-work will probably need to be painted every seven to nine years,

depending on colour, location and maintenance. Therefore, it is probable that the exterior paint-work on this house has used up about six years of its life expectancy of eight years. For the remainder of the painting costs I will allow the Owners to recover 2/8 of the costs, and the remaining 6/8 I assess as being the betterment gained by the Owners. This means that I will set the recoverable painting costs at:

2/8 x ($7,020 - $1,755)	=	$ 1,316
+ painting repairs		1,755
		$ 3,071

6.15 **Other repair costs** The Owners have made a number of claims for additional costs which are associated with, or caused by, the repair work. These were listed in paragraph 4.1 of this Determination, and I will review each of these items.

(a) **Scaffolding** I have already included a suitable allowance for scaffolding in the individual rates.

(b) **Remove and replace downpipes** I do not see this work as being a necessary part of the repair work that I have allowed.

(c) **Protect gardens** I would not expect this to be a cost or charge by a remedial tradesman.

(d) **Remove and replace shutters** I do not see this work as being a necessary part of the repair work that I have allowed.

(e) **Remove and replace fencing** I do not see this work as being a necessary part of the repair work that I have allowed.

(f) **Fit membrane to planter box** No evidence was led on this claim, and I would not consider it a part of the remedial work that has been identified.

(g) **Replace rotten soffit to entry** There will be some repairs necessary to this soffit, for damage which has probably been caused by the leaks in the parapet. However, I am not convinced that the cost will be any

more than $500-$600, and I will allow this claim as a total cost of $600.00.

(h) **Flashings on the pergola ribbon board** No evidence was led on this claim, and I would not consider it a part of the remedial work that has been identified.

(i) **Rubbish removal** I have already included a suitable allowance for this item in the individual rates.

(j) **GST** All rates are inclusive of GST, so no further amount needs to be added.

7. OTHER CLAIMS FOR DAMAGES

7.1 In the previous section of this Determination I considered all the claims for the costs of repairing the leaks in the dwelling. There are some further claims being made by the Owners that will need to be determined, and these are:

- Repairing interior wall linings and trim $ 16,875.00
- General damages $ 10,000.00
- Legal costs $ 5,000.00
- Reports $ 1,400.00

7.2 **Repairing interior wall linings and trim** The amount claimed by the Owners is described as a 'Contingency fee' for replacing interior wall linings and other work to make good. The basis for this claim appears to be an estimate given to the Owners by Mr Rex Moyle. Mr Moyle did not appear as a witness at the hearing, so there was no opportunity to question him on his report or on his estimate. Whilst I appreciate that Mr Dixon did not formally submit Mr Moyle's report, we were all given a copy of it and I did say that I would not be able to attach much weight to the contents.

7.3 However, it seems clear from his report that he considered that there was "extensive leaking around the exterior joinery", and that there was "a high possibility that the [timber] framing is untreated". This seems to have led him to conclude that there would probably be the need for extensive repair work to replace the rotted timber.

7.4 The evidence given to me, and particularly the evidence provided by the investigations undertaken by the WHRS Assessor during the Hearing, would not support a claim that the timber framing in this house has been seriously damaged by the leaks that I have considered in this Determination. There is minor water ingress in the bottom corners of some of the windows. There are leaks from the parapet capping, which have been the main cause of any consequential damage. The only place in this house where moisture has been detected inside the building has been beside the fireplace in the lounge, and in the bedroom 4 ceiling.

7.5 The Owners are entitled to be compensated for repairing any damage that has been caused to the internal wall linings by the leaks. The evidence is that the timber framing in the house is generally boric treated (or H1) and there is no serious damage to any framing timbers. The extent of the repair work to the internal linings, even assuming that the stains on the Bedroom 4 ceiling were caused by the parapet capping, is not extensive and would be adequately completed by a tradesman in two days, so I would assess the total repair costs at $950.00.

7.6 **General Damages** The Owners are claiming general damages of $10,000.00 for the significant and humiliation that has been caused by the leaks in their house.

7.7 I do not need to provide an extensive review of the authorities concerning jurisdiction as it has been held on appeal from other WHRS determinations that adjudicators have the power and jurisdiction to make awards of general damages – *Waitakere City Council v Smith*, Auckland District Court, CIV 2004-090-1757, Judge McElrea, 28 January 2005; *Young & Porirua City Council v McQuade*, Porirua District Court, CIV 2003-99-392/2004, Judge Barber, 3 March 2005.

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

> The availability of general damages for pain and suffering, humiliation, distress and loss of enjoyment has been part of our law for some time. In the context of house construction there was $15,000.00 awarded to the plaintiffs in *Chase v de Groot* [1994] 1 NZLR 613. That was a case of defective foundations requiring complete demolition of the house following a fire. The recorded judgment does not include Tipping J's detailed consideration of issues of damages but in *Attorney-General v Niania* [1994] 3 NZLR 98 at page 113 122 he refers to his earlier judgment in *Chase* and the fact that the award in that case (and another in 1987, *Dynes V Warren* (High Court, Christchurch, A242/84, 18 December 1987) had been made after a detailed examination of a number of comparative authorities. On the basis of what he said there the authors of Todd, *Law of Torts in New Zealand* 3rd edition page 1184 said that his remarks indicated "these amounts [in *Chase* and *Dynes*] were considered to be modest". We do not read those words into His Honour's judgment in *Niania*. We were also referred to *Stevenson Precast Systems Limited v Kelland* (High Court, Auckland, CP 3003-SD/01: Tompkins J; 9/8/01 and *Smyth v Bayleys Real Estate Limited* (1993) 5 TCLR 454.

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

7.10 Having carefully considered the evidence, I am not persuaded that the Owners have shown that I should make an award of general damages. Until the WHRS Assessor drew their attention to the small water stain on the carpet by the fireplace, the Owners were not aware of any leaks into the dwelling. They certainly knew of the cracks, and I have no doubt that the cracks caused them concern, but this should not have caused undue stress.

7.11 The Owners have not been caused any exceptional inconvenience by the leaks. Mrs Theobald told me that she was embarrassed by the fact that they had spent over half a million on a house only to find that it is a 'leaky house', which she feels is falling to bits around her. Whilst I accept that she has told me how she genuinely feels, I must stand back and review the facts. The house is not falling to bits, and the few sections of plaster that have become loose, and some have fallen off, can easily and quickly be repaired. The claim for general damages will not be allowed.

8. LIABILITY OF RESPONDENTS

8.1 Mr and Mrs Coulter

8.1.1 When the Coulters sold the property to the Owners, they signed a standard form of Sale & Purchase Agreement issued by the Real Estate

Institute of New Zealand and the Auckland District Law Society (7th edition 1999). This Agreement included the following clause:

> 6.0 Vendor's warranties and undertakings
>
> ....
>
> 6.2 The vendor warrants and undertakes that at the giving and taking of possession:
>
> (5) Where the vendor has done or caused or permitted to be done on the property any works for which a permit or building consent was required by law:
>
> (a) The required permit or consent was obtained: and
> (b) The works were completed in compliance with that permit or consent; and
> (c) Where appropriate, a code compliance certificate was issued for those works; and
> (d) All obligations imposed under the Building Act 1991 were fully complied with.

8.1.2 The Coulters gave their undertaking that all building work had been carried out with all necessary permits and consents, and that the work complied with the standards set by the Building Code.

8.1.3 The Building Act requires all work to comply with the New Zealand Building Code, which is found in the First Schedule to the Building Regulations 1992. The Building Code contains mandatory provisions for meeting the purposes of the Act, and is performance-based. That means it says only what is to be achieved, and not how to achieve it.

8.1.4 I do not think that it is necessary to repeat in detail all of the provisions in the Building Code, and so will simply summarise by saying that water ingress or leaks into a building contravene parts of E2, E3, B1 and B2 of the Code.

8.1.5 I find that the Coulters were in breach of the warranty given in clause 6.2(5) of the Sale and Purchase Agreement, and this breach led to water penetration and resultant damage. Therefore, they are liable to the Owners for the following damages.

Window flashings (see para 6.7)	$ 5,400.00
Finish to top of parapets (see para 6.8)	2,313.00
Meshing of angles and sills (see para 6.9)	1,095.00
Kick-outs (see para 6.10)	200.00
Repainting (see para 6.14)	3,071.00
Repair front soffit (see para 6.15 (g))	600.00
Repair internal linings (see para 7.5)	950.00
	$ 13,629.00

8.1.6 As an alternative claim against the Coulters, the Owners say that the Coulters were the "builders' of the house and are liable to them in negligence. They say that, as builders, the Coulters owed subsequent purchasers a duty of care, and that they were in breach of that duty.

8.1.7 The existence of a duty of care has been clearly established in New Zealand in such cases, and I will refer to two reasonably recent court cases.

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

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

- Tipping J in *Chase v de Groot* [1994] 1 NZLR 613, at pp 419-620

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

> The council's position can be more simply stated, again without prejudice to the scope of its duty of care in the present case. Subject to further discussion of that point the legal principles applying are:
>
> 1. A council through its building inspector owes a duty of care in tort to future owners.
>
> 2. For present purposes that duty is to exercise reasonable care when inspecting the structure to ensure that it complies with the permit and all relevant provisions of the building code and bylaws.

8.1.8 The Coulters say that they were not the builders of the house. They submit that:

- The house was the first that they had had built for them;
- They were not present during most of the construction;
- They had no experience in building or plastering;
- They did not order materials.

8.1.9 The Owners say that the Coulters arranged for the Building Consent and identified themselves as being the "builders" on the application form. They subcontracted most of the work to different tradespeople, and the carpentry and concrete work were all done on labour only. The Coulters were responsible for supplying the materials, and co-ordinating and managing the construction process.

8.1.10 By and large I prefer the submissions made by the Owners on this issue. Whilst the Coulters did little of the physical construction or building work on the dwelling, they did organise the building process. They were the ones who were responsible for making sure that the work complied with the Building Code and, as such, they did owe a duty of care to subsequent owners.

8.1.11 I find that the Coulters were negligent in their organisation and supervision of the different contractors that were engaged for the construction work, and thereby were in breach of the duty to take care that they owed to the Owners. Their negligence or breach led to water penetration and resultant damage. Therefore, they are liable to the Owners as outlined in paragraph 8.1.5 above.

8.2 **Bay Building Certifiers Ltd (BBCL)**

8.2.1 The claim against the Certifier must be in tort and based on negligence. It is now well established in New Zealand that both those who build, and those who inspect building work, have a duty of care to both building owners and subsequent purchasers.

8.2.2 This has been established, not only by the cases that I have mentioned when considering the Coulters' liability, but also by court cases such as:

- Cooke P in *Invercargill City Council v Hamlin* (1995) 72 BLR 45 at p 49

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

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

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

8.2.3 A certifier will not be held to be negligent if he carries out his inspections at such times and with due diligence so that he can say that he has reasonable grounds to conclude that the work complied with the Building Code. It is not a matter of strict liability.

8.2.4 BBCL knew Mr Marklew and believed him to be an experienced and competent plasterer. It was submitted that the building inspector is not a clerk of works, and cannot be expected to identify all the problems that might be concealed within an exterior cladding system, particularly when they knew and trusted the plasterer. I would accept that this is generally correct, but as Greig J said in *Steiller* (above) "The standard of

care can depend on the degree and magnitude of the consequences which are likely to ensue." I would expect a certifier to take reasonable precautions to ensure that the plasterer was competent, familiar with the technical requirements, and exercising the appropriate amount of supervision when employing labour.

8.2.5 However, it is always easier to tell people what they should have done when one is aware of the problems that were later encountered. I would not dismiss the suggestion that a certifier is entitled to rely upon a known tradesman and trust the tradesman to build properly. This is entirely reasonable, but there must be checks to ensure that the tradesman is maintaining standards and quality control. If the certifier can show that he has taken reasonable steps to check the work, and the workers, then he may well show that he has discharged his duty of care.

8.2.6 Should a prudent building inspector, or certifier, carrying out all the inspections and tests that should be done by a prudent inspector, have noticed or detected that the exterior cladding system had defective parts?

8.2.7 This dwelling was built in mid-1999, and I must apply the standards that were to be expected of a reasonably experienced and prudent certifier at that time. In my opinion, the certifier would not have necessarily noticed that the sill flashings were not passing underneath the jamb flashings. It is probable that this part of the work would not have been visible at the times of the inspections. The failure to notice this defect was not negligence on the part of BBCL.

8.2.8 However, the certifier should have noticed that the tops of the parapets had not been properly sealed, and it would appear that the certifier did not venture onto the roof during the final inspection, or he would certainly have noticed the unfinished state of the top of the parapets. I find that BBCL was negligent in failing to notice the defective parapet finishing.

8.2.9 Mr Bruce submitted on behalf of BBCL that it was believed that Mr Marklew was an approved applicator, and that it was not necessary to check every detail of his work. It was assumed, and BBCL says that it

was entitled to assume, that an approved applicator would follow the recommended details for the particular type of system that was being installed. However, the certifier probably should have noticed that un-perforated PVC angles and edge trim were being used without meshing, which was definitely not a feature in any recognised system.

8.2.10 I do not think that I am expecting too much of a certifier when I conclude that these external angles and PVC trim (without mesh) should have caused the inspector to look more closely, or ask a few questions. Under these circumstances I find that BBCL was negligent in failing to notice these defects.

8.2.11 The final matter is the kick-outs at the bottom of the abutment flashings. Very few inspectors or building consultants would have noticed this problem in 1999. BBCL was not negligent when it failed to detect these omissions.

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

Finish to top of parapets (see para 6.8)		$ 2,313.00
Meshing of angles and sills (see para 6.9)		1,095.00
Repainting (see para 6.14)	part only	1,990.00
Repair front soffit (see para 6.15(g))		600.00
Repair internal linings (see para 7.5)	part only	450.00
		$ 6,448.00

8.3 **Mr Marklew**

8.3.1 The claims against Mr Marklew are founded in the argument that there was a duty of care owed by the plasterer to subsequent purchasers, and that Mr Marklew was negligent or breached that duty of care.

8.3.2 Mr Marklew accepted, at the hearing, that he had not installed the window sill flashings with sufficient care, and that they should have

projected past the bottom of the jamb flashings. I find that this was negligence on his part.

8.3.3 He told me at the Hearing that he had recommended to Mr Coulter that a Butynol capping should be applied over the tops of the parapets, but Mr Coulter had told him to stick to the drawings. However, I have found that a plaster capping, double meshed and with a slight slope, would have been weathertight. The problem was that the tops of the parapets were not properly finished, and Mr Marklew should have completed them in a workmanlike manner so that they would not leak. I find that he was negligent by failing to complete the tops properly.

8.3.4 The meshing of the PVC external angles and sill flashings would have prevented the cracking and lifting of the plaster in these areas. Mr Marklew should have known that the plaster would not properly adhere to these plastic trim members, and cracks would start of appear in a relatively short period of time. This was negligence on the part of an experienced plasterer.

8.3.5 The kick-outs were nothing to do with the plaster and are not a matter which should be placed at Mr Marklew's door.

8.3.6 I find that Mr Marklew was negligent in his supervision and carrying out of the external cladding on this dwelling, and thereby was in breach of the duty to take care that he owed to the Owners. His negligence or breach led to water penetration and resultant damage. Therefore, he is liable to the Owners for the following damages:

Window flashings (see para 6.7)		$ 5,400.00
Finish to top of parapets (see para 6.8)		2,313.00
Meshing of angles and sills (see para 6.9)		1,095.00
Repainting (see para 6.14)		3,071.00
Repair front soffit (see para 6.15(g))		600.00
Repair internal linings (see para 7.5)	part only	450.00
		$ 12,929.00

9. CONTRIBUTORY NEGLIGENCE

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

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

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

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

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

9.3 I will firstly consider a claim made to two respondents under the banner of 'Contributory Negligence; but also raised by the First Respondents as an estoppel claim. Mr Smith submitted, on behalf of the Coulters, that the Owners are estopped from making these claims against his clients on the grounds that the Owners knew about the leaks, and the purchase was made with the full knowledge that the dwelling did leak.

9.4 This submission must, of course, be based upon the facts being found to be in line with the facts as alleged by the Coulters. I was given a considerable amount of evidence on this topic which included:

- Mr and Mrs Coulter saying that the real estate agent (Ms Harris) told them that the Theobalds had noticed cracks and leaks, and had reduced their offer price accordingly.

- Mr and Mrs Theobald saying that they did notice some cracks, but only after their offer had been accepted, and

- Ms Harris denying that she had discussed cracks or leaks with anyone.

- Mr Tito said that he was told by Mrs Theobald (in January 2003) that they had negotiated the price of the house down because it had leaks.

- Mr Stickland said that Mr Theobald had told him (in November 2003) that they were aware that the house leaked at the time they purchased it.

- BBCL showed me a file note on their files which confirmed what Mr Tito said, and had told them in January 2003.

9.5 In addition to this conflicting testimony, I was also told by the Coulters that there were sure that the Theobalds had used a ladder to have a look at the roof and, presumably, the top of the parapets. Both Mr and Mrs Coulter, and Ms Harris, denied that any of them had taken or used a ladder during their pre-purchase visits to the house. However, Mr Morrison told me that he had seen a ladder leaning against the front of the house when the Theobalds were visiting in May 2002.

9.6 Clearly someone or some people are mistaken about what they saw or what they heard about this whole matter of whether the Owners had knowledge of the leaks when they agreed to buy this house. Let me try to restrict the issue to some material findings.

9.7 I am not sure whether it is really relevant whether the Theobalds used a ladder during any of their visits. I would not see it as a criticism of a prospective purchaser who wanted to look at the roof before deciding whether to buy. On the contrary, one would expect a prudent and careful purchaser to want to give the property a thorough inspection, which would involve looking at all parts of the house. However, I would expect the Theobalds to know whether they had carried a ladder down from Auckland, as it is a reasonably bulky article to put into a car. But even if Mr Theobald had climbed onto the roof, it does not mean that he would have seen anything that would automatically tell him that the house leaked.

9.8 The real issue here is whether the Theobalds knew the building leaked, and if so, whether they used this information as a bargaining chip with the Coulters. The two couples did not meet prior to the agreement to purchase, so it was not a matter of direct dialogue. Any communication between these couples must have been either in the written documents, or by way of Ms Harris. I prefer the evidence of Ms Harris on this important point, and I am not persuaded that there was any talk of leaks, or reducing the price on account of leaks, prior to the agreement and buy and sell this house.

9.9 I have reached the view that the Theobalds did notice some cracks when they visited the house, and this was during their visit in early August 2002. I do not think that they saw these cracks as being anything more than a maintenance issue. Neither the Coulters nor the Theobalds remembered any talk of cracks or leaks during the 3 August visit, but they all remember a bottle of wine provided by the Theobalds as a 'thank you' gift for the short delay in reaching a settlement. If the Theobalds thought that they were buying a house that leaked, or if the Coulters had felt unhappy that they had dropped the selling price under a false pretext of leaks, I cannot imagine that this subject would not have been discussed – and a bottle of wine would have been unlikely.

9.10 In conclusion, I do not accept that the Owners are estopped from bringing these claims for the reasons above. I find that they did not know that the house leaked at the time of purchase, and they could not have negotiated a lower price on the basis that the house had leaking problems.

9.11 BBCL says that the Owners purchased their house from the Coulters in mid 2002 without obtaining a pre-purchase inspection from a building surveyor or consultant. As BBCL did not have legal representation, it is not surprising that I was not referred to any previous cases that might support this claim. However, this type of claim has been raised in other adjudications, and I will refer to one of my own Determinations – *Shepherd v Lay & Others* (WHRS Claim 939, 11 March 2005).

9.12 There certainly have been cases where the courts have reduced the amount of damages, on the grounds that purchasers have failed to obtain pre-purchase inspections, or failed to take the steps which a reasonably prudent purchaser would have been expected to have taken. However there is no authority for the

proposition that a purchaser of a three-year-old house in 2002 should have obtained a pre-purchase inspection report.

9.13 Therefore, I will not allow any of these claims for a reduction in the damages due to contributory negligence on the part of the Owners.

10. CONTRIBUTION BETWEEN RESPONDENTS

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

10.2 Our law does not allow one tortfeasor to recover a contribution from another tortfeasor, and the basis for this is found in s.17(1)(c) of the Law Reform Act 1936.

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

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

10.4 **Window Flashings** The main burden of responsibility for failing to complete the window flashings correctly must be borne by the plasterer, Mr Marklew. I have found that BBCL should not be held to be liable for this defect, so its contribution will be zero. The Coulters must bear some responsibility as they were in overall control of the building work, but I assess that their contribution should be in the ratio of 1:4 with Mr Marklew.

10.5 **Finish to Top of Parapets** I accept the evidence of Mr Marklew that he drew Mr Coulter's attention to the parapet cappings, so that the plastered cap was selected by Mr Coulter. He should have realised the increased risk of this finish, but more importantly, Mr Coulter did not ensure that the top had been properly

finished. I would set the contribution of the Coulters and Mr Marklew as being equal. BBCL should have checked the parapet caps, but I would set its contribution as 20%. Therefore the Coulters and Mr Marklew should each bear 40% of the costs.

10.6 **Meeting of Angles and Sills** The Coulters chose to use a plasterer who was not an approved applicator of a recognised EIFS external cladding system. They decided to use Mr Marklew, and they gained the benefit of a cheaper price, but that should have increased their vigilance and level of supervision. On the matter of the meeting to the angles and sills I am going to set the contributions as being the same proportions as for the parapets.

10.7 **Kick-outs** The Coulters will have to bear the costs of this defect on their own, as it was not a problem caused by Mr Marklew, nor could it have reasonably been noticed by BBCL.

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

	Coulters	BBCL	Marklew
Window flashings	$ 1,080.00		$ 4,320.00
Finish to top of parapets	925.00	463.00	925.00
Meshing of angles and sills	438.00	219.00	438.00
Kick-outs	200.00		
Repainting	1,012.00	398.00	1,661.00
Repair front soffit	240.00	120.00	240.00
Repair internal linings	680.00	90.00	180.00
	$ 4,575.00	$ 1,290.00	$ 7,764.00

11. COSTS

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

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

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

(i) Claims by the Owners against the First Respondents;

(ii) Claims by two of the Respondents against the Owners.

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

11.4 Some of the Respondents have applied for costs as a part of their responses or submissions. Where I have found that a Respondent had a liability to the Owners, it probably goes without saying that I would normally see no justification in making an award of costs in favour of that Respondent. I will not award any of the Respondents any of their costs or expenses in this adjudication.

12. ORDERS

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

12.2 Scott and Karen Coulter are ordered to pay to the Owners the amount of $13,629.00. The Coulters are entitled to recover a contribution of up to $1,290.00 from Bay Building Certifiers Ltd and/or a contribution of up to

$7,764.00 from Mr Marklew, for any amount that they have paid in excess of $4,575.00 of the amount of $13,629.00 to the Owners.

12.3 Bay Building Certifiers Ltd is ordered to pay to the Owners the amount of $6,448.00. It is entitled to recover a contribution of up to $4,575.00 from the Coulters and/or a contribution of up to $7,764.00 from Mr Marklew, for any amount that it has paid in excess of $1,290.00 of the amount of $6,448.00 to the Owners.

12.4 Mr Marklew is ordered to pay to the Owners the amount of $12,929.00. He is entitled to recover a contribution of up to $4,575.00 from the Coulters and/or a contribution of up to $1,290.00 from Bay Building Certifiers Ltd, for any amount that he has paid in excess of $7,764.00 of the amount of $12,929.00 to the Owners.

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

Scott and Karen Coulter	$ 4,575.00
Bay Building Certifiers Ltd	1,290.00
Mr Marklew	7,764.00
	$ 13,629.00

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

NOTICE

Pursuant to s.41(1)(b)(iii) of the WHRS Act 2002 the statement is made that if an application to enforce this determination by entry as a judgment is made and any party takes no steps in relation thereto, the consequences are that it is likely that judgment will be entered for the amount for which payment has been ordered and steps taken to enforce that judgment in accordance with the law.

Dated this 10th day of June 2005.

A M R DEAN
Adjudicator

792.0300.Determination