

**CLAIM NO: 363**

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

**IN THE MATTER** of an adjudication

**BETWEEN** **GLEN COLIN TONKS**

Claimant

**AND** **KEVIN WAYNE STONE**

First Respondent

**AND** **DAVID HOPPER**

Second Respondent

**AND** No third respondent BLS  
Consulting Ltd having been  
struck out

**AND** **CHRISTCHURCH CITY  
COUNCIL**

Fourth Respondent

**Hearing:** 10 May 2005

**Appearances:** Glen Tonks, the Claimant in person  
Ben Walker, for the Claimant  
No appearance by or on behalf of the First Respondent  
David Hopper, the Second Respondent in person  
Neil Eade, on behalf of the Fourth Respondent  
Mike Anticich, Assessor appointed by WHRS

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**DETERMINATION**  
**(Dated 14<sup>th</sup> July 2005)**

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## **1. BACKGROUND**

- 1.1 On 18 November 2002 the claimant made application to the Weathertight Homes Resolution Service (WHRS) under the Weathertight Homes Resolution Services Act 2002 (the Act) in respect of their property at 37A Wairoa Street Christchurch.
- 1.2 An assessor's report dated 25 March 2003 was provided by Mike Anticich of AA House & Property Checks Ltd Ltd pursuant to s10 of the WHRS Act.
- 1.3 The claim was accepted pursuant to s7 of the WHRS Act.
- 1.4 The Claimant made application pursuant to s26 of the Act for the matter to be referred to adjudication.
- 1.5 I was assigned the role of adjudicator pursuant to s27 of the Act.
- 1.6 A preliminary conference was held on 22 November 2004 by teleconference. The preliminary conference set down the procedures for the adjudication process and timetabling.

The persons connected to the teleconference were:

- Glen Tonks – Claimant
- Ben Walker, counsel for the Claimant
- Kevin Stone, First Respondent
- David Hopper, Second Respondent
- Brian Spence, Third Respondent
- Richard Raymond, counsel for the Third Respondent
- Paul Robertson, counsel for the Fourth Respondent

1.7 By Procedural Order No. 2 dated 22 November 2004 the Third Respondent was struck out as a party to the adjudication proceedings.

1.8 A further preliminary conference was held on 15 February 2005 by teleconference

The persons connected to the teleconference were:

- Glen Tonks & Vickie Crawford, Claimants
- Ben Walker, counsel for the Claimant
- Ian Kearney, solicitor for the First Respondent
- David Hopper, Second Respondent
- Neal Eade for the Christchurch City Council, Fourth Respondent
- Paul Robertson, counsel for the Fourth Respondent

1.9 A further preliminary conference was held on 18 March 2005 by teleconference

The persons connected to the teleconference were:

- Ben Walker, counsel for the Claimant
- Dean Russ, counsel for the First Respondent
- Paul Robertson, counsel for the Fourth Respondent

- 1.9 On 6 May 2005 the claim against the Christchurch City Council, the Fourth Respondent was discontinued by the Claimant as the matter was settled between them.
- 1.10 A hearing was conducted before me which commenced at 9.30am on 10 May 2005. The hearing was held at the Copthorne Hotel, Durham Street, Christchurch.
- 1.11 The parties that were present or represented from the outset of the hearing were:
- The Claimant Glen Tonks
  - Counsel for the Claimant, Ben Walker
  - The Second Respondent, David Hopper
  - For the Third Respondent Christchurch City Council, Neil Eade
- 1.12 Mr Kevin Stone, the First Respondent was not present or represented at the hearing. I explained the situation regarding a party that does not participate in the proceedings and referred to ss.37 and 38 of the Act.
- 1.13 Parties that appeared as witnesses and gave evidence under oath or affirmation were:
- Glen Tonks - Claimant
  - David Hopper – the Second Respondent
  - Neil Eade –for Fourth Respondent
- 1.14 Parties that appeared as expert witnesses or were called by me to assist the tribunal were:
- Mike Anticich – WHRS appointed Assessor

- 1.15 At the commencement of the hearing I outlined my powers under the Act and I would endeavour to relax the rules of evidence and assist the parties in presenting the facts and allow them to question the other parties in an informal way. I would however be maintaining the principles of natural justice.
- 1.16 The question of an inspection of the property was discussed at the commencement of the hearing and an inspection was made by the Adjudicator who was accompanied by those attending the hearing.
- 1.17 During the hearing I advised that the Responses to the Notice of Adjudication and the replies to the responses were a matter of record and I would refer to them if required. I invited the parties to make any comment on the content of those documents.
- 1.18 Mr Hopper when invited to give any oral evidence produced a comprehensive report including copies of drawings. Mr Hopper acknowledged that the report should have been sent to WHRS prior to the hearing but he had not sent it as he was stubborn on the point that he considered any action against him was time barred. Mr Walker objected to admission of the report as evidence. I was not prepared to deny Mr Hopper the opportunity to speak and reading the report was the easiest way for him to
- 1.19 All parties who attended the hearing were given the opportunity to present their submissions and evidence and to cross examine all of the witnesses.
- 1.20 Mr Eade and Mr Walker made closing submissions.

## **2. THE PROPERTY**

- 2.1 The dwellinghouse is situated at 37A Wairoa Street, New Brighton, Christchurch and is owned and occupied by the claimant the owner.

- 2.2 A building permit was issued dated 25 November 1992. The completion date is unknown and no Code Compliance Certificate has been issued as the work was carried out under a building permit.
- 2.3 Construction was from mid 1993 to late 1994.
- 2.4 The builder/developer was Mr Kevin Stone and Mr Stone is the First Respondent
- 2.5 The property was purchased by the Claimant in December 1998
- 2.6 The construction of the house is concrete slab foundations, timber framing solid plaster exterior cladding, part aluminium and part timber windows and long run galvanised roofing.

### **3. THE CLAIM**

- 3.1 The claim as stated by Counsel for the Claimant “*relies on the assessor’s report prepared by Mr Anticich, dated 25 March 2003.*”
- 3.2 The Assessor’s report lists as Cause(s)

*“The cause(s) of the water entering the dwelling house is/are as follows:*

- 1) Difficult design, particularly with regard to the lack of properly-designed parapet and balcony barrier flashings.*
- 2) The location, which is relatively exposed to easterly and southerly storms.*
- 3) Poor workmanship generally with specific regard to the solid plaster walls*
- 4) The use of a solid plaster monolithic cladding system which does not have any exposed or concealed flashings at most of the window or door jambs or*

*at head or sills and is therefore dependent solely on a thin skin of paint and plaster to maintain water tightness.*

- 5) *A major problem with this type of cladding is the lack of drainage in the cladding system to allow moisture to escape should it penetrate the exterior cladding.*

*Following our inspection of this property we conclude that there are several large areas which are extremely or highly leak-prone and where modification is required. In the majority of cases, the existing and impending moisture problems relate to poor or inadequate or inept flashing practice.”*

- 3.3 The Assessor’s report lists the damage as:

*“The nature and extent of any damage caused by the water entering the dwellinghouse is serious where the internal lining was removed in the upstairs bathroom below the window. This window is certainly the worst-fitted window, being glass block, but there is clear evidence of similar widespread damage throughout the house as all windows will, and apparently do, leak to some degree.*

*Some minor repairs have already taken place, but these repairs have not addressed the major weathertightness issues that are causing the leaks.”*

- 3.4 The Addendum to the Assessor’s report states:

*“There has definitely been further deterioration of the external envelope and some additional internal damage to the dwelling.”*

- 3.5 The Assessor’s report lists the repairs as:

*“The work needed to make the dwellinghouse watertight and repair that damage is as follows:*

*The entire solid plaster exterior cladding needs to be removed and replaced with a full cavity EIFS exterior cladding system.*

*A fully approved flashing system needs to be put in place around all windows and doors.*

*The tops of all parapet walls need to be thoroughly flashed with a watertight material such as Protectowrap Jiffy seal 500, followed by Protecto tape prior to over plastering with elastomeric cement modified polymer plaster applied by EIFS applicators.*

*The poorly-applied butynol prickle flashings need to be correctly flashed with matching profile roofing material.*

*All the very awkward flashing of rounded junctions between walls and roofs and skylights and the like need to be flashed by an experienced plumber as considerable thought and care is required to ensure weathertightness at these difficult points. Conventional flashing materials will not be able to effect weathertightness due to the curved shapes of the walls and roof skylight and the trapezoidal-section roofing.*

*Of particular concern is the need to design a satisfactory flashing and choice of roofing material at the semi-circular skylight which is a very high-risk area and is leaking badly at present.*

*Remove, re-design and re-construct the two balconies so as to remove the high leak potential of the existing poor balcony design.”*

- 3.6 The Assessor's report included estimated costs of repairs. During the interlocutory proceedings I directed the Assessor, if in his opinion it was necessary, to prepare an updated report. The Assessor prepared an addendum to his report which included updated photographs and updated estimated costs of repair work.



- 3.7 There was some confusion as to whether the claim against the First Respondent was a claim under contract. The claim by the Claimant against the First Respondent Mr Kevin Stone relies on the assessor's report and it is submitted by the Claimant that the majority of the liability for the damage to the property rests with the builder. The cause of action can be deduced from the 'Reply of Claimant to Responses by Respondents' dated 17<sup>th</sup> March 2005 at paragraph 10. *"The First Respondent owed a duty of care to the Claimant to build the house in accordance with the building permit. This was not done."* And at paragraph 21 *"The Claimant claims against the First Respondent in tort. The claim is based on the fact that the builder was negligent in constructing the property in question."* This is reinforced in the 'Case for the Claimant' dated 6<sup>th</sup> May 2005 at paragraph 14. *"Case law has been provided to the Weathertight Homes Resolution Service in the responses, in support of the legal position that a builder and designer owe a duty of care to future owners. Mr Stone and Mr Hopper owed a duty to Mr Tonks when he purchased the property, and after."*
- 3.8 The claim by the Claimant against the Second Respondent David Hopper, the designer of the dwellinghouse, is not specific and is based on the Assessor's report. The 'Reply of Claimant to Responses by Respondents' dated 17<sup>th</sup> March 2005 at paragraph 35 states: *"Mr Hopper was identified as a party to the claim by the Assessor. Mr Anticich has identified poor design as part of the reason for damage which has occurred on the property. It is on that basis that the Claimant makes claim upon the Second Respondent."* As noted in the preceding paragraph the 'Case for the Claimant' dated 6<sup>th</sup> May 2005 at paragraph 14 it is submitted that Mr Hopper owed a duty of care to future owners.
- 3.9 I have to review the facts as presented in the evidence to answer the following questions:
- Does the building leak?
  - What is the probable cause of the leak?
  - What damage has been caused by the leak?
  - What remedial work is required
  - At what cost?

- 3.10 The cause of the leaks and the resulting damage are predominantly related (1) to the exterior cladding and the openings therein or at the edges of the cladding, or (2) the roof. I will therefore answer the questions in relation to the exterior cladding and the edges thereof and in relation to the roof.
- 3.11 The majority of the repair work noted in the Assessor's report is related to the exterior envelope and the roof, however there is mention of replacement of the balconies which I consider may be partly outside the scope of the provisions of the WHRS Act and I will deal with that separately.

#### **4. EXTERIOR CLADDING**

- 4.1 The exterior cladding has defects including; there are extensive and random cracks in the plaster; the plaster/window and door junctions have opened up; plaster/other materials junctions have opened up; the plaster has been carried down past the bottom of the bottom plates to the exterior wall framing; and penetrations to the cladding are not properly sealed
- 4.2 The plaster cracking is not damage as a consequence of a leaky building but I am satisfied from the evidence that the cracking to the plaster and the movement at openings and edges is such that water has penetrated the outermost building element designed to prevent water ingress. There is evidence from moisture testing that there were isolated areas of higher than normal moisture levels and the moisture testing done by the Assessor when he re-visited were extremely high. From my personal observations of the damage at internal areas the damage is as a result of water penetration.
- 4.3 There are many cases of inadequate flashings around the windows and doors including; lack of flashings at the semi-circular windows; lack of head flashings or the head flashings not extending to the ends; opening of laps in the flashing; and the poor workmanship at the junction of the cladding and the glass block windows all are contributing to the moisture penetration into the walls or directly into the interior of the dwellinghouse.

- 4.4 As well as the photographs in the Assessor's report a physical inspection identifies the damage as a result of moisture penetration that has occurred to the reveals to various windows and doors, to finishing timbers such as architraves and skirtings. The Assessor's report photographs 41 to 46 establish that there has been damage to the timber wall framing and plywood lining as a result of the moisture penetration and that it is getting worse.
- 4.5 I am satisfied that the moisture penetration through the external envelope results in the building being classified as a leaky building.

## 5. ROOF

- 5.1 The Assessor's report notes that the Claimant advised that as a result of serious leakage into the main bedroom ceiling, a plumber was employed by the owner to fix flashings to the roof directly above the main bedroom to remedy this problem. Remedial work commenced on August 2002. The Claimant in his evidence states: *I did not discover any major problems until 2002. I noticed leaking in 1999 but had no idea of the seriousness of it. I used sealants to undertake minor "patch up work". In 1999 I engaged a plumber to undertake some sealant work on the parapet above the bathroom. This was not identified as a major problem at the time.*"

- 5.2 Significant items in relation to the Roofing mentioned in the Assessor's report are:

*"The twin-wall polycarbonate roofing (i.e. the middle section on the semi circular roof) has been pitted with innumerable hailstone holes. It may be that this panel was inserted upside down as one side is UV-protected and the other is not. The adjoining panels to the left and right were in pristine condition."*

*Staining at various parts on the underside of the Lounge ceiling.*

*Leaks have also occurred at the top left and right of the Velux skylight window....”*

*Six items under the heading Flashing*

*One item under the heading Rainheads*

*Four items under the heading Roof.”*

- 5.3 The Assessor’s report contains many photographs of the roof, especially roof parapet junctions, which show defective flashing work. From my personal observations during the inspection I am satisfied that there is defective flashing work to the roofing that enables moisture penetration and contributes to the dwellinghouse being a leaky building.

## **6. REMEDIAL WORK AND COST**

- 6.1 The Assessor lists in his report the repair work that he considers necessary and I have stated that at paragraph 3.5 above. The Assessor in the addendum to his report states that: *“There has been further deterioration of the external envelope and some additional internal damage to the dwelling. It is clearly apparent that a re-clad is required as soon as possible to avoid more substantial repairs.”*
- 6.2 The poor state of the solid plaster finish to the walls and parapets, the lack of and inadequate flashings around windows and doors, the poorly flashed roofing, the rotten finishing timber and timber windows, the water damage to the internal wall linings and the evidence of rotten timber framing in the walls are all very evident and are a state of fact. I accept that the repairs as outlined in the Assessors report are necessary, except for the rebuilding of the balconies.
- 6.3 I do accept that the junction of the deck with the house is suspect and water may be penetrating where the joists are cantilevered. This can be remedied by adequate flashing when the exterior cladding is replaced and I will include for that when I assess costs of remedial work.

- 6.4 The evidence on the scope of repairs was not challenged. The Second Respondent in his informal submission presented later in the hearing suggests similar items to those mentioned in the Assessor's report and in the Plasterpride quotation, except Mr Hopper's opinion was that new solid plaster 22mm thick with galvanised steel reinforcement on building paper was the appropriate finish rather than an EIFS system. Mr Hopper also considered that the balconies did not need to be rebuilt.
- 6.5 The Assessor's report dated 25 March 2003 included estimates of the cost of repairs totalling \$53,500.00 which included rebuilding of the two balconies but excluded scaffolding, replacement of the curved head windows, replacement of rotten timber, internal work and other consequential work. The revised costings as a result of the Addendum to the Assessor's report are an estimate of approximately \$82,132.00 but that estimate excludes scaffolding, replacement of curved head windows, internal work and other consequential work.
- 6.6 The Claimant had agreed with the scope of repairs in the Assessor's report and Mr Tonks had included as part of his brief of evidence copies of a quotation of \$47,819.25 from QA Plastering Solutions for new cladding using Rockcote's EPS 40mm with battens plaster system, and a quotation of \$12,656.25 from Concut for removing the existing solid plaster system. There were no figures provided for other work such as flashings, window replacement, scaffolding, roofing repairs, cappings, timber framing replacement, finishing timber replacement, wall lining repairs and redecoration. With the 'Additional Brief of Evidence' of Mr Tonks updated costings were provided for the work that was considered necessary now to repair the damage as a result of the weathertightness issues. A quotation was provided of \$139,711.50 from Plasterpride (NZ) Ltd for the complete re-clad of the exterior, repairs to roofing replacement of curved head windows and glass blocks, allowances for replacement of rotten timber framing and plywood, repairing plasterboard linings, skirtings and architraves and rebuilding two balconies.

6.7 The updated quotation excludes provisional sums for parts of the work. The sums are \$7,875.00 for rebuild two balconies, \$11,812.50 for replacing timber framing and plywood bracing/sublining, \$9,000.00 to replace roof flashings and re-design skylight etc; and \$3,375.00 for repair to plaster board linings, replace skirtings and architraves. The extent of the provisional sums has the effect of making the quotation an estimate. I consider the allowances are reasonable therefore I consider that the quotation/estimate is a reasonable assessment of the cost of repairs.

6.8 The quotation/estimate states:

*“No allowance has been made for the following requirements:*

- Building consent/application or payment thereof*
- Testing of timber etc*
- Landscaping – protection of existing flora. We strongly recommend that all plants be removed and temporarily replanted elsewhere away from the building works*
- Electrical – Disconnection and reinstatement of light fittings, alarms etc*
- Plumbing – Removal and reinstatement of plumbing and waste pipes and re-flashing.*
- Unforeseen work – including any additional building code or local body requirements, additional framing or straightening, bracing, flashings, etc as may be required after the stucco and building paper is removed.*
- Repair or repaint fascia, gutters or down pipes*
- Repaint timber work including balconies, doors or door frames etc.”*

6.9 The Respondents did not put forward any alternative cost information in their evidence.

6.10 I have already found that the rebuilding of the balconies should not be part of the repair work. I consider an allowance of \$562.50 should be included for the work required to ensure the penetrations for the balcony framing are weathertight is sufficient and the allowance of \$7,875.00 for the rebuild should be excluded. Most of the exclusions to the Plasterpride quotation will most likely result in cost

to the Claimant as part of the repair costs but the Claimant has not claimed for an allowance for the exclusions or for any cost of professional fees, administration and supervision. I am reluctant to allow costs of repair that have not been claimed. There will be betterment as a result of carrying out the repair work. The issue of mitigation of loss has been raised but not betterment. As with the failure to claim all of the likely repair and consequential costs I am reluctant to make adjustment for betterment. I accept the quotation as provided by Plasterpride is as accurate an estimate as I can expect for the repair work and I will use it as the base to set the value of the repair work

- 6.11 The Claimant should not benefit twice from part settlement and I have taken into account the settlement agreement between the Claimant and the Fourth Respondent when setting the values for any liability of the respondents.

## **7. LIABILITY**

### **7.1 The First Respondent, Kevin Wayne Stone**

7.1.1 The claim against the First Respondent is a claim in tort for a breach of duty of care to subsequent owners of the dwellinghouse.

7.1.2 Mr Stone was the builder of the dwellinghouse and this was not disputed.

7.1.3 The subcontractors involved, if there were any, in the building of the house have not been identified and the First Respondent did not seek to join any other parties to the adjudication. As the builder Mr Stone must accept responsibility for the building.

7.1.4 The existence of a duty of care has been clearly established in New Zealand and the 'Reply of the Claimant to Responses by Respondents' cites the decision in *Chase v De Groot* [1994] 1 NZLR 613. There are other authorities but I accept *Chase v De Groot* as sufficient authority and the facts in this case are sufficiently similar that I conclude that Mr Stone did have a duty of care in tort to the Claimant to take reasonable care to

build the house in accordance with the building permit and relevant Acts regulations and territorial by laws at the time.

7.1.5 I am convinced from the evidence that the external envelope and the roof flashings were so poorly constructed and not in accordance with the details on the drawings or in accordance with the regulations that they caused major leaks and Mr Stone breached that duty of care.

7.1.6 In defence to the allegations of breach of duty Mr Stone denies any liability in his Responses to the Adjudication claim. Both the Claimant and the Fourth Respondent replied to the responses in a similar manner and the Fourth Respondent summarises the Responses from Mr Stone as:

*“Mr Stone denies liability to the claimant on the basis:-*

*The house was built for his own use and not for resale.*

*The house was not leaking when sold*

*The house was built in accordance with ‘technologies of the time.*

*The house was inspected by the Christchurch Council.*

*The property was sold “as is where is” and he refers to the agreement for sale and purchase as altered. “*

The replies from the Claimant and Fourth respondent to these heads of defence are:

7.1.7 The First Respondent also claimed contributory negligence and failure to mitigate losses by the Claimant.

7.1.8 I will deal with the defences raised under the headings referred to above.



### **House built for own use and not for resale**

7.1.9 In his Response to the Adjudication claim he states “*The house was supposed to stay in the family indefinitely. The house was not leaking when sold to claimant*”.

7.1.10 Counsel for the Claimant and the Fourth Respondent refer to the decision in *Chase v De Groot* and I have already decided that Mr Stone breached his duty of care to take reasonable care to build the house in accordance with the building permit and relevant Acts regulations and territorial by laws at the time and will attract liability to the Claimant. The fact that Mr Stone built the house for his own use is no defence to a breach of that duty of care

### **The house was not leaking when it was sold**

7.1.11 Again I have already decided that Mr Stone breached his duty of care to take reasonable care to build the house in accordance with the building permit and relevant Acts regulations and territorial by laws at the time and will attract liability to the Claimant. The fact that the house was not leaking when sold is no defence to a breach of that duty of care to future owners.

### **The house was built in accordance with ‘technologies of the time.**

7.1.12 Counsel for the Claimant and the Fourth Respondent refer to the decision in *Roy v Thiessen* [2003] SKQB 249 and in the ‘Reply to Responses by Respondents’ from the Fourth Respondent cites relevant passages from that decision. The facts are similar enough to this case and at paragraph 36 of that decision states: [36] *I am further satisfied that persons lacking the necessary skill or ability to comply with the requisite standards, must either refrain from undertaking the construction of a building or retain the services of a competent person to supervise and ensure each facet of the construction meets the requisite standards...*” I have no reason to distinguish that situation from the situation in this claim.

The house may have been built to the standards and technologies of the time but the fact is it was built in a sub-standard way.

**The house was inspected by the Christchurch City Council**

7.1.13 Counsel for the Claimant submitted that the First Respondent can not rely on the fact that the property was inspected by the council as a defence.

7.1.14 In the 'Reply to Responses by Respondents' from the Fourth Respondent it is submitted that "*A person in the position of a builder or taking responsibility for the construction of a house cannot excuse his or her own negligence by referring to the involvement of the Council.*" and cites as authorities *Anns v Merton London Borough Council* [1977] 2 All ER 492 and *J W Harris & Son Limited v Demolition & Roading Contractors (NZ) Limited* [1979] 2 NZLR 166. I accept those submissions and I will deal with the issue of any liability of the Fourth Respondent later

**The property was sold "as is where is"**

7.1.15 In the First Respondent's second 'Response By First Respondent' to the notice of adjudication at paragraph 4 it is submitted "*The claim against the First Respondent can only be in contract as the Claimant contracted with the First Respondent to purchase the property.*" The First Respondent relies on a Further Term of Sale in the Sale and Purchase Agreement at Clause 18 that:

*"The purchaser acknowledges that the Pool on the property has no compliance permit and that the property requires some finishing work. He accepts these facts without further obligations to the vendor and the price agreed reflects this"*

The First Respondent's second 'Response By First Respondent' to the notice of adjudication at paragraph 9 states: "*No claim in tort can exist against the First Respondent as the law of tort will not duplicate duties in standards agreed to apply in contract by the parties.*"

7.1.16 The Claimant in the 'Reply of Claimant to Responses by Respondents' at paragraph 21 states "*The Claimant claims against the First Respondent in*

*tort. The claim is based on the fact that the builder was negligent in constructing the property in question.”*

7.1.17 The principle of a concurrent liability in tort and contract is well established in New Zealand and I consider that in the various decisions that support that principle there are similar cases such as *Riddell v Porteous* that would apply to this claim. I find that the Claimant has a cause of action in tort.

7.1.18 The First Respondent's second 'Response By First Respondent' to the notice of adjudication at paragraph 10 states: *Even if a claim could be formulated by the Claimant in tort, that claim is clearly abrogated by the express acknowledgement by the Claimant, as purchaser, that the property was not finished and required further work.”*

7.1.19 The evidence presented established that the unfinished work was of a very minor nature and that clause 18 referred primarily to the swimming pool which the Claimant had removed shortly after taking possession. The swimming pool was separate from the house and the nature of the unfinished work was not related to the latent problems that have now eventuated. The work that is the subject of the claim was completed at the time of the sale and purchase agreement. I find that the claim is not abrogated by the wording of clause 18 of the sale and purchase agreement.

### **Contributory Negligence**

7.1.20 The First Respondent in the second 'Response by First Respondent' alleges contributory negligence by the Claimant on the grounds that the Claimant was on express notice that finishing work was required and failed to properly inspect the property at the time, and by failing to undertake due diligence of the Council's file in relation to the work yet to be undertaken.

7.1.21 From the evidence the list of finishing work that was uncompleted was of minor items of finishing work and have no connection whatsoever with the subject matter of this claim . It is submitted by Counsel for the Claimant that the Claimant had little or no knowledge of building matters and I accept that as correct and relevant.

7.1.22 As regards the allegation of failure to undertake a due diligence exercise of the Council's files I accept the evidence of Mr Tonks that his discussions with the real estate agent on the uncompleted work was not such that it should have alerted him to make further enquiries and I am persuaded that there is nothing on the list of works uncompleted that would suggest any potential problems with the dwellinghouse. The last paragraph of Mr Tonk's brief of evidence sums it up "*When I purchased the house , I relied on the LIM report, I trusted the builder and architect and had no reason to believe that I would find myself in the predicament I am currently in.*" I do not find that the actions or omissions of the Claimant contributed to the situation.

### **Mitigation of Loss**

7.1.23 The First Respondent in the second 'Response by First Respondent' alleges the Claimant failed to mitigate any alleged damage on the grounds that the Assessor's report provides that the house has not been properly maintained and that only minor remedial work has been undertaken to the property.

7.1.24 Mr Tonks gave evidence that He first noticed leaking in 1999 but had no idea of the seriousness of it and it was not until 2002 when he discovered that much of the structure was literally rotting away. I was impressed with the genuineness of the evidence given by Mr Tonks and I accept that he is a lay person when it comes to building and that it was reasonable in the circumstances for him to take the stop gap measures that he did.

7.1.25 The Assessor in his addendum to his report states "It is clearly apparent that a re-clad is required as soon as possible to avoid more substantial

repairs.” That is correct as during inspection it was evident that the all round delamination of the solid plaster was going to result in a total failure of the external cladding. However the repair work required is substantially the same as that which was required at the time of the initial Assessor’s report. Had the Claimant carried out any major maintenance work it would have been of little effect and I find that the loss now is the same as when the Claimant first realised there was a major problem. The Claimant has not failed to mitigate any loss.

## 7.2 The Second Respondent, David Hopper

7.2.1 The “Case for the Claimant’ states that *“The Claimant relies on the assessor’s report”* and *“At this point the Second Respondent’s liability has been identified by the assessor in terms of the preparation of the plans and specifications and there may be further liability with regard to the relationship between the architect and the builder once construction was underway.”*

7.2.2 The Claimant did not present any other evidence to establish any breach of duty of care by the Second Respondent.

7.2.3 The First Respondent chose not to participate in the hearing. Neither the initial or the second ‘Response by First Respondent’ to the notice of adjudication mention the Second Respondent.

7.2.4 The only references in the Assessor’s report that can be considered are in relation to design are;

*The design and execution of the shower installation is well below par.*

*The same poor flashing detail observed in the semi-circular lounge window exists on the dining room window also*

*The incorrect flashing detail at the base of the south wall has been employed on all sides of the dwelling.*

*Highly suspect detail where cantilevered joists support the balcony decking.*

*There is a highly suspect flashing detail where trapezoidal-section roof butts into curved parapet wall above the semi-circular windows.*

*Difficult design, particularly with regard to lack of properly-designed parapet and balcony barrier flashings.*

- 7.2.5 Mr Hopper in his evidence advised that his plans were fully detailed and that he finished his plans in October 1992 and they were passed by the council when granting the permit in November 1992. This was not disputed. Mr Hopper also confirmed that he was not engaged to supervise the construction and that the builder made changes to the building from the plans without consulting him.
- 7.2.6 Mr Hopper in his written submissions tabled at the latter part of the hearing confirms his oral evidence and states: *“The builder/owner disregarded many important details on my plans and changed major items. He decided to tackle jobs that he should have got qualified tradesman to handle”*. Attached to the written submissions are a set of plans which have many details different to the actual construction and had they been followed by the builder the building would not have deteriorated to the extent it has as the drawings show proper flashing details, metal cappings to the parapets and the balconies at a lower level than the floor of the house.
- 7.2.7 Mr Walker in his closing submissions acknowledged that after giving consideration to the submissions from Mr Hopper that Mr Hopper was largely absolved from liability.

7.2.8 I have no doubt whatsoever that the building was adequately designed and it is not the design that is at fault but the deviations from the details on the drawings combined with the poor workmanship by the builder. I find that the Second Respondent has not breached any duty of care and owes no liability to the Claimant or the other respondents can be attached to the Second Respondent.

7.2.9 The Second Respondent raised Section 4 of the Limitation Act, Section 91 of the Building Act and Section 7 of the WHRS Act as a defence and applied to be struck out under Section 34 of the WHRS Act. During the interlocutory period I declined the application to be struck out as I considered it appropriate that the Second Respondent responded to any allegations of liability against him at the hearing.

7.2.10 During the interlocutory period the Fourth Respondent opposed the removal of the Second Respondent not only because he prepared the plans and specifications but also on the grounds that

- b) *Mr Hopper may have been asked to advise on aspects of construction or to certify payments due to builders or other contractors*
- c) *It also behoved Mr Hopper to clearly warn Mr Stone of the need to engage a suitably qualified person to supervise the building work.*
- d) *Even if his involvement ended on 7 October 1992, Mr Hopper will be a concurrent totfeasor with the Council. In that situation, a claim for contribution by the Council can be made pursuant to s 17 of the Law Reform Act. Such a claim can be made at any time; it is not subject to limitation.*

7.2.11 Mr Stone did not attend the hearing and in his Responses has not disputed the claim by Mr Hopper that he was not engaged to supervise the construction. I accept the evidence of Mr Hopper that he had nothing further to do with the house after he handed over the plans.

7.2.12 In support of b) above it was submitted that the case of *Rowlands v Collow* [1992] 1 NZLR 178 was applicable. In that case Justice Ted Thomas held that the engineer involved would have been liable even if the engineer hadn't carried out any site observation/supervision if he had not warned the owners that:

*“ they would need to instruct someone to supervise the work or to take such other steps as he might recommend to ensure that the contractor constructed the driveway property “*

It was submitted that the case concerned an engineer but the point is equally valid for an architect

7.2.13 The Fourth Respondent as they had settled with the Claimant prior to the hearing chose to take a benign role. No evidence was adduced at the hearing to advance the claim that Mr Hopper should have warned Mr Stone and Mr Hopper was not examined on that issue. I consider that it would be wrong to hold Mr Hopper potentially liable for the acts of a builder when he was clearly commissioned only to prepare plans. If the Fourth Respondent had wished to proceed with the claim that Mr Hopper was a concurrent tortfeasor with the Council they should have pursued that claim at the hearing.

### **7.3 Fourth Respondent, Christchurch City Council**

7.3.1 The claim by the Claimant against the Fourth Respondent has been withdrawn. The Fourth Respondent remains as a respondent in the proceedings as their application for removal was declined as they may be a concurrent tortfeasor with the other respondents.

7.3.2 The Fourth Respondent in the 'Response by Fourth Respondent' at paragraphs 22 and 23 claims that it should be indemnified by the First and Second Respondents in respect of any liability it may attract to the claimant. The principle of concurrent tortfeasors applies to all of the



respondents in this claim. The Fourth Respondent acknowledges the concurrent tortfeasor position in paragraph 26 of their 'Reply to Responses by Respondents'.

7.3.3 The Fourth respondent has denied any liability in the 'Response by Fourth Respondent' dated 7<sup>th</sup> February 2005 and in the 'Reply to Responses by Respondents' dated 18<sup>th</sup> February 2005.

7.3.4 The Fourth Respondent has submitted that any claim against the Council is statute barred under Section 91 of the Building Act on the grounds that by Section 91(3) the ten year long limitation period commences on the later of the date of the issue of the building permit or a code Compliance Certificate. The dwellinghouse the subject of this claim was constructed under a building permit therefore a Code Compliance Certificate is not required and will not be issued. The ten years therefore ran from 25 November 1992 and the present claim is statute barred. The claim that was anticipated from the Claimant was an allegation that the Council was negligent during the inspection process and this would be within the ten years period. However there is no claim by the Claimant.

7.3.5 Any claim against the Fourth Respondent is founded in a cross claim by the First Respondent. The initial and second 'Response by First Respondent' to the adjudication claim do not make a claim against the Fourth Respondent. The 'Reply by First Respondent to Other Respondents' Responses' addresses the possible cross claim by the Fourth Respondent against the First and Second Respondents but it does not plead any claim against the Fourth Respondent.

7.3.6 The First Respondent did not attend the hearing to present any evidence to establish that the Fourth Respondent should be liable for any breach of duty of care in carrying out the inspection process. Section 29(2)(a) is discretionary and under the circumstances I am not in a position to make any finding in relation to any liability of the Fourth Respondent to the First Respondent.

## **8. ORDERS**

- 8.1 For the reasons set out in this determination, I make the following orders:
- 8.2 Mr Kevin Wayne Stone, the First Respondent, is ordered to pay to Glen Colin Tonks, the Claimant, the amount of \$114,399.00 inclusive of GST.
- 8.3 No other orders are made and no orders for costs are made.

### **NOTICE**

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

This Determination is dated this 14<sup>th</sup> July 2005.

**G D DOUGLAS**  
Adjudicator