CLAIM NO: 01086

UNDER **The Weathertight Homes Resolution Services Act 2002**

IN THE MATTER OF **an adjudication**

BETWEEN **RUSSELL WILLIAM TIDMARSH**
and
JOY ISABELLE TIDMARSH

Claimants

AND **JOHN GLOVER**

First respondent

(Intituling continued next page)

Hearing: 5 December 2005

Appearances: Russell Tidmarsh and Christopher Twigley for the Claimants
John Glover, the First Respondent in person
Jeremy Atkinson for the Second Respondent
Raymond Brockliss for the Fourth Respondent
Steven Cook, the Sixth Respondent in person
No appearance by or on behalf of the Seventh Respondent
John Glover for the Eighth Respondents

Determination: 28 September 2006

DETERMINATION

AND	**PAUL KELLY** Second respondent
AND	**TONS OF TILES (AUCKLAND) LIMITED** **(Now struck out)** Third respondent
AND	**EXCEL COATINGS LIMITED** Fourth respondent
AND	**COWPERTHWAITE LIMITED** **(Now struck out)** Fifth respondent
AND	**STEVEN COOK** Sixth respondent
AND	**ROBERT NEIL BOLER** Seventh respondent
AND	**JOHN RITCHIE GLOVER and NEIL GOLLAN as Trustees of the Glover Family Trust** Eighth 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 Claimants, Russell and Joy Tidmarsh are the owners (**the owners**) of a dwellinghouse located at 36 Sale Street, Howick, (**the property**) and it is the owners’ dwelling that is the subject of these proceedings.

[3] The First Respondent, John Glover, is a former owner of the property. John Glover arranged for the cross-lease and construction of 2 dwellings on the property during the time that he was the owner of the property. The Claimant’s dwelling was the second dwelling to be built on the property. John Glover transferred the subject property to the Eighth respondents, John Richard Glover and Neil Gollan as Trustees of the J Glover Family Trust when the Glover Family Trust was formed on 19 November 1997.

[4] The Second respondent, Paul Kelly, is a builder. Paul Kelly undertook certain of the construction work on both dwellings on the property for John Glover on a labour only basis.

[5] The Third respondent was Tons of Tiles (Auckland) Limited. Tons of Tiles (Auckland) Limited is a duly incorporated company and carries on business as a tile supplier and tiling contractor. The Third respondent was struck out as a party to the adjudication proceedings on the ground that it was fair and appropriate, there being no tenable evidence of a causal link between the work undertaken by the Third respondent and the alleged damage to the Claimants’ dwelling.

[6] The Fourth respondent, Excel Coatings Limited (**Excel**), is a duly incorporated company based in Kerikeri and carries on the business of

the installation and application of cladding systems and specialist coatings. Excel was engaged by John Glover to clad the exterior of the owners' dwelling with Harditex sheet cladding and to apply a textured coating to the exterior surface.

[7] The Fifth respondent was Cowperthwaite Limited. Cowperthwaite Limited is a duly incorporated company and carries on business as a roofing contractor. The Fifth respondent was struck out as a party to the adjudication proceedings on the ground that it was fair and appropriate, there being no tenable evidence of a causal link between the work undertaken by the Fifth respondent and the alleged damage to the Claimants' dwelling.

[8] The Sixth respondent is Steven Cook. Steven Cook traded under the name of B & B Contractors, waterproofing membrane suppliers and applicators, and applied the waterproofing membranes to the showers and decks of the Claimant's dwelling for John Glover.

[9] The Seventh respondent is Robert Neil Boler. Robert Neil Boler was at all material times an approved and registered building certifier in the Auckland area and a director of Approved Building Certifiers Limited. Robert Neil Boler approved the plans and specifications for the Claimants' dwelling for a building consent, undertook certain inspections of the Claimants' dwelling during the course of construction and on completion of the building works, issued a code compliance certificate in respect of all the building work undertaken pursuant to the building consent.

[10] The Eighth respondents are John Ritchie Glover and Neil Gollan, as Trustees of the J Glover Family Trust (**the Trust**). John Glover transferred the property to the Trust when it was formed on 19

November 1997. The Trust sold the property to the Claimants on 19 March 1999.

MATERIAL FACTS

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

[12] Mr Glover purchased the property at 36 Sale Street, Howick, in or about 1990.

[13] In or about 1995, Mr Glover applied to Manukau City Council to cross-lease the property. The cross-lease application was granted and Mr Glover arranged for plans to be prepared for a new dwelling. Mr Glover obtained a building consent for the dwelling and in or about late 1995, he arranged for the construction of a dwelling at the rear of the property.

[14] Mr Glover sold the dwelling at the rear of the property shortly thereafter and arranged for the construction of what is now the Claimant's dwelling on the front of the property.

[15] The Building consent was issued for the Claimants' dwelling on 27 November 1996. Mr Glover engaged the same contractors that had built the rear dwelling for him and construction work began on the front dwelling in early 1997. The building work was completed and a Code Compliance Certificate (**CCC**) was issued by the Seventh respondent, Robert Neil Boler, on 15 September 1997.

[16] Mr Glover transferred the property to the Eighth respondents when the Trust was formed on 19 November 1997.

[17] On or about 5 March 1999, the Claimants entered into an Agreement for Sale and Purchase with Mr Glover to purchase the property. The Trust was subsequently identified in correspondence between the parties' solicitors as the registered proprietor and vendor of the property. The Agreement was amended to record the Eighth respondents as the vendors, and settlement occurred on 19 March 1999.

[18] In or about March 2003, the Claimants first observed evidence of water penetration, namely water running out of the recessed ceiling lights in the lounge below the rear upper level deck.

[19] On or about 8 July 2003, the owners filed a claim with the Weathertight Homes Resolution Service (**the WHRS**).

[20] Shortly afterwards the owners cut a hole in the lower lounge ceiling to investigate the source of the water they observed running out of the recessed light fittings. They discovered that the floor joists were in an advanced stage of rot and in or about September 2003, the owners engaged Eden Construction Ltd to carry out certain necessary repair work. The repair work involved removal of the particle board flooring inside the dining room, removing the ranchslider, lifting some of the deck tiles, replacing the rotten floor joists and reinstating those areas. The repair work undertaken at that time cost the owners approximately $5,000.00.

[21] On or about 5 May 2004, the WHRS Assessor, Mr Clint Smith, provided a report concluding that the owners' dwelling was a leaky building and he assessed the cost of repairing the damage to the owner's dwelling at $49,275.00.

[22] Following an application for removal by the then Third respondent, Tons of Tiles (Auckland) Ltd, Mr Smith revisited the owners' property at my direction on or about 23 May 2005 to investigate whether the tiling work undertaken by Tons of Tiles (Auckland) Ltd had caused or contributed to water penetration of the owners' dwelling.

[23] On 25 May 2005, Mr Smith provided a supplementary report concluding that the tiling contractor's work had not caused or contributed to the water penetration of the owners' dwelling notwithstanding that certain of the tiling work did not meet the appropriate standards for that work. As a result of Mr Smith's reporting, Tons of Tiles (Auckland) Ltd was subsequently struck out as a party to the adjudication proceedings.

[24] On or about 4 July 2005, Mr Smith filed a further report at my direction, updating the cost to repair the damage to the owners' property in the revised amount of $56,025.00 including GST.

THE HEARING

[25] The hearing of this matter was convened at 10.00am on 5 December 2005 at the WHRS Auckland Office, Level 8, AA Centre, 99 Albert Street Auckland.

[26] The Claimants and the Second respondent, Paul Kelly, were represented by counsel at the hearing (Mr Twigley for the Claimants excused himself from the hearing after the lunch break). The First, Fourth, and Sixth respondents appeared in person. The Eighth respondents were represented by the First respondent, John Glover. There was no appearance by or on behalf of the Seventh respondent, Robert Neil Boler.

[27] Mr Smith, the independent building expert appointed by WHRS to inspect and report on the owners' property, attended the hearing and gave sworn evidence. Mr Smith's initial report contained a number of helpful photographs which I shall refer to in this determination using the same numbers as Mr Smith.

[28] The only witness (who gave sworn or affirmed evidence) in support of the claim was:

- Mr Russell Tidmarsh (Mr Tidmarsh is a Claimant in this matter)

[29] The witnesses (who all gave sworn or affirmed evidence) to defend the claim were:

- Mr John Glover (Mr Glover is a former bricklayer presently employed by Housing New Zealand as a supervisor. Mr Glover arranged for the construction of the owners' dwelling whilst he was the owner of the property and is the First respondent in this matter. Mr Glover is also one of the Eighth respondents in his capacity as a Trustee of the Glover Family Trust)

- Mr Paul Kelly (Mr Kelly is a building contractor and is the Second respondent in this matter)

- Mr Raymond Brockliss (Mr Brockliss is a cladding and specialist coatings contractor and is director of the Fourth respondent, Excel)

- Mr Steven Cook (Mr Cook is a waterproofing contractor and is the Sixth respondent in this matter)

[30] I undertook a site visit and inspection of the Claimants' dwelling on the morning of 5 December 2005 in the presence of representatives of the Claimants, the First, Second, Fourth, Sixth and Eighth respondents, and the WHRS Assessor, Mr Smith.

[31] Following the close of the hearing, all parties presented helpful and detailed closing submissions on a sequential basis which I believe canvass all of the matters in dispute. The final submission in reply was received from the First respondent on 27 January 2006.

THE CLAIM

[32] In the Notice of Adjudication filed on or about 4 February 2005, the owners sought the sum of $54,275.00 from the respondents based on the value of the remedial work assessed by Mr Smith in the original WHRS report dated 5 May 2004. That claim was subsequently amended by the owners during the course of the adjudication to include items of work omitted from the calculations in Mr Smith's reports and increased costs at the rate of 1% per month from the date of the revised estimate being 4 July 2004. In the end, the claim for damages is made in the aggregate amount of $79,149,72 together with a claim for general damages in the sum of $10,000.00 and costs of $3,500.00.

CAUSES OF ACTION

[33] Those who design, build, develop, inspect or sell leaky buildings may be liable to owners of those buildings for breach of contract and/or alternatively, in tort for negligence for breach of the duty of care. The

contractual liability may arise out of a building contract and/or from warranties contained in a Sale and Purchase Agreement.

[34] Owners may claim against all the various respondents in tort for negligence in respect of faulty design, workmanship, supervision, inspection and/or approval of the building work.

[35] Under section 90 of the Building Act 1991 civil proceedings may only be brought against a building certifier in tort and not in contract.

[36] The owners claim against the First respondent, John Glover, in contract for breach of contractual warranties and in tort for breach of the duty of care he owed them as subsequent purchasers of the property. The owners claim that John Glover was the builder/developer of their property and as such he owed them a duty of care that he breached by constructing, or allowing to be constructed, a dwellinghouse that does not comply with the New Zealand Building Code and is a leaky building.

[37] The owners claim against the Second respondent, Paul Kelly, in tort for breach of the duty of care he owed them as subsequent purchasers of the property. The owners claim that Paul Kelly negligently constructed the deck by constructing inadequate falls and omitting critical angle fillets and chamfers at changes of direction in the surface of the deck that has caused the waterproofing membrane to fail resulting in water penetration and damage.

[38] The owners claim against the Fourth respondent, Excel, in tort for breach of the duty of care Excel owed them as subsequent purchasers of the property. The owners claim that Excel negligently installed the Harditex cladding causing water penetration and damage.

[39] The owners claim against the Sixth respondent, Steven Cook, in tort for breach of the duty of care he owed them as subsequent purchasers of the property. The owners claim that Steven Cook negligently installed the waterproofing membrane over an improperly constructed substrate, namely one with insufficient falls and no angle fillets and no, or insufficient chamfers, causing the membrane to split resulting in water penetration and damage.

[40] The owners claim against the Seventh respondent, Robert Neil Boler, in tort for breach of the duty of care he owed them as subsequent purchasers of the property. The owners claim that Robert Neil Boler negligently inspected and certified the building works in his capacity as a building certifier.

[41] The owners claim against the Eighth respondents, John Glover and Neil Gollan as Trustees of the Glover Family Trust (from whom they purchased the property) in contract for breach of warranty in the Sale and Purchase Agreement.

THE DEFENCE FOR THE FIRST RESPONDENT - JOHN GLOVER

[42] The First respondent denies liability for the Claimants' loss either for breach of contract or breach of the duty of care.

[43] The first respondent rejects the allegations of the Claimants and the other respondents that he was a builder or developer.

[44] The First respondent asserts that the vendor of the property was the Trust and not John Glover personally. As a result, the First respondent

contends the contractual obligations are owed by the Trust to the Claimants in accordance with the express provisions of the contract.

[45] The First respondent submits that no duty of care is owed by previous owners/owner builders to subsequent purchasers.

[46] The First respondent further submits that having no liability in tort or contract, he cannot be liable pursuant to s17(1)(c) of the Law Reform Act 1977 to contribute to any such loss or damage that any other respondent may be held liable for.

THE DEFENCE FOR THE SECOND RESPONDENTS – PAUL KELLY

[47] The Second respondent denies liability for the Claimants' loss.

[48] The Second respondent alleges that he was a subcontractor to John Glover, the owner and developer of the property, with ultimate and non-delegable responsibility for all aspects of the project. The Second respondent asserts that he had no part in the design of the building, nor was he involved in the installation of the cladding, the waterproofing membrane, or the stainless steel handrail which is said to have leaked.

[49] The Second respondent contends that it cannot be said that the fall on the decks was the cause of water penetration.

[50] The Second respondent asserts that he chamfered the hard edges of the deck in an appropriate way. He contends that he was not asked or required to install angle fillets and at the time the work was done there was no recognised industry practice to the effect that fillets were required and none were specified by the developer or the designer

THE DEFENCE FOR THE FOURTH RESPONDENT - EXCEL

[51] Excel denies liability for any damage to the owners' dwelling.

[52] Excel submits that all cladding work was done to the specifications in the James Hardie manual except for specific changes requested by John Glover, namely the change from a timber cap on the handrail to a flat Harditex top, a request to keep the Harditex as low as possible in the areas where tiles were to be laid later, and a request to delete the plastic jointer for the control joint at the midfloor level.

[53] Excel submits that any hairline cracks in the cladding are maintenance issues, that the conditions of the warranties require the applicator to be notified to be able to fix such problems and Excel never received any notification of this problem.

THE DEFENCE FOR THE SIXTH RESPONDENT – STEVEN COOK

[54] Steven Cook denies liability for any damage to the Claimants' dwelling and claims that lack of construction joints where the tiles are constrained in the deck drain has caused the tiles to cut through the membrane resulting in water penetration.

[55] Steven Cook further contends that as a discharged bankrupt he cannot now be liable for claims in relation to work that he did prior to being adjudged bankrupt in November 2002.

THE DEFENCE FOR THE SEVENTH RESPONDENT – ROBERT NEIL BOLER

[56] Robert Neil Boler was served the Notice of Adjudication, the Assessor's report that relates to this claim, copies of all Procedural Orders of the Adjudicator in this matter including the Guidance Notes for Parties/Counsel and all other documents and communications that relate to this matter, on 4 October 2005.

[57] Robert Neil Boler took no part in these proceedings. He failed or neglected to provide a response to the adjudication claim or a reply to any written response by any other party and he failed or neglected to attend on the pre-hearing conference on 2 December 2005, the site inspection on 5 December 2005, or the hearing on 5 December 2005. That is unfortunate as he may have had knowledge and information that would have assisted me in the determination of this claim.

[58] The position is quite clear however, and pursuant to section 37 of the Act my power to determine the claim is not affected by the Fifth respondent's failures. In the circumstances, pursuant to section 38(a) & 38(b) I may draw any inferences from the Fifth respondent's failures that I think fit and determine the claim on the basis of the information available to me.

THE DEFENCE FOR THE EIGHTH RESPONDENTS – JOHN GLOVER AND NEIL GOLLAN

[59] The Eighth respondents accept that they were the vendors of the property, but deny liability for the Claimants' losses.

[60] The Eighth respondents submit that their only obligations to the Claimants were pursuant to clause 6.1 of the Agreement for Sale and Purchase, that there was no contractual breach by them to the owners, and therefore they cannot be liable to the owners in contract.

[61] The Eighth respondents submit that there is no duty of care owed by previous owners to subsequent owners and therefore they cannot be liable to the owners in tort.

THE DAMAGE TO THE CLAIMANTS' DWELLING

[62] It is a significant factor in this claim that the existence and the nature of the damage caused by water ingress and the amount claimed by the owners to carry out work to remedy that damage is not disputed or considered unreasonable in the circumstances by the respondents.

THE CLAIMANTS' LOSSES AS A RESULT OF THEIR DWELLING BEING A LEAKY BUILDING

[63] The owners claim that they have suffered damage and loss in the aggregate amount of $89,149.72 as a result of their dwelling being a leaky building, calculated as follows:

a.	Cost of repair work undertaken in 2003	$ 4,444.00
b.	Assessor's estimate	$49,800.00
c.	Front deck (items omitted by Assessor)	$ 5,272.00
d.	Rear deck (Harditex spraying omitted)	$ 1,980.00
e.	Increased costs on Assessor's estimate from 4 July 2005 at 1% per month (14 mths)	$ 6,972.00
f.	Building Consent fees	$ 1,887.31
Subtotal		$70,355.31
Add GST		$ 8,794.41

Total cost of remedial work	$ 79,149.72
Add general damages	$ 10,000.00
Total	$ 89,149.72

[64] The owners also seek an award of costs in the amount of $3,500.00.

THE CAUSES OF THE DAMAGE TO THE CLAIMANTS' DWELLING

[65] Following inspections of the property on 6, 13 and 19 April 2004, Mr Smith reported that water was entering the dwelling as a result of the following construction:

[a] The omission of fillets and chamfers at locations where there is a change of direction in the timber deck construction.

[b] Lack of fall in the decks.

[c] The Harditex wall cladding was installed hard down onto the waterproofing membrane.

[d] The flat Harditex handrail tops.

[e] The fixings for the stainless steel handrail.

[f] The failure to install the recommended flashing at the inter-storey junction above bedroom 3.

[g] The incorrect fitting of the roof flashing at the kitchen window junction.

[66] In general terms, the water penetration can be broadly categorised into 3 distinct areas or locations, namely the front deck, the rear deck and Elevation B (being the same elevation reference used by the architect on sheet 4 of the architectural plans) and that is the manner in which Mr Smith has approached his analysis of the problem and his costings for the remedial work.

[67] Items [a] – [e] in paragraph [65] supra are typical complaints in relation to both the front and rear decks and items [f] and [g] relate only to 'Elevation B'.

[68] It is common ground, or at least was not disputed by any party, that the Harditex installed hard down on the waterproofing membrane has allowed moisture to wick up and transfer to the framing, that the flat Harditex handrail tops and the fastenings for the stainless steel handrails have allowed water to penetrate into the handrail framing, and the apron flashing on the roof adjacent to the kitchen window had been cut short and allowed water to enter the wall cavity in heavy rain conditions. Responsibility (and thus liability) for the decisions to effect those works as described and the damage consequent upon that noncompliant work was contested. I shall deal with those contentions when I consider the respondents' liability for the resultant damage later in this determination.

The disputed or contentious causes of water penetration

[69] Paul Kelly and Steven Cook do not accept that the lack of proper falls or the lack of angle fillets have caused or contributed to water penetration.

[70] Excel contends that the inter-storey control joint that it constructed was a superior option to the Hardies PVC flashing.

Lack of falls in the decks

[71] In his report dated 5 May 2004 Mr Smith had this to say about the falls in the decks:

> The construction of the decks has not allowed for any fall as the floor joists had not been ripped down as required in the plans. NZ Building Code Acceptable Solution E2/AS1 requirements recommend membrane clad roofs have a minimum pitch of 1.5' (1:40). Where it can be shown that the performance requirements of the NZBC provisions E2.3.1 and E2.3.2 are not being met with the pitch less than 1.5', a warranty equal to the durability requirements of the Building Code (15 years) is to be provided by the supplier/manufacturer and/or installer.

And in relation to the rear deck:

> The fall on the deck was only 1:100.

[72] When cross-examined by the Second respondent on this issue Mr Smith accepted that no particular fall was specified on the plans. He acknowledged that there was some fall in the rear deck, but he said the front deck was level and both decks pond in certain areas.

[73] When cross-examined by the Sixth respondent, Mr Smith confirmed his view there was no sign of water penetration through the body of the deck and therefore no widespread failure of the membrane.

[74] Paul Kelly's evidence on this matter was that no particular falls are required on exterior decks so long as the fall is adequate to get water away and that he constructed the decks as he thought best trying to

balance falls on one hand and reducing the depth of the joists by ripping them to fall over the wide spans on the other.

[75] After considering the extensive evidence given in relation to this issue, I accept that the decks have been constructed with inadequate falls (NZBC E2/AS1). However, there is no evidence to establish that the lack of proper falls has caused water penetration of the owners dwelling, there being no widespread failure of the membrane and no sign of water penetration through the body of the deck. I acknowledge that it is possible that the lack of falls may have contributed to water penetration where water ponded and the membrane failed in the gutters. However, such postulation is merely speculative and but for the failure of the membrane in the gutters, there is no technical evidence to establish that water could or would have soaked/migrated through the membrane.

[76] In the end, whilst I am driven to conclude the deck construction is non-compliant (with the building code) and thus defective, I am not persuaded that the lack of fall in the decks/gutters has caused or contributed to water penetration of the owners' dwellinghouse.

Lack of angle fillets

[77] Mr Smith's evidence was clear on this point. He was firmly of the view that the lack of angle fillets at internal corners/changes of direction in the timber deck substrate caused the waterproofing membrane to fracture under stress allowing water to penetrate the owners' dwelling.

[78] Mr Smith was also firmly of the view that the installation of angle fillets where membrane is turned up a vertical face and the forming of chamfers where membrane is turned down (into a gutter) were necessary and standard construction details when the owners' dwelling

was constructed in 1997. Mr Smith produced as appendices to his report, a specification and application notes for Equus Dexx, a similar liquid applied glass reinforced waterproofing membrane (the identity of the membrane used on the owners' dwelling was unable to be identified at the time of his report), an extract from the BRANZ Good Practice Guide for Membrane Roofing, and BRANZ Bulletin 345: Flat Membrane Roofs – Design and Installation, dated June 1996.

[79] The specification, the BRANZ Guide and the BRANZ Bulletin referred to, and relied on, by Mr Smith, all state categorically that angle fillets should be installed as a general requirement for all substrates where a membrane turns up a vertical face and a chamfer or radius should be formed where the membrane is turned down (into a gutter).

[80] Mr Tidmarsh opines that the initial leaking into the lower level lounge was a result of membrane failure at the turn up below the ranchslider. It was his evidence that when the tiles and screed were removed a split in the membrane where it was turned up against the wall of the dwelling was evident and there was no angle fillet installed.

[81] It was Paul Kelly's evidence that he did form a chamfer on the edges of the plywood deck substrate at the gutters but did not install angle fillets where the membrane was required to turn up a vertical face. He said that he had only ever seen angle fillets used on a commercial gutter and the installation of angle fillets was not accepted practice in 1997 and did not become so until a year later.

[82] Paul Kelly contends that the plans did not specify the installation of angle fillets and neither was he requested/instructed to install them by John Glover or Steven Cook. He further submits that the plans and specifications provided that butynol was to be used as the waterproofing

membrane on the decks and that he had no part to play in the decision by John Glover and/or Steven Cook to depart from the specification, which decision was made after his contract was completed.

[83] Steven Cook confirmed that he installed the waterproofing membrane on the owners' decks for John Glover. He described the waterproofing membrane as an Australian acrylic product called 'Ultralite' marketed by Futureproof Industries Limited.

[84] Steven Cook contends that the membrane failure was caused by the use of cement based adhesives and movement against a grouted edge. Under cross-examination, Mr Cook accepted that with the benefit of hindsight, angle fillets should have been used, but he maintained his contention that the absence of angle fillets was not the cause of the leaks.

[85] The evidence of Mr Smith and Mr Tidmarsh in relation to the physical damage to the membrane that they observed is consistent. Each says that the membrane had split and failed where it had been turned up a vertical face without the use of angle fillets, both in the gutter and against the exterior wall of the dwelling and, that water had penetrated the dwelling at those locations.

[86] I am satisfied that the documentary technical evidence provided by Mr Smith, namely the BRANZ Bulletin and the BRANZ Guide, clearly establishes that the installation of angle fillets where a membrane turns up a vertical face of a substrate was a necessary requirement and standard practice for the (informed) industry in 1997. For my part, that evidence certainly accords with my own industry experience of residential construction for at least the preceding decade. Moreover, no evidence was produced by Mr Cook to establish that angle fillets were

not required by the manufacturer of the 'Ultralite' waterproofing membrane for the proper substrate preparation and membrane application.

[87] There may well be some merit to Mr Cook's theory regarding abrasion and movement causing membrane failure, but in the end, the technical literature current in 1997 makes it clear that the installation of angle fillets was a necessary requirement for the proper installation of membranes over all substrates. Angle fillets were not installed and there has been membrane failure at those junctures causing water penetration.

[88] Of the competing views as to the cause of the membrane failure, I prefer on balance, indeed to a higher standard even, the opinion and reasons advanced by Mr Smith. I am driven to conclude therefore, that the cause, or major contributor of the membrane failure, and thus the water penetration, was a result of the failure to install angle fillets where the membrane was turned up a vertical face of the deck substrate.

The inter-storey control joint

[89] In his report dated 5 May 2004, Mr Smith stated that when he removed the Harditex band, the Harditex cladding under the band was damp and the moisture content of the timber framing at this location was 40%+. Mr Smith reported that when he removed a section of the Harditex wall cladding under the band and below the silicone joint, he observed that the floor joists and ceiling strapping in the lower floor were also damp and he recorded a moisture meter reading of 40%+ at that point.

[90] In the circumstances therefore, I am satisfied that the evidence establishes that the inter-storey control joint/banding detail failed and caused water penetration.

Summary of causes of water penetration

[91] To summarise the position therefore, I am satisfied that the evidence establishes that water is entering the dwelling as a result of the following construction:

[a] The omission of angle fillets where the waterproofing membrane is turned up a vertical face.

[b] The Harditex wall cladding was installed hard down onto the waterproofing membrane.

[c] The flat Harditex handrail tops.

[d] The fixings for the stainless steel handrail.

[e] The failure to install the recommended flashing at the inter-storey junction above bedroom 3.

[f] The incorrect fitting of the apron flashing on the roof adjacent to the kitchen window.

THE REMEDIAL WORK AND THE PROPER COST OF REPAIR

[92] Mr Smith set out the scope of the remedial work that he considered necessary to prevent water penetration of the owners' dwelling and to

repair the consequential damage at section 5.3 of his report dated 5 May 2004. Mr Smith's evidence in this regard was not contested.

[93] The cost to repair the damage claimed by the owners was not challenged.

[94] Quantec, the quantity surveyors and construction cost consultants engaged by Mr Smith to quantify and cost the remedial work that he specified, provided a fully priced schedule although the cost of individual items were not directly apportioned to the six causes of water penetration that I have identified (see para.91 supra).

[95] The schedule is suitably comprehensive however, and I am satisfied that the costs in relation to the identified causes are readily ascertainable from the schedule, at least in terms of the following categories of damage:

- The deck (lack of angle fillets) –Para. [91] item (a)
- The handrail – Para. [91] items (b),(c) & (d)
- The inter-storey control joint – Para. [91] item (e)
- The apron flashing – Para. (91) item (f)

[96] I am satisfied therefore that the evidence establishes the cost of the remedial work for each of those categories as follows:

<u>The decks</u>

Quantec estimate (items:2,3,4,5,6,8,9,10,13,14,
62% of15,17,18,19,21,22,23,24,25,27,28,31,
79%of32,34,35) [equates to 43% of estimate] $15,945.00
Add:
Preliminaries, contingencies, margin (43% thereof) $ 5,301.47

Subtotal	$21,246.47
Add:	
Increased costs since 4 July 2005 (43% thereof – see para.63 item e.)	$ 2,997.96
Items omitted by Assessor (see para.63 items c&d)	$ 7,252.00
Building consent fees (50% thereof – cost of deck repairs = 50% of total cost of work to be completed including items omitted by Assessor (see para.63 items b,c&d))	$ 943.66
Cost of repairs to deck undertaken in 2003 (see para.63 item a.)	$ 4,444.00
Subtotal	$36,884.09
Add GST	$ 4,610.51
Total repair costs related to water penetration through decks incl. of GST	**$41,494.60**

The handrails

Quantec estimate (items:1,7,11,12,38% of15,16,20 26,29,30,21%of32,33)[equates to 33% of estimate]	$12,512.00
Add:	
Preliminaries, contingencies, margin (33% thereof)	$ 4,068.57
Subtotal	$16,580.57
Add:	
Increased costs since 4 July 2005 (33% thereof)	$ 2,300.76
Building consent fees (29% thereof – cost of handrail repairs = 29% of total cost of work to be	

completed including items omitted by Assessor	
(see para.63 items b,c&d))	$ 547.32
Subtotal	$19,428.65
Add GST	$ 2,428.57
Total repair costs related to water penetration through handrails incl. of GST	**$21,857.22**

The inter-storey control joint

Quantec estimate (items:36-51 less item 48) [equates to 23% of estimate]	$ 8,684.00
Add preliminaries, contingencies, margin (23% thereof)	$ 2,835.67
Subtotal	$11,519.67
Add:	
Increased costs since 4 July 2005 (23% thereof)	$ 1,603.56
Building consent fees (20% thereof – cost of Handrail repairs = 20% of total cost of work to be completed)	$ 377.46
Subtotal	$13,500.69
Add GST	$ 1,687.59
Total repair costs related to water penetration through inter-storey control joint incl. of GST	**$15,188.28**

The apron flashing

Quantec estimate (item 48) [equates to 1% of estimate]	$ 330.00

Add preliminaries, contingencies, margin (1% thereof)	$ 123.29
Subtotal	$ 453.29
Add:	
Increased costs since 4 July 2005 (1% thereof)	$ 69.72
Building consent fees (1% thereof – cost of Apron flashing repairs = 1% of total cost of work to be completed)	$ 18.87
Subtotal	$ 541.88
Add GST	$ 67.74
Total repair costs related to water penetration through apron flashing incl. of GST	**$ 609.62**

[97] To summarise the position therefore, the total cost of the remedial work is **$79,149.72** inclusive of GST (see para.63 supra) calculated as follows:

The deck	$41,494.60
The handrail	$21,857.22
The inter-storey control joint	$15,188.28
The apron flashing	$ 609.62
Total	$79,149.72

LIABILITY FOR DAMAGE TO THE CLAIMANTS' DWELLING AND THE COST OF REPAIR

The liability of the First respondent, John Glover, in contract

[98] The position of the First respondent in this matter, at law, was initially confused.

[99] By letters dated 23 February 2005, 21 June 2005 and 14 July 2005, the First respondent's solicitor, Mr Woods of Rice Craig Barristers & Solicitors, advised the Case Manager inter alia, that "the only responsibility our client has at law to Mr and Mrs Tidmarsh is pursuant to the terms and conditions as Vendor in respect of the Agreement for Sale and Purchase."

[100] Then by letter dated 18 August 2005, Mr Woods advised the Case Manager inter alia "We wish to advise you that the vendor of the property on the sale to Mr and Mrs Tidmarsh was the Glover Family Trust." In support of his contention, Mr Woods enclosed a letter dated 18 March 1999 from Rice Craig to the owner's then solicitors, Messrs Kelly Flavell, together with a copy of the Land Transfer dated March 1999 and a copy of Certificate of Title 115C/696 recording that the property was registered in the names of the Trustees as at 9 March 1999.

[101] Under cover of a further letter dated 2 September 2005, Mr Woods provided two copies of the Agreement for Sale and Purchase dated 5 March 1999 (**the Agreement**). One document which I take to be the initial document prepared, records only the name of John Ritchie Glover as vendor. The second document, which I take to have been prepared some time immediately prior to the settlement of the property when it became clear to John Glover and/or his solicitors that the property had been transferred to the Trust upon its formation, had the name of Stanley Neil Gollan added to that of John Ritchie Glover as vendor and

was duly executed by John Glover and by Neil Gollan "as Trustee for John Glover Family Trust".

[102] Mr Atkinson, counsel for the Second respondent, Paul Kelly, submits that the evidence as to the vendor is unsatisfactory, that there is no evidence about how the two forms of agreement both dated 5 March 1999 came into existence and it appears the version signed by Mr Gollan was amended after the purchasers had signed the original, but there is no evidence to establish that the purchasers approved the amendment.

[103] Prior to the settlement date of the Agreement, and even during the early stages of these proceedings, there was, and remained, a degree of confusion as to the correct identity of the previous proprietor(s) and thus the vendor(s) of the property to the owners. In the end however, I am satisfied that the documentary evidence clearly establishes that the vendor of the property was the Trust and accordingly the First respondent, John Glover, cannot be liable to the owners in contract for breach of the Agreement.

The liability of the First respondent, John Glover, in tort

[104] The issue occupied a significant portion of the evidence and the submissions of the parties but in the end the issue has become relatively straightforward.

[105] In essence the owners, supported by the respondents, contend that John Glover was the builder/developer of the owners' property and submit that as such he owed a duty of care to the owners that he breached causing loss and damage.

[106] Against that, Mr Woods submits that first, John Glover is not/was not a builder or a developer, and secondly, that no duty of care is owed by previous owners/owner-builders to subsequent owners. Mr Woods further submits that as John Glover has no responsibility in tort or contract, he cannot be liable for contribution under the Law Reform Act 1936.

The liability of builders/developers to subsequent owners

[107] Following a long line of cases including *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394, *Mt Albert Borough Council v Johnson* (CA) [1979] 2 NZLR 234, *Morton v Douglas Homes Limited* [1984] 2 NZLR 548, *Brown v Heathcote County Council* [1986] 1 NZLR 84, *Lester v White* [1992] 2 NZLR 483, *Chase v de Groot* [1994] 1 NZLR 613, *Riddell v Porteous* [1999] 1 NZLR 1, 12 (CA), the law is well settled in New Zealand, that those who build and/or develop properties owe a non-delegable duty of care to owners and subsequent purchasers. The non-delegable duty on the 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. 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.

The liability of previous owners/owner builders to subsequent owners

[108] Mr Woods submitted that there is no general obligation upon a vendor to disclose anything concerning the quality of his or her property and the principal of *caveat emptor* (let the buyer beware) applies. He further

submitted that the Sale and Purchase Agreement is not of a kind requiring the utmost good faith by the vendor to the purchaser and accordingly there is no fiduciary duty by the vendor to the purchaser in respect of matters of quality - the vendor is only liable in respect of the express provisions of the contract (See – Blanchard, *A Handbook on Agreements for Sale and Purchase of Land* (4th ed, 1988) at pp 97-98, para 706).

[109] I agree with Mr Woods, however it should be noted that where a vendor misrepresents the state or condition of the property to the subsequent purchaser inducing the purchaser to enter into a contract or to continue with the contract, the vendor will be liable to the subsequent owner for loss or damage pursuant to Section 6 of the Contractual Remedies Act 1979 (*Gail Jeanette La Grouw as Sole Trustee of the GJ Peacocke Trust v Marita Ellen Cairns* DC AK NP 5655/99 2 August 2002, Judge Cadenhead). A vendor will also be liable to the subsequent owner where the vendor deliberately conceals defects so that they are in effect latent (*Gardiner v Howley* (HC) Auckland 16 May 1994, Temm J).

[110] Mr Woods also submitted that tortious duties of care may be held concurrently with contractual duties if there is an assumption of responsibility and the terms of the contract do not preclude tortious liability but he further submitted that there is no duty of care owed by previous owners or owner/builders to subsequent owners.

[111] Mr Atkinson took issue with Mr Woods' contention that there is no duty owed by previous owners to subsequent owners. In his submission, it is well established that a builder/developer owes a duty in tort to take care in building a house. He submits that *Brian v Maloney* 1995 182 CLR 609) and the New Zealand case of *Mt Albert Borough Council v Johnson*

[1979] 2 NZLR 234 (CA) in particular, concerned a previous owner/developer/vendor.

[112] I accept that Mr Atkinson is correct on that point as clearly evidenced by the principles derived from the authorities referred to in paragraph 111 above and in paragraph 107 supra. However, whether or not a duty of care is owed by previous owners is clearly dependent on the circumstances. The fact that a person is a previous owner does not of itself give rise to an inalienable duty of care to a subsequent owner, something more than mere ownership is required.

[113] As stated previously, the law is well settled in New Zealand that those who build or develop properties (including former owners) owe a non-delegable duty of care to owners and subsequent purchasers. The position is no different when the builder is/was also the owner. An owner builder owes a like duty of care in tort to future owners to build a dwelling in accordance with the building permit and the relevant building code and bylaws (per Tipping J in *Chase v de Groot* [1994] 1 NZLR 619-620).

[114] Mr Woods properly acknowledged that a tortious duty of care may be held concurrently with contractual duties. However, I should add that the two causes of action will usually be concurrent and co-extensive because the contract defines the task to be undertaken and there would be difficulty in holding a respondent owed a duty of care if performance of that duty required the respondent to do more or different work than the contract with the original owner required or permitted. Even where there is concurrent liability in contract and tort, the courts are careful to ensure that tort liability does not extent beyond contractual liability with regard to matters covered by the contract (*Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 194, *Frost v Sutcliffe v Tuiara* [2004] 1 NZLR 782, 789, *Rolls-Royce NZ Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA)).

[115] It is clear however, that a builder cannot defend a claim in negligence made against him or her by a third party on the ground that he or she complied with the requirements of his or her contract with the owner although the nature of the contractual duties may be relevant in defining or limiting the duty of care owed to third parties (*Bowen & Anor v Paramount Builders (Hamilton) Limited & Anor* [1977] 1 NZLR 394 (CA)).

[116] Whilst the terms of a building contract may operate to discharge a duty of care to persons who are parties to the contract, it cannot discharge that duty to strangers to the contract or determine what a builder must do to satisfy his duty to such persons because, per Windeyer J in *Voli v Inglewood Shire Council* (1963) 110 CLR 74 "that duty is cast upon the builder by law, not because he made a contract, but because he entered upon the work."

[117] Accordingly, it is readily established that a previous owner may be liable to a subsequent owner in contract and may owe a duty of care to subsequent owners in circumstances where the previous owner is, or was, a developer and/or a builder. To summarise the position therefore:

- In a contract for the sale of land the basic rule in the absence of express contractual provisions is *caveat emptor* (let the buyer beware).

- In a contract for the sale of a house to be built, there will generally be an implied warranty that the builder will do the work in a good and workmanlike manner, will supply good and proper materials and that the dwelling will be fit for human habitation.

- There is no such warranty if the house is already complete before sale.

- A previous owner may owe a non-delegable duty of care to subsequent owners to build a dwelling in accordance with the building permit and the relevant building code and bylaws in circumstances where the previous owner is, or was, the developer and/or the builder of the subject dwelling.

- The duty of care may be defined, limited or discharged by contract to persons who are parties to that contract.

- A contract cannot discharge that duty of care to strangers to that contract or determine what the builder must do to satisfy that duty.

- Liability in tort and in contract will usually be concurrent and co-extensive

Builder or developer – professional or handyman –qualitative or structural defects - latent or patent defects – does it matter?

[118] Liability of a professional builder to a subsequent owner of a domestic dwelling for defects in such dwellings has long been a feature of New Zealand case law since *Bowen & Anor v Paramount Builders (Hamilton) Limited & Anor* [1977] 1 NZLR 394. This position was upheld by the Privy Council in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 in relation to a council although it is assumed that the liability of a builder would be no less extensive (*Rolls-Royce NZ Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA)). The liability of a professional builder to a subsequent owner of a domestic dwelling has also been upheld in Australia - see *Bryan v Maloney* (1995) 182 CLR 690.

[119] John Glover contends that he is neither a builder nor a developer. Mr Glover gave evidence that he is a bricklayer by trade with some

handyman skills and is, and was at all material times, employed full time by Housing New Zealand as a supervisor. He says he has never built a house and his skill falls short of the requirements needed to be a builder.

[120] Mr Woods submitted that the owners appear to assume that Mr Glover had overall responsibility for the project which is incorrect both in fact and at law and that there is no evidence to indicate that John Glover was a "developer". Mr Woods contended that these labels, owner/builder/developer, must be carefully considered and must not be entertained without compelling evidential support. Mr Woods further submitted that the word "developer" should be given its ordinary meaning, namely "a person in the business of improving land or in the trade of building houses".

[121] Mr Woods also submitted that it is clear from the evidence that Paul Kelly accepts responsibility as being the builder in this case which is not disputed.

[122] Against that, Mr Atkinson submitted that Paul Kelly has made it clear from the beginning that he contracted to carry out certain specified building work under a contract with Glover. The work was limited to structural works and excluded weatherproofing, cladding and other work carried out by subcontractors under the direction of Mr Glover and on terms not known to Mr Kelly. Mr Atkinson acknowledged that Mr Kelly's obligation was to carry out the work that he did to a good and workmanlike standard but he submitted that Paul Kelly bore no responsibility for work carried out by other subcontractors with whom he had no contractual relationship. Mr Atkinson further submitted that the application of labels such as builder or owner does not assist in this analysis.

[123] In Mr Atkinson's submission it is common for laymen, without significant building experience and without professional qualifications, to develop their own properties either by carrying out the work themselves or by having the work carried out by others, or a combination of the two. Mr Atkinson further submitted that it is meaningless to emphasis that Mr Glover is a bricklayer. He contended that if Mr Glover was a chartered accountant or a lawyer he would still have been the developer and the builder in the sense that he employed people to do the work, purchased materials for that purpose and took responsibility for all the important decisions including the terms of instructions to various subcontractors, the commissioning of the designer, the negotiation of prices for carrying out the work, the type and size of the development and the payment of the subcontractors. He was, he submitted, the head contractor. The issue of whether he was engaged in other work, or how often he intended to check on progress has in Mr Atkinson's submission, no relevance at all. In Mr Atkinson's submission, the word "developer" includes not only a person who is in the business of improving land or in the trade of building houses, but anybody who carries out development work, whether in business or not.

Labels

[124] I am not much concerned with the labels that parties may elect to use for themselves and others in these proceedings. What is of primacy of course in determining liability of any respondents to the Claimants or to other respondents are the acts (or omissions) of the respondents and the assumption of responsibility and legal liability consequent upon those acts.

[125] In general terms, a person who employs an independent contractor is not liable for the independent contractor's negligence in the course of his

or his or her work (Todd - The Law of Torts in New Zealand 2nd Edition at para 22.5) For example, in *Cashfield House Ltd v David & Heather Sinclair Ltd* [1995] 1 NZLR 452, Tipping J held that the owners of an arcade were not vicariously liable for the negligence of an independent contractor they had hired to renovate a mezzanine floor and whose negligence had caused a sprinkler system to rupture.

[126] However, those respondents, who by their conduct fall within the categories of "builders" or "developers", fall into the categories of persons whom the courts have held to owe a non-delegable duty of care to subsequent owners. The duty is to ensure that proper care and skill is exercised in the building of a dwellinghouse to observe the terms of a building consent and the building code and local bylaws (See: *Mount Albert Borough Council v Johnson* and *Morton v Douglas Homes Ltd.*)

Developers

[127] In *Body Corporate No. 187820 and Anor v Auckland City Council and Ors* HC AK CIV-2004-404-6508 26 September 2005, a case that involved inter alia, determining whether a company was a developer or a financier for the purpose of a summary judgement application, Doogue J identified what he saw as being the two essential characteristics of a "developer", namely that the person had direct involvement or control over what occurred on a property (for example by way of planning, supervising or directing the building process) and secondly, that the person stood to profit from the sale to the end buyer. To the second characteristic, I think could helpfully be added for the sake of completeness, "or to obtain a valuable benefit", as some development product is certainly not put to the market immediately. This is particularly so in circumstances where a developer elects to take the property for his or her own immediate use and who obviously benefits by not having to

pay market value for the property as a result of not having to pay a premium to another to plan, direct or control the building process or for the risks, responsibilities and liabilities attendant upon those duties.

[128] Mr Atkinson submitted that in New Zealand it is quite common for laymen without significant experience and without professional qualifications to develop properties. Obviously control over the subject property and potential for profit or to obtain a valuable benefit will exist in both cases. Is the position any different therefore whether the person carrying out the development work is in business or not?

[129] It is difficult to see how any logical or sensible distinction can be drawn between a person who is in the business of carrying out development work and a person who is 'not in business' (**an amateur**) but nonetheless engages in development work, even on a one-off basis, or that the standard of care expected of an amateur in carrying out development work ought to differ from that of a professional. Certainly a subsequent purchaser of property has no ready means of ascertaining the professional status, or experience, or the extent of the knowledge and skills of the original developer, and nor should they be required to in my view. To ensure buildings are safe and sanitary and to safeguard people from possible injury, illness, or loss of amenity in the course of the use of any building, all building work is required to be undertaken to the same minimum standard, namely the Building Code (s7. BA91). In New Zealand a culture of reliance has developed over many years between purchasers of residential property on the one hand and those who develop, build and certify building work on the other to the extent that in a succession of cases it has been decided that community standards and expectations demand the imposition of a duty of care on developers, builders and local authorities to ensure compliance with the building consent and the building code and local bylaws (See: *Mt Albert*

Borough Council v Johnson [1979] 2 NZLR 234, *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548, *Invercargill City Council v Hamlin* [1996] 1 NZLR 513).

[130] A careful and astute developer can clearly reduce his or her risk by the careful selection of contractors and can restrict, limit or manage his or her risk of future liability by contract.

[131] To my mind, there is no principled reason for holding that a person who is not in the business of development work, but who engages in development work to obtain a valuable benefit (even on a one-off basis) should be entitled to operate in a legal vacuum, immune from liability to all subsequent owners that may be affected by his or her negligence. I am satisfied that the duty is cast upon that person by the law because of the dependence, reliance, vulnerability and proximity between subsequent owners on the one hand and those that develop property on the other. Professional or amateur, each must, in my view, be under the same duty of care and to the same persons – it would not be just in the circumstances for there to be two standards. Accordingly I am satisfied that it is both just and reasonable to hold that a "developer" may be described as any person who stands to obtain a profit or valuable benefit by carrying out, or engaging others to carry out, development work, whether in trade or otherwise.

[132] In the end it will be a pragmatic question of fact as to whether a person may be categorised as a developer such that in relation to the subject property a non-delegable duty of care is owed by that person to subsequent purchasers.

Builders

[133] The initial issue to be considered is what defines a builder in the New Zealand context. The ancillary issue is whether the position vis-à-vis liability for defective work is any different for a professional builder or an amateur or DIY enthusiast.

[134] Residential building in New Zealand, at least for the past 30 years, has been characterised by a process whereby almost every singular aspect of the design, construction and inspection of any dwelling is undertaken by specialists (persons possessed of specialist knowledge and skills). The specialist contractors may carry out their work onsite or off site prefabricating components for later installation by others, with the next contractor in the construction chain coming to their work at such time as it may be complete. The builder *per se* has in the main become a mere project manager and coordinator of specialist contractors, including in many cases carpentry contractors and sub-specialists in that field. The concept of a builder being a person who constructs a dwelling with his or her own hands, skill and knowledge from concept to completion, is therefore something that has in this age of specialisation, largely been relegated to history.

[135] It is therefore of little assistance to think of a builder solely in terms of a person who physically constructs a dwelling. In this day and age, that person is more likely to be contracted to the "developer" or the "builder/head contractor" on a labour only basis.

[136] It would seem therefore that a builder or head contractor may usefully be described as a person, who:

- builds or constructs buildings either personally or by subcontracting others to undertake various aspects of the construction work.

- plans and manages the construction process including selection of tradesmen and materials.

- selects, sources and purchases materials.

- negotiates and prepares and obtains quotations and prices and manages the finances of the construction process.

- determines the sequence of work.

- checks and approves and/or arranges for the approval or certification by others, of the building works

[137] This list is merely indicative of the tasks that a builder could or may undertake and is intended as a general guide only. It is not intended to be definitive or exhaustive of the circumstances or tasks that may give rise to a person being categorised as a builder. A labour only building contractor will clearly owe a duty of care in relation to the work that he or she contracts to undertake, but a labour only builder does not owe a non-delegable duty of care to subsequent purchasers in respects of acts or omissions by subcontractors and suppliers not contracted to him or her or under his or her control or direction.

Professional or handyman - structural or qualitative defects – latent or patent defects

[138] So I turn now to the issue of whether or not the position is any different for a professional builder or a DIY enthusiast/handyman and whether any duty of care is owed in relation to defects that are latent or patent and/or structural or qualitative.

[139] Almost all of the cases referred to so far have involved professional builders and actual material physical damage and/or economic loss directly related to structural damage. Of those, the only cases where recovery for qualitative defects have been allowed are the cases of *Brown v Heathcote County Council* [1986] 1 NZLR 76, and *Stieller v Porirua City Council* [1986] 1 NZLR 84, although both cases are distinguishable because they involved claims against the local authority only and not against the builder.

[140] Mr Woods referred me to the case of *Willis v Castelein* [1993] 3 NZLR 103 as authority for holding that no duty of care is owed for defects by an owner/renovator to a purchaser. Mr Woods submitted that because the vendor in the *Willis* case had carried out the work himself, he had taken upon himself a far greater responsibility than Mr Glover in this present case which means the likelihood of Mr Glover being liable in tort is significantly less than Mr Castelein in *Willis* .

[141] *Willis* was an appeal from the District Court decision of Judge Lawson and involved a vendor, Castelein, who had personally undertaken building and renovation work on the property prior to the sale to Willis. Castelein was not a professional builder but he had partly constructed a shed for which he had obtained a permit from the local authority and he had extended and renovated the kitchen without a permit. Certain of the work was inadequate and defective. When the purchasers found out that the kitchen renovations had been undertaken without a permit and that no final clearance had been given by the council for the work on the

shed, they claimed damages for the costs of repairing the allegedly defective work which the vendors had carried out to the property before the sale.

[142] Judge Lawson found at first instance that the allegations amounted to no more than allegations of defective workmanship resulting in a product that was merely inferior to what it would have been had the work been done in a more workmanlike manner, and moreover, that presumably the quality was reflected in the price paid. He found that the defects were defects in quality and the extent of the duty of care which he found was owed by the defendants was limited to a duty not to so alter or build as to cause damage to the building's structure or cause present or imminent danger to the health and safety of the persons occupying it. He said that in doing so, he did not distinguish between a home handyman and a professional builder.

[143] Williams J accepted Judge Lawson's factual findings, namely that the defects were of quality only and there was no threat of physical damage to the shed or the house and the defective work posed no threat to safety or health and expressed the view that purchasers in the situation of the purchaser, Willis, are quite capable of looking after themselves. He said: "They are not disabled from inspecting, asking questions about quality and workmanship and negotiating protective contract terms."

[144] In the end, Williams J said that he agreed entirely with the learned District Court Judge that any liability in tort should be confined to cases of physical damage and danger due to a latent defect, either existing or likely, to life or property, and does not encompass aesthetic or qualitative imperfections. He also agreed there is no duty in tort in relation to defects of quality owed by the owner renovator to the purchaser to whom he or she sells the house and the relationship should be governed

entirely by the terms of the contract for sale and purchase between them.

[145] As I have said earlier, it is well settled that professional builders owe a duty of care to subsequent owners not to create defective and non-compliant building work that may cause or contribute to loss and damage to the fabric and structure of a dwellinghouse and/or adversely affect the health and safety and amenity of its occupants. It is difficult to see how any sensible distinction could be drawn between owner renovators/DIY enthusiasts and professional builders, or that the standard of care expected of an amateur in doing building work which if carried out negligently has the capacity to cause harm to other persons ought to differ from that of a professional. *Willis* is authority for extending (if that were needed), or including in that category of persons who owe a duty of care to subsequent owners not to create defective and non-compliant building work that could cause damage to the building's structure or cause present or imminent danger to the health and safety of the persons occupying it, all persons, professional builders, owner/renovators, DIY enthusiasts or otherwise, who undertake building work. If any person, by his or her conduct enters into work or engages in tasks that place that person in the category of a builder for the purpose of any particular case, any argument as to whether there is a difference in liability between the professional builder on the one hand and the home handyman on the other evaporates - per Temm J, *Gardiner v Howley* supra.

[146] *Willis* is authority for holding that no duty in tort is owed by the owner renovator to the purchaser to whom he or she sells the house for qualitative defects or imperfections.

[147] The position of the professional builder will almost certainly be different from the owner renovator where the purchaser buys the house from the builder prior to completion because in conventional circumstances, the professional builder's liability in contract and tort will be concurrent and co-extensive. The liability in tort arises because into any building contract for the construction of a dwellinghouse, unless expressly excluded, there are implied terms requiring that the building work be carried out in a workmanlike manner and with reasonable care and skill, that the materials will be merchantable, and that the dwellinghouse will be reasonably fit for human habitation.

[148] I turn therefore to consider whether the position of the professional builder in tort would be any different to that of the owner renovator in relation to subsequent purchasers or purchasers of a completed dwelling because the implied terms/warranties do not apply where a builder sells a house which he has completed. Once again, in such cases it is difficult to see how any logical or sensible distinction can be drawn between an owner/renovator and a professional builder in relation to aesthetic or qualitative defects or imperfections. The underlying rationale stated in *Willis* for holding that there is no duty in tort in relation to defects of quality owed by owner renovators to purchasers must logically apply equally to professional builders, namely that a purchaser is perfectly able to inspect a property, or to have an inspection carried out by an expert and to ask questions of the vendor to ascertain the extent, if any, of defects or imperfections of an aesthetic or qualitative nature that will affect the price the purchaser is prepared to pay for the property. In that case the maxim *caveat emptor* applies and accordingly I am driven to conclude that no duty of care is owed by a professional builder to a subsequent purchaser in relation to aesthetic or qualitative defects or imperfections.

[149] I return now to respond to Mr Woods submissions first, that *Willis* is authority for holding that no duty of care is owed for defects by an owner/renovator to a purchaser and secondly, that the likelihood of Mr Glover being liable in tort is significantly less than Mr Castelein in the *Willis* case.

[150] It is readily apparent from the preceding discussion that Mr Woods' first submission is not strictly correct. The statement requires qualification because the immunity from liability applies only in relation to aesthetic or qualitative defects or imperfections. Insofar as structural defects and non-compliant work is concerned, there is simply no distinction to be drawn between owner renovators/DIY enthusiasts and professional builders. All persons who carry out building work owe a duty of care to subsequent purchasers to build in accordance with the building consent and the building code.

[151] Turning now to Mr Woods' second submission. Even if John Glover were to be considered an owner/renovator in the present case, which he clearly was not, his relationship with the owners is not one that was characterised or defined by contract and can readily be distinguished from that of the vendor Castelein and the purchaser Willis, John Glover having sold the property to the Trust, and the Trust in turn having sold the property to the owners. However, as either an owner/renovator or a builder, Mr Glover would be in precisely the same position as Mr Castelein was. He would owe a duty of care to the owners for any defective and non-compliant building work that could cause damage to the building's structure or cause present or imminent danger to the health and safety of the persons occupying it and would be liable to them in damages for the cost of effecting the necessary repairs. He would not be liable to the owners in tort for aesthetic or qualitative defects or imperfections.

Latent or patent defects

[152] Many of the cases considered by New Zealand courts are concerned solely with the issue of latent (hidden and not obvious at the time, but which develop later) as opposed to patent (obvious at the time) defects and a prime example is the list of authorities concerning houses with defective foundations (*Johnson v Mt Albert Borough Council*, *Morton v Douglas Homes* etc). Generally that is because of the application of the principle of *caveat emptor* 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. The application of that maxim was clearly demonstrated by the outcome in *Willis.*

[153] The Australian courts have considered the issue in *Zumpano & Anor v Montagnese & Anor* [1997] 2 VR 525. This was a case where a homeowner sued his builder in respect of losses to repair numerous defects in his home. The court gave consideration as to whether the earlier 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 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.

[154] 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, one of the plaintiffs (the husband) was an experienced architect and principal of a home building company and moreover, it was apparent from the evidence before the Court that he was aware of the problem with the paint at the time of purchase.

[155] In both *Zumpano* and *Goulding*, the claims related to patent 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. It is notable that the approach of the Australian courts to patent and qualitative defects is consistent with the findings in *Willis*.

[156] Aesthetic and qualitative defects are almost always patent defects. The defects that typically give rise to WHRS claims are almost always latent and not obvious to unsophisticated and vulnerable purchasers, or indeed to expert building surveyors undertaking non-invasive pre-purchase inspections in many cases.

[157] To summarise this issue therefore, all persons who by their negligence create, or cause to be created, latent defects causing or contributing to water penetration and loss and damage to a dwellinghouse will be liable to subsequent purchasers because the penetration of a dwellinghouse

by water is prima facie a breach of the building code. No duty in tort is owed by any person who creates a patent or qualitative defect to a subsequent purchaser, but a builder who sells an incomplete house will generally be liable to the immediate purchaser in contract and tort for patent and aesthetic and qualitative defects and imperfections.

Builder or developer?

[158] Initially John Glover was said by his solicitors to have had no more involvement in the construction of the owners' dwellinghouse than sweeping up and tidying up behind workers.

[159] When cross-examined on the extent of his involvement with the property by Mr Atkinson, it was John Glover's evidence that he applied for and organised to cross-lease the property, that he engaged an architect Kim Veltman to design the two dwellings that were constructed on the property, that he applied for and obtained building consents for each of the dwellings, that he engaged contractors directly, some of whom were engaged on a labour only basis such as the building contractor Paul Kelly, he sourced and paid for materials, he applied for and obtained code compliance certificates upon completion of the building work, and that he on-sold both of the cross lease properties and is now living elsewhere.

[160] It was the evidence of Paul Kelly, Ray Brockliss and Steven Cook, that each was engaged by, and paid by, John Glover, to carry out certain aspects of the construction of the owners' dwelling, that John Glover issued instructions to them about how he wanted certain aspects of the work to be undertaken and that John Glover was on site frequently observing or checking on progress.

[161] Accordingly, the evidence drives me inexorably to reach only one conclusion. For the purpose of this case, John Glover was the developer and the head contractor/builder, there is simply no other conclusion to be drawn from the facts in my view.

Liability

[162] Accordingly, having determined that John Glover was the developer and the builder for the purpose of this claim, it follows for the reasons set out earlier in this determination that John Glover owed the owners a non-delegable duty of care to ensure the building work was carried out in accordance with the building consent and the building code.

[163] The evidence establishes overwhelmingly that water has penetrated the external envelope of the dwelling and that there has been degradation and decay of the structure and fabric of the dwelling.

[164] The building work does not comply with the provisions of the building code: The water penetration contravenes building code Clause E2 – External Moisture and the resultant decay and damage to the timber framing contravenes Clause B1-Structure and B2-Durability.

[165] Accordingly, the owners have established a prima-facie case that the First respondent, John Glover, breached the duty of care that he owed them as the developer and/or the builder of their dwelling by constructing, or causing to be constructed, defective and non-compliant building works that have caused damage to the building's structure and that present danger to the health and safety of the persons occupying it. By reason of the said breaches, the owners have suffered loss and damage to their property in the amount of $79,149.72. for which the First respondent, John Glover is liable.

[166] Accordingly I find the First respondent, John Glover liable to the Claimants for damages in the sum of $79,149.72.

The liability of the Second respondent, Paul Kelly

[167] It was Paul Kelly's evidence that he was engaged by John Glover as a labour only building contractor to carry out specified building work under a contract with John Glover. His undisputed evidence was that the work he was engaged to undertake was limited to structural works including forming the deck substrates. He said the work excluded waterproofing, roofing and flashings, cladding, fitting the stainless steel handrails, and other work undertaken by specialist subcontractors under the direction of John Glover.

[168] Mr Woods submitted that Paul Kelly was the builder and it is clear that he accepts responsibility as being the builder.

[169] In his closing submissions, Mr Atkinson said that Mr Woods' submission was clearly wrong and sought to clarify the position by stating that Mr Kelly's obligation was to carry out the work that he did to a good and workmanlike standard, but he bore no responsibility for work carried out by other subcontractors with whom he had no contractual relationship.

[170] John Glover was the developer and the builder for the purpose of this claim. Paul Kelly was the labour only building contractor contracted to John Glover to undertake certain of the building work. That much I am satisfied is certain and beyond dispute. Even if Paul Kelly were to be described as a sub-contractor (which technically he is not although I am sure that he and others would often see and describe him in that light), the position at law would be no different. I had cause to consider the liability of sub-contractors recently in WHRS Claim: 00465 – Procedural

Order No.4. I do not propose to repeat the careful and extensive consideration given to that issue herein, but adopt *mutatis mutandis* the reasoning therein for holding that a sub-contractor owes a duty of care to a subsequent owner to carry out the subcontract works in accordance with the Building Act and Regulations including the building code. Contractor or subcontractor, the position and the liability remains the same.

[171] Accordingly, I am satisfied that there was a sufficient relationship of trust, confidence and proximity between Paul Kelly on the one hand and the owners on the other hand, that it must have been in the reasonable contemplation of Paul Kelly, that carelessness on his part in carrying out the building work that he was contracted to do in accordance with recognised building practices and standards to ensure compliance with the building code was likely to cause loss and damage to future owners and that he would be liable for any breach of that duty of care.

[172] Paul Kelly was responsible for constructing and preparing the deck substrate for the application of a waterproofing membrane. I have determined that the installation of angle fillets was a necessary requirement and standard practice for the industry in 1997 when the owners' dwelling was constructed. Paul Kelly failed or neglected to install angle fillets where the membrane was turned up a vertical face of the deck substrate.

[173] I have found that the waterproofing membrane on the decks failed causing water penetration and damage because of the failure to install angle fillets where the membrane was turned up a vertical face of the deck substrate.

[174] I am satisfied that the evidence establishes that Paul Kelly was not involved with, or responsible for, the handrail capping, the installation of the stainless steel handrail, the cladding, or the apron flashing. Therefore, it follows that he has no liability in relation to the damages and losses associated with those defective works.

[175] Accordingly, I find the Second respondent, Paul Kelly, breached the duty of care that he owed the owners in relation to the construction of the deck substrates and accordingly I find Paul Kelly liable to the owners for damages in the sum of $41,494.60 being the cost to repair and reconstruct the decks and associated works (see para 96 supra).

The liability of the Fourth respondent, Excel Coatings Limited

[176] Excel contracted with John Glover to supply and install the Harditex exterior cladding and the textured coating finish.

[177] For the reasons stated earlier, I am satisfied that there was a sufficient relationship of trust, confidence and proximity between Excel on the one hand and the owners on the other hand, that it must have been in the reasonable contemplation of Excel, that carelessness on its part in carrying out the cladding work that it was contracted to do in accordance with recognised building practices and standards to ensure compliance with the building code was likely to cause loss and damage to future owners and that it would be liable for any breach of that duty of care.

[178] It was not disputed by Excel, that the Harditex installed hard down on the waterproofing membrane has allowed moisture to wick up and transfer to the framing, that the flat Harditex handrail tops have allowed water to penetrate into the handrail framing, that the inter-storey control joint has failed causing water penetration, and that the apron flashing on the roof

adjacent to the kitchen was cut short when the cladding was installed allowing water to enter the dwelling.

[179] In essence, Mr Brockliss deposed that Excel installed the Harditex wall cladding and formed the flat horizontal handrail surfaces and the inter-storey control joint to details requested by John Glover and therefore Excel has no liability for any failure, loss, or damage.

[180] Mr Brockliss said that all the work was done by Excel to the specifications in the "Hardies Manual" except for the specific changes requested by Mr Glover. In particular Mr Brockliss said that Mr Glover insisted that he did not want an angle on the handrail cap for aesthetic reasons and for ease of fitting the handrail, that Mr Glover requested the Harditex be as low as possible in the area where the tiles were to be laid and that Mr Glover insisted he wanted the midfloor band to be as thin as possible because the Hardies jointer would protrude and look unsightly.

[181] John Glover denies that he had any involvement in determining the angle of the handrail.

[182] Mr Woods submitted that even if Mr Glover had made the requests alleged by Mr Brockliss, it would have been for Mr Brockliss to have made the decision whether or not to comply because Mr Brockliss was under a duty to ensure the work was carried out with reasonable care and skill and it is no defence for Mr Brockliss to say he was asked to be negligent.

[183] Mr Brockliss accepted that the installation of the cladding around the decks and the formation of the handrail capping was not undertaken in accordance with the manufacturer's recommendations.

[184] In relation to the inter-storey control joint, Mr Brockliss deposed that he formed the control joint using a Fosroc product, Silaflex MS, and that this was perfectly acceptable because the control joint width falls within the range allowable as specified by Fosroc. Mr Brockliss contends he formed the inter-storey control joint according to the Fosroc specifications to meet the requirements of the Building Code. Mr Brockliss provided a copy of the Fosroc Technical Data sheets for Silaflex MS with his response on 1 March 2005.

[185] It was Mr Smith's evidence that the Harditex Technical Manual requires a proprietary PVC control joint flashing to be installed at midfloor junctions and therefore the horizontal inter-storey control joint has not been formed in accordance with the manufacturer's recommendations. Mr Smith appended the relevant pages from the James Hardie Harditex Technical Manual to his report that detailed 3 alternative methods by which horizontal flashing/control joints were to be formed. The joint described and formed by Excel did not comply with any of the methods approved and recommended by James Hardie Building Products.

[186] In the end the issue is quite straightforward notwithstanding the reasons given by Mr Brockliss for departing from recommended installation procedures. It would seem that Mr Brockliss, who was unrepresented throughout these proceedings, was in essence asserting a plea of *volenti non fit injuria.* The maxim means "No harm is done to one who consents". However a plea of *volenti* can only succeed if a defendant can establish that the plaintiff freely and voluntarily agreed to take upon himself or herself the risk of harm which in fact eventuated. In this case however, the owners are the plaintiffs (not John Glover) and persons to whom Excel owed a duty to take care. It is clear that *a fortiori* the owners did not, and could not have agreed to take upon themselves any risks associated with Excel's work – they of course knew nothing of it. John

Glover's conduct may go some way toward a claim for contribution but it does not provide Excel with a defence or discharge Excel from liability to others, such as the owners, who may be affected by carelessness on its part. Mr Woods correctly identified that it is simply no defence for someone in Excel's position to say it was asked to be negligent.

[187] I have found that the installation of the cladding system at the decks and on the handrails and at the inter-storey relief joint and the apron flashing was not undertaken in accordance with the manufacturer's recommendation and failed causing water penetration and damage.

[188] I am satisfied that the evidence establishes that Excel was not involved with, or responsible for, the construction or waterproofing of the deck or the supply and installation of the stainless steel handrails. The cost of repairing and replacing the stainless steel handrails is readily identified from the costs schedule attached to the Assessor's report in the amount of $7,486.88 (See items 16&32, plus preliminaries, margin, contingencies & GST). Therefore, it follows that Excel has no liability in relation to the damages and losses associated with that defective work.

[189] Accordingly, I find the Fourth respondent, Excel, breached the duty of care that it owed the owners in relation to the installation of the cladding system (the handrail, the inter-storey control joint and the apron flashing). I therefore find Excel liable to the owners for damages in the sum of $30,168.24 being the cost to repair and reconstruct the cladding adjacent to the tiles, the handrail, the inter-storey relief joint and the apron flashing calculated as follows:

The handrail repairs (see para.96)	$21,857.22
Deduct remedial work to stainless steel handrail (see para 188)	($ 7,486.88)

The inter-story relief joint (see para.96)	$15,188.28
The apron flashing (see para.96)	$ 609.62
Total	$ 30,168.24

The liability of the Sixth respondent, Steven Cook

[190] Steven Cook contracted with John Glover to supply and install the waterproofing membrane on the decks of the owners' dwelling.

[191] For the reasons stated earlier, I am satisfied that there was a sufficient relationship of trust, confidence and proximity between Steven Cook on the one hand and the owners on the other hand, that it must have been in the reasonable contemplation of Steven Cook, that carelessness on his part in carrying out the waterproofing work that he was contracted to do in accordance with recognised building practices and standards to ensure compliance with the building code was likely to cause loss and damage to future owners and that he would be liable for any breach of that duty of care.

[192] I have found that the waterproofing membrane on the decks failed causing water penetration and damage because of the failure to install angle fillets where the membrane was turned up a vertical face of the deck substrate.

[193] I have found that Paul Kelly was responsible for constructing and preparing the deck structure and the substrate for the waterproofing membrane including installing angle fillets. However, I am satisfied that the documentary technical evidence provided by Mr Smith, namely the BRANZ Bulletin and the BRANZ Guide, clearly establishes that the installation of angle fillets where a membrane turns up a vertical face of

a substrate was a necessary requirement and standard practice for the (informed) industry in 1997.

[194] Steven Cook was the specialist waterproofing contractor. In my view, the evidence establishes that he should have been aware of the requirement for angle fillets to be fitted to internal corners. It appears that he was either not aware of the requirement, or he simply overlooked it and proceeded to apply the waterproofing membrane over the inadequately prepared substrate. In either case however, he accepted the substrate as suitable for the application of his product, or at least, in breach of a duty to warn, he failed to warn John Glover that it was not and thus he induced reliance and failed to prevent a loss. In the end, Steven Cook breached the duty of care he owed to the owners by departing from accepted application practice, namely by applying a waterproofing membrane over an improperly prepared substrate (one without angle fillets installed at internal corners) and by reason of the said breach, the owners have suffered loss and damage to their property for which Steven Cook is liable.

[195] I am satisfied that the evidence establishes that Steven Cook was not involved with, or responsible for, the handrail capping, the installation of the stainless steel handrail, the cladding or the apron flashing. Therefore, it follows that he has no liability in relation to the damages and losses associated with those defective works.

[196] Accordingly, I find the Sixth respondent, Steven Cook, breached the duty of care that he owed the owners in relation to the application of the waterproofing membrane on the decks and accordingly I find Steven Cook liable to the owners for damages in the sum of $41,494.60 (see para. 96 supra) being the cost to repair and reconstruct the decks and associated works.

Bankruptcy

[197] Mr Cook gave evidence that he was adjudged bankrupt in November 2002 and was discharged from bankruptcy in November 2005. He asserts that as a discharged bankrupt he cannot be liable for claims in relation to events that occurred prior to his being adjudged bankrupt in 2002. The waterproofing work on the owners' dwelling was undertaken in 1997.

[198] Bankruptcy is a regime designed to deal with debts and not uncrystallised causes of action in tort. For that reason, a discharge from bankruptcy acts as a discharge of any debt or cause of action that occurred prior to that date, but not a claim in negligence that is yet to come to fruition.

[199] After considering the evidence I am satisfied that the claim against Mr Cook did not crystallise until, at the earliest, March 2003, when the owners first noticed water running out of the light fittings in the living room. Accordingly, the claim was not a provable debt pursuant to section 87 of the Insolvency Act 1967 i.e. a "present or future, certain or contingent" debt arising prior to the bankruptcy of Mr Cook in 2002.

[200] Under section 114 of the Insolvency Act 1967, a discharge from bankruptcy acts to release the bankrupt from all debts provable at the date of bankruptcy.

[201] As any claim by the owners against Mr Cook could not have arisen prior to discoverability of the defective waterproofing work in March 2003 at the earliest, the owners could not have proved in the bankruptcy in 2002 and their claim is therefore not affected by Mr Cook's supervening bankruptcy. Accordingly Mr Cook's bankruptcy is neither relevant, nor a

defence, to any claim against him by the Claimants in these proceedings.

Liability of the Seventh respondent, Robert Neil Boler

[202] Unfortunately Mr Boler failed or neglected to take part in these proceedings. However I am entitled to draw any inferences from his failures that I think fit and determine the claim on the basis of the information available to me.

[203] I am satisfied that the documents attached to Mr Smith's report as appendices 1(a) - (k) establish that Robert Neil Boler was the building certifier responsible for checking and approving the plans and specifications and issuing the building certificate dated 11 September 1995 to Manukau City Council, that he conducted inspections including most notably the final building inspection on 15 September 1997, and that he issued a code compliance certificate also dated 15 September 1997.

[204] Under section 90 of the Building Act 1991, all proceedings against a building certifier in respect of the exercise by the building certifier of the certifier's statutory function in issuing a building certificate or a code compliance certificate are to be brought in tort.

[205] For the purpose of the following discussion, the terms 'council' or 'council building inspector' and 'building certifier' are interchangeable for the purpose of considering liability.

[206] 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.

[207] 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

[208] 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.

[209] 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

[210] The extent of a Council inspector's duty does not extend to including 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

Defects not detectable by visual inspection

[211] The evidence has established overwhelmingly that water has penetrated the external envelope of the dwelling and that there has been degradation and decay of the structure and fabric of the dwelling.

[212] Therefore the building work does not comply with the provisions of the building code: The water penetration contravenes building code Clause E2 – External Moisture and the resultant decay and damage to the timber framing contravenes Clause B1-Structure and B2-Durability, yet Mr Boler conducted a final building inspection on 15 September 1997 and issued a code compliance certificate the same day certifying that he was satisfied on reasonable grounds that the building work complied with the building consent and the building code.

[213] Put simply, the work does not comply with the building code. It would seem therefore, that the only defence available to Mr Boler in the circumstances would be that the defective work that has caused or contributed to the water penetration would not have been detectable by any reasonable building inspector carrying out a visual inspection (See *Stieller*) and therefore the grounds for issuing the code compliance certificate were reasonable in the circumstances.

[214] Having carefully considered the evidence and having viewed the owners' property, I am satisfied that a reasonably competent building inspector/certifier carrying out a visual inspection of the owners' dwelling in September 1997 should have observed that the cladding around the decks was installed incorrectly and in contact with the tiled surfaces and that the Harditex handrail capping was constructed without fall.

[215] I am not persuaded that Mr Boler, or any other building inspector/certifier, should, or could have observed or determined, that

angle fillets had not been installed beneath the waterproofing membrane, that the handrail stanchions had been installed without gaskets or sealant to the base of the stanchions or without sealant to the threads of the fasteners, that the inter-storey control joint had not been formed in accordance with the manufacturer's recommendations, or that the apron flashing had been cut short on the roof adjacent to the kitchen. I am satisfied that all of these items would have been obscured from view by tiles, trim or facings and the fixing and sealing arrangements put in place (if any) for the handrail stanchions could not be ascertained without testing. I am not persuaded that any of these items would have been readily observable during the course of intermediate inspections or that they would have formed part of any reasonable specific inspection regime by a building inspector/certifier in 1997.

[216] Accordingly, I find the Seventh respondent, Robert Neil Boler, negligently conducted a final inspection of the building work and negligently issued a code compliance certificate and is liable to the owners for damages in the sum of $14,370.34 (being the aggregate amount of $21,857.22 for remedial work to the handrails less $7,486.88 for the stainless steel handrails for which Mr Boler has no liability (see paras. 96 & 188 supra)).

The liability of the Eighth respondents, John Glover and Neil Gollan

[217] The position of the Eighth respondents was initially confused and did not readily become clear until quite late in these proceedings.

[218] The evidence has established that the Eighth respondents were the vendors of the property to the owners and that they did not carry out or cause to be carried out any building work requiring a building consent in their capacity as Trustees of the Trust.

[219] There is no evidence that they breached any of their contractual obligations or warranties pursuant to the Agreement for Sale and Purchase and accordingly they cannot be liable to the owners in contract.

[220] There is no evidence that the Eighth respondents owed the owners a duty of care or that they breached any such duty and accordingly, the Eighth respondents cannot be liable to the owners in tort for negligence.

THE CLAIM FOR GENERAL DAMAGES

[221] The owners jointly claim general damages in the amount of $10,000.00 for stress, anxiety, the loss of enjoyment of their property whilst the defects were identified and remedied in 2003 and the further inconvenience, loss of privacy and loss of enjoyment of their property associated with the bulk of the repair work that is yet to be undertaken. Mr Tidmarsh has also referred in his submissions to the stress associated with prosecuting the claim. In particular, he referred to the slow progress of the claim which he alleged was due to lack of co-operation by respondents and other delaying tactics.

[222] 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.

[223] In <u>*Waitakere City Council v Sean Smith*</u> CIV 2004 - 090 - 1757, 28 January 2005, an appeal from my determination in Claim No. 00277, Judge FWM McElrea held in a reserved judgment issued on 28 January 2005, at para 78, that:

> "Standing back and looking at the matter overall, I am clear that the purpose and intent of the Act is not inconsistent with a power to award general damages but is in fact enhanced by it. Both in s29 dealing with jurisdiction and in s42 dealing with the substance of decisions, parliament used the widest language possible, and it would be inappropriate for the courts to try and cut that down so as to impose restrictions on the jurisdiction of the WHRS. The Act should be interpreted in a way that allows it to afford the fullest possible relief to deserving Claimants."

[224] In <u>*Maureen Young and Porirua City Council v Dennis and Jane McQuade & Ors*</u> CIV–2003–392/2004 Judge Barber followed Judge McElrea's decision, and in that case, increased the amount awarded by the Adjudicator for general damages.

[225] I accept without hesitation Mr Tidmarsh's evidence that he and his wife have both suffered considerable stress, anxiety, inconvenience and disruption under the pressures of dealing with their family home (which they understood to be new, well built and relatively maintenance free) being a leaky building.

[226] Accordingly, 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 owners should each be able to recover distress damages from a

respondent, or respondents, found liable for breach of contract, or breach of the duty of care.

[227] 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.

[228] A review of the fifteen WHRS determinations in respect of which awards of general damages have been made to date, discloses that awards have been made within the range of $2,000.00 - $18,000.00 for any one Claimant. I am satisfied that an award of general damages in the amount of $5,000.00 for each of the owners in this matter falls within the established parameters for awards in relation to leaky building claims and recognises the degree of stress, anxiety, inconvenience and the loss of enjoyment of the property that I apprehend the owners have suffered to date and will continue to suffer during the further remedial work in this case.

CONTRIBUTION

[229] I have found that the First respondent, John Glover, breached the duty of care that he owed to the Claimants. John Glover is a tortfeasor or wrongdoer and is liable to the Claimants in tort for the full extent of their loss, namely $79,149.72.

[230] I have found that the Second and Sixth respondents breached the duty of care they owed to the Claimants and each of them is liable to the Claimants in tort for their losses associated with defective deck

construction and waterproofing to the extent of $41,494.60. The Second and Sixth respondents are on one hand, concurrent tortfeasors, because they are responsible for different acts/torts (i.e. negligent construction on the part of the Second respondent and negligent waterproofing on the part of the Sixth respondent) 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)).

[231] On the other hand, the Second and Sixth respondents are each joint tortfeasors with the First respondent in respect of the same damage. A tort is committed by several persons as joint tortfeasors where the act giving rise to the tort is one for which both or all are responsible or where it is committed as a joint act. In this case, the non-delegable duty of care owed by a builder/developer gives rise to joint responsibility for defective building work.

However, notwithstanding that distinction:

> 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]

[232] I have found that the Fourth respondent breached the duty of care it owed to the Claimants and is liable to the Claimants in tort for their losses in relation to repairs associated with defective exterior cladding work to the extent of $30.168.24

[233] I have found that the Seventh respondent breached the duty of care it owed to the Claimants and is liable to the Claimants in tort for their losses in relation to repairs associated with defective exterior cladding work to the extent of $14,370.34.

[234] The Fourth and the Seventh respondents are on one hand, concurrent tortfeasors and concurrently liable in respect of the same damage, and on the other hand, they are joint and concurrent tortfeasors respectively with the First respondent in respect of the damage for which I have found each of them liable.

[235] Under section 17 of the Law Reform Act 1936 any tortfeasor is entitled to claim a contribution from any other tortfeasor in respect of the amount to which it would otherwise be liable.

[236] 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…

[237] 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.

[238] 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. In *Mount Albert Borough Council*

v Johnson [1979] 2 NZLR 234 (CA)*,* the Court apportioned responsibility for the damages at 80% to the builder and 20% to the Council on the basis that primary responsibility lay with the builder as the person responsible for construction in accordance with the bylaws and that the inspector's function was supervisory.

[239] As in *Mount Albert v Johnson* primacy for the damage to the owners' dwelling rests with the First, Second, Fourth and Sixth respondents as the builder/contractors 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 is a condition of every building consent that the building work is 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 builder/contractors' primary responsibility.

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

The deck

[241] I have found the First, Second and Sixth respondents each liable for the entire amount of the owners' losses caused by water ingress and associated damage in relation to the decks in the amount of $41,494.60. I am satisfied that it is just and reasonable that primacy for the loss and damage to the extent of 50% should rest with the Sixth respondent, the expert waterproofing contractor, who proceeded to apply the waterproofing membrane over the inadequately prepared substrate, followed by the First respondent developer/builder to the extent of 30% and the Second respondent, the building contractor, at 20%.

[242] I am satisfied that it is just and reasonable that the First respondent, the developer/builder, should bear more responsibility than the Second respondent labour only building contractor on the ground that as the developer/builder of the owners' dwelling, it was the First respondent's responsibility to carry out, or to arrange to have carried out, the building works in accordance with the building code and the building consent. The observance of that requirement was the First respondent's primary responsibility.

[243] Arguments such as those advanced by Mr Glover, namely that he was not a professional builder or developer and therefore did not have the necessary skills or knowledge to know whether work was being undertaken properly will receive scant regard in this jurisdiction. The short answer for anyone contemplating carrying out development and or building work is to employ a suitably skilled and experienced person to manage and supervise the building process or assume that responsibility at your own peril because the consequences of failure are severe.

[244] Whilst each of the First, Second and Sixth respondents is liable for the entire amount of the owners' losses caused by water ingress and associated damage in relation to the decks in the amount of $41,494.60, each is entitled to a contribution toward that amount from the other tortfeasors according to the relevant responsibilities of the parties for the damage that I have determined above. Therefore I determine that the respondents' contributions *inter se* in relation to the 'deck' damage and repairs are as follows:

The First respondent, John Glover	30%	$ 12,448.38
The Second respondent, Paul Kelly	20%	$ 8,298.92
The Sixth respondent, Steven Cook	50%	$ 20,747.30
Total	100%	$ 41,494.60

The handrail

[245] I have found the First respondent liable for the entire amount of the owners' losses caused by water ingress and associated damage in relation to the handrail constructions in the amount of $21,857.22.

[246] I have found the Fourth and the Seventh respondents each liable for the owners' losses caused by water ingress and associated damage in relation to the handrail constructions in the amount of $14,370.34.

[247] I have carefully considered the evidence in relation to the causes of water penetration in relation to the handrail constructions, the nature and extent of the damage and the schedule of the costs of repair. In the end my considered view leads me to be satisfied on balance that the fitting of the stainless steel handrail is responsible for 60% of the loss and damage in relation to the handrail constructions. Therefore I determine the loss and damage in the aggregate amount of $14,370.34 may be apportioned as follows:

Fitting of SS Handrail	60%	$ 8,622.20
Flat surface to handrail	20%	$ 2,874.07
Wicking	20%	$ 2,874.07
Total	100%	$14,370.34

[248] I have determined that neither the Fourth nor the Seventh respondents bear any responsibility for the installation of the stainless steel handrails. Accordingly, the First respondent alone shall bear full responsibility for the loss and damage associated with the stainless steel handrail installation in the amount of $8,622.20.

[249] In relation to the balance of the losses associated with the handrail constructions, I am satisfied that it is just and reasonable that the Fourth

respondent, the specialist cladding contractor should bear more responsibility than the First respondent. In my view, the First respondent developer/builder was entitled to rely on the expertise of the specialist cladding contractor whose responsibility it was to carry out the installation of the cladding in accordance with the manufacturers recommended, approved and recognised practice and in accordance with the building code. I am satisfied that the extent of the liability of the Fourth respondent should therefore be fixed at 50%.

[250] However, notwithstanding the particular skill and knowledge of the specialist contractor it remained the First respondent's responsibility to carry out, or to arrange to have carried out, the building works in accordance with the building code and the building consent. The observance of that requirement was the First respondent's primary responsibility and I am satisfied that the responsibility of the First respondent should be fixed at 30%.

[251] The Seventh respondent's role on the other hand is essentially supervisory and to that extent I consider that his role should be less than that of the principal author(s) of the damage. Having considered the matter carefully, I see no compelling reason to depart from the general principle in this case and accordingly I fix the responsibility of the Seventh respondent certifier, Robert Neil Boler at 20%.

[252] Each of the First, Fourth and Seventh respondents is liable for the entire amount of the owners' losses caused by water ingress and associated damage in relation to the flat handrail surfaces and the wicking of the cladding in the amount of $5,748.14 (See para 247 supra). Each is entitled to a contribution toward that amount from the other tortfeasors according to the relevant responsibilities of the parties for the damage that I have determined above. Therefore I determine that the

respondents' contributions *inter se* in relation to the 'handrail' damage and repairs are as follows:

The First respondent, John Glover	30%	$ 1,724.44
The Fourth respondent, Excel	50%	$ 2,874.07
The Seventh respondent, Boler	20%	$ 1,149.63
Total	100%	$ 5,748.14

Inter-storey control joint

[253] I have found the First and the Fourth respondents each liable for the owners' losses caused by water ingress and associated damage in relation to the inter-storey control joint in the amount of $15,188.22.

[254] I am satisfied that it is just and reasonable that the Fourth respondent, the specialist cladding contractor, should bear more responsibility for the loss and damage than the First respondent on the ground that First respondent developer/builder was entitled to rely on the expertise of the specialist cladding contractor whose responsibility it was to carry out the installation of the cladding in accordance with the manufacturer's recommended, approved and recognised practice and in accordance with the building code. I am satisfied that the extent of the liability of the Fourth respondent should be fixed at 60% and the liability of the First respondent at 40%. Each is entitled to a contribution from the other according to the relevant responsibilities of the parties for the damage that I have determined above. Therefore I determine that the respondents' contributions *inter se* in relation to the 'inter-storey control joint' damage and repairs are as follows:

The First respondent, John Glover	40%	$ 6,075.31
The Fourth respondent, Excel	60%	$ 9,112.97
Total	100%	$15,188.28

The apron flashing

[255] I have found the First and the Fourth respondents each liable for the owners' losses caused by water ingress and associated damage in relation to the inter-storey control joint in the amount of $609.62.

[256] I am satisfied that it is just and reasonable that the Fourth respondent, the specialist cladding contractor should bear more responsibility for the loss and damage than the First respondent on the ground that First respondent developer/builder was entitled to rely on the expertise of the specialist cladding contractor whose responsibility it was to carry out the installation of the cladding in accordance with the manufacturer's recommended, approved and recognised practice and in accordance with the building code. I am satisfied that that the extent of the liability of the Fourth respondent should be fixed at 60% and the liability of the First respondent at 40%. Each is entitled to a contribution from the other according to the relevant responsibilities of the parties for the damage that I have determined above. Therefore I determine that the respondents' contributions *inter se* in relation to the 'inter-storey control joint' damage and repairs are as follows:

The First respondent, John Glover	40%	$ 243.85
The Fourth respondent, Excel	60%	$ 365.77
Total	100%	$ 609.62

[257] Accordingly, if each respondent meets his or its obligations under this determination, this will result in the following payments being made by the respondents to the Claimants for special damages:

Location of damage	**1R**	**2R**	**4R**	**6R**	**7R**	**Total damage**
The deck	12,448.38	8,298.92		20,747.30		**41,494.60**
The handrail: Wicking/flat tops Fitting of SS/handrail	 1,724.44 8,622.20		2,874.07		1,149.63	**14,370.34**
Repair and replace SS handrail	7,486.88					**7,486.88**
The inter-storey control joint	6,075.31		9,112.97			**15,188.28**
The apron flashing	243.85		365.77			**609.62**
Total	**36,601.06**	**8,298.92**	**12,352.81**	**20,747.30**	**1,149.63**	**79,149.72**
% of Total	**46**	**10**	**16**	**26**	**2**	**100**

[258] I am satisfied in this case that the justice of the matter will be served if the amount of $10,000.00 that the owners are entitled to recover from the respondents in general damages is apportioned between the tortfeasors according to the extent of the damage I have determined each is responsible for in para 257 above. Therefore I determine that the amount of $10,000.00 that the owners are entitled to recover in general damages shall be apportioned between the tortfeasors as follows:

First respondent	46%	$ 4,600.00
Second respondent	10%	$ 1,000.00
Fourth respondent	16%	$ 1,600.00

Sixth respondent	26%	$ 2,600.00	
Seventh respondent	02%	$ 200.00	
Total		$10,000.00	

[259] To summarise the position therefore, if each respondent meets his or its obligations under this determination, this will result in the following payments being made by the respondents to the Claimants for special and general damages:

First respondent:		
Special damages	$36,601.06	
General damages	$ 4,600.00	
Subtotal	$41,201.06	**$41,201.06**
Second respondent:		
Special damages	$ 8,298.92	
General damages	$ 1,000.00	
Subtotal	$ 9,298.92	**$ 9,298.92**
Fourth respondent:		
Special damages	$12,352.81	
General damages	$ 1,600.00	
Subtotal	$13,952.81	**$13,952.81**
Sixth respondent:		
Special damages	$20,747.30	
Genral damages	$ 2,600.00	

Subtotal	$23,347.30	**$23,347.30**
<u>Seventh respondent:</u>		
Special damages	$ 1,149.63	
General damages	$ 200.00	
Subtotal	$ 1,349.63	**$ 1,349.63**
Total		**$89,149.72**

[260] Accordingly, I determine that the First respondent is entitled to a contribution towards the amount of $83,749.72 (See paras 166 & 258 supra) that the Claimants would otherwise be entitled to obtain from him in damages pursuant to this determination as follows:

- From the Second respondent, Paul Kelly, $8,298.92; and
- From the Fourth respondent, Excel, $12,352.81; and
- From the Sixth respondent, Steven Cook, $20,747.30; and
- From the Seventh respondent, Robert Neil Boler, $1,149.63

[261] The Second respondent is entitled to a contribution towards the amount of $42,494.60 (See paras 175 & 258 supra) that the Claimants would otherwise be entitled to obtain from him in damages pursuant to this determination as follows:

- From the First respondent, John Glover, $12,448.38; and

- From the Sixth respondent, Steven Cook, $20,747.30.

[262] The Fourth respondent is entitled to a contribution towards the amount of $31,768.24 (See paras 189 & 258 supra) that the Claimants would otherwise be entitled to obtain from him in damages pursuant to this determination as follows:

- From the First respondent, John Glover, $16,665.80; and

- From the Seventh respondent, Robert Neil Boler, $1,149.63

[263] The Sixth respondent is entitled to a contribution towards the amount of $44,094.60 (See paras 196 & 258 supra) that the Claimants would otherwise be entitled to obtain from him in damages pursuant to this determination as follows:

- From the First respondent, John Glover, $12,448.38; and

- From the Second respondent, Paul Kelly, $8,298.92

[264] The Seventh respondent is entitled to a contribution towards the amount of $14,570.34 (See paras 216 & 258 supra) that the Claimants would otherwise be entitled to obtain from him in damages pursuant to this determination as follows:

- From the First respondent, John Glover, $10,346.64; and

- From the Fourth respondent, Excel, $2,874.07

COSTS

[265] The owners claim to have incurred legal costs in the amount of $3,500.00 and have sought a determination that their legal costs be met by one or more of the respondents in these proceedings.

[266] 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.

[267] 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.

[268] I have carefully considered the owners claim for costs, however, I am not persuaded that any party has acted in bad faith, or that its case was without substantial merit such that an award of costs would be appropriate in this case.

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

CONCLUSION AND ORDERS

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

[a] The First respondent is in breach of the duty of care owed to the Claimants is liable to the Claimants in damages for the loss caused by that breach in the sum of $83,749.72.

[b] The Second respondent is in breach of the duty of care owed to the Claimants and is liable to the Claimants in damages for the loss caused by that breach in the sum of $42,494.60.

[c] The Fourth respondent is in breach of the duty of care owed to the Claimants and is liable to the Claimants in damages for the loss caused by that breach in the sum of $31,768.24.

[d] The Sixth respondent is in breach of the duty of care owed to the Claimants and is liable to the Claimants in damages for the loss caused by that breach in the sum of $44,094.60.

[e] The Seventh respondent is in breach of the duty of care owed to the Claimants and is liable to the Claimants in damages for the loss caused by that breach in the sum of $14,570.34.

[f] The claim against the Eighth respondents fails and I make no order against them.

[g] As a result of the breaches referred to in [a], [b], [c], [d] and [e] above, the First respondent on the one hand and the Second, Fourth, Sixth and Seventh respondents on the other hand are joint tortfeasors.

[h] As a result of the breaches referred to in [b] and [d] above, the Second and Sixth respondents are concurrent tortfeasors.

[i] As a result of the breaches referred to in [c] and [e] above, the Fourth and Seventh respondents are concurrent tortfeasors.

[j] As between the First respondent on the one hand and the Second respondent on the other hand, the First respondent is entitled to a contribution from the Second respondent for the same loss that each has been found liable for being $8,298.92.

[k] As between the First respondent on the one hand and the Fourth respondent on the other hand, the First respondent is entitled to a contribution from the Fourth respondent for the same loss that each has been found liable for being $13,352.81.

[l] As between the First respondent on the one hand and the Sixth respondent on the other hand, the First respondent is entitled to a contribution from the Sixth respondent for the same loss that each has been found liable for being $20,747.30.

[m] As between the First respondent on the one hand and the Seventh respondent on the other hand, the First respondent is entitled to a contribution from the Seventh respondent for the same loss that each has been found liable for being $1,149.63.

[n] As between the Second respondent on the one hand and the First respondent on the other hand, the Second respondent is entitled to a contribution from the First respondent for the same loss that each has been found liable for being $12,448.38.

[o] As between the Second respondent on the one hand and the Sixth respondent on the other hand, the Second respondent is entitled to a contribution from the Sixth respondent for the same loss that each has been found liable for being $20,747.30.

[p] As between the Fourth respondent on the one hand and the First respondent on the other hand, the Fourth respondent is entitled to a contribution from the First respondent for the same loss that each has been found liable for being $16,665.80.

[q] As between the Fourth respondent on the one hand and the Seventh respondent on the other hand, the Fourth respondent is entitled to a contribution from the Seventh respondent for the same loss that each has been found liable for being $1,149.63.

[r] As between the Sixth respondent on the one hand and the First respondent on the other hand, the Sixth respondent is entitled to a contribution from the First respondent for the same loss that each has been found liable for being $12,448.38.

[s] As between the Sixth respondent on the one hand and the Second respondent on the other hand, the Sixth respondent is entitled to a contribution from the Second respondent for the same loss that each has been found liable for being $8,298.92.

[t] As between the Seventh respondent on the one hand and the First respondent on the other hand, the Seventh respondent is entitled to a contribution from the First respondent for the same loss that each has been found liable for being $10,346.64.

[u] As between the Seventh respondent on the one hand and the Fourth respondent on the other hand, the Seventh respondent is entitled to a contribution from the Fourth respondent for the same loss that each has been found liable for being $2,874.07.

[v] As a result of the breaches referred to in [a], [b], [c], [d] and [e] above, the gross entitlement of the Claimants is $89,149.72.

Therefore, I make the following orders:

(1) The First respondent, John Glover is liable to pay the Claimants the sum of $83,749.72.

(s42(1))

(2) The Second respondent, Paul Kelly, is liable to pay the Claimants the sum of $42,494.60.

(s42(1))

(3) The Fourth respondent, Excel Coatings Limited, is liable to pay the Claimants the sum of $31,768.24.

(s42(1))

(4) The Sixth respondent, Steven Cook, is liable to pay the Claimants the sum of $44,094.60.

(s42(1))

(5) The Seventh respondent, Robert Neil Boler, is liable to pay the Claimants the sum of $14,570.34.

(s42(1))

(6) In the event that the First respondent, John Glover, pays the Claimants the sum of $83,749.72, he is entitled to a contribution of $9,298.92 from the Second respondent, $13,952.81 from the Fourth respondent, $23,347.30 from the Sixth respondent and $1,349.63 from the Seventh respondent in respect of the amount which the First respondent on the one hand and the Second, Fourth, Sixth and Seventh respondents on the other hand have been found jointly liable for breach of the duty of care.

(s29(2)(a))

(7) In the event that the Second respondent, Paul Kelly, pays the Claimants the sum of $42,494.60, he is entitled to a contribution of $12,448.38 from the First respondent and $20,747.30 from the Sixth respondent in respect of the amount which the Second respondent on the one hand and the First and Sixth respondents on the other hand have been found jointly liable for breach of the duty of care.

(s29(2)(a))

(8) In the event that the Fourth respondent, Excel Coatings Limited, pays the Claimants the sum of $31,768.24, it is entitled to a contribution of $16,665.80 from the First respondent and $1,149.63 from the Seventh respondent in respect of the amount which the Fourth respondent on the one hand and the First and Seventh respondents on the other hand have been found jointly liable for breach of the duty of care.

(s29(2)(a))

(9) In the event that the Sixth respondent, Steven Cook, pays the Claimants the sum of $44,094.60, he is entitled to a contribution of $12,448.38 from the First respondent and $8,298.92 from the Second respondent in respect of the amount which the Sixth respondent on the one hand and the First and Second respondents on the other hand have been found jointly liable for breach of the duty of care.

(s29(2)(a))

(10) In the event that the Seventh respondent, Robert Neil Boler, pays the Claimants the sum of $14,570.34, he is entitled to a contribution of $10,346.64 from the First respondent and $2,874.07 from the Fourth respondent in respect of the amount which the Seventh respondent on the one hand and the First and Fourth respondents on the other hand have been found jointly liable for breach of the duty of care.

(s29(2)(a))

(11) Each party shall bear its own costs and expenses in this matter.

(s43(2))

[271] To summarise the position therefore, if all respondents meet their obligations under this determination, this will result in the following payments being made forthwith:

To the Claimants by:		
The First respondent	$41,201.06	
The Second respondent	$ 9,298.92	
The Fourth respondent	$13,952.81	
The Sixth respondent	$23,347.30	
The Seventh respondent	$ 1,349.63	
	$89,149.72	$89,149.72
Total amount of this determination:		**$89,149.72**

Dated this 28th day of September 2006

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.