FILE NO: 0092

UNDER The Weathertight Homes Resolution Services Act 2002

IN THE MATTER OF an adjudication

BETWEEN:	**DAVID JOHN WIDDOWSON & ANGELA PHYLLIS WIDDOWSON**
	Claimant
AND:	**PETER FRANCES BEKX**
	First Respondent
AND:	**DEBBIE ANNE BEKX**
	Second Respondent
AND:	**WAIPA DISTRICT COUNCIL**
	Third Respondent
AND	**IAN M STUART**
	Fourth Respondent (REMOVED)
AND	**STUDORP LTD**
	Fifth Respondent

DETERMINATION OF ADJUDICATORS
DATED 15th SEPTEMBER 2004

1.0 Background Summary

1.1 The Claimants made application to Weathertight Homes Resolution Service ("WHRS") pursuant to the Weathertight Homes Resolution Service Act 2002 ("the Act") on the 3rd day of December 2002 in respect of their dwelling house situated at 446 Taylor Avenue, Te Awamutu.

1.2 An Assessors Report dated the 15th day of March 2003 was provided by Pre-view Building Surveyors Limited (Graham Hodgson) pursuant to s10 of the Act.

1.3 The claim was accepted as an eligible claim pursuant to s7 of the Act.

1.4 The Claimants made application pursuant to s26 of the Act for the claim to be referred to Adjudication.

1.5. Pursuant to s27 of the Act the Claim was assigned (on the 30th day of March 2003) to Adjudicator TIMOTHY SCOTT to chair an adjudication assisted by Adjudicator GEORGE DOUGLAS.

1.6. At the time of referral to the Adjudicators there were three Respondents, Peter Frances Bekx, Debbie Ann Bekx and the Waipa District Council. Mr and Mrs Bekx had 'built' the dwelling house with Mr Bekx undertaking the actual construction thereof and subsequently had sold to the Claimants. The Waipa District Council was the Local Authority within which District the dwelling house had been constructed.

1.7. A Preliminary Conference ("PC") was convened on the 27th day of June 2003 and a further Conference was convened on the 19th day August 2003. At the second Conference the claim was referred (at the request of the Claimant and with consent of all Parties) to mediation pursuant to the relevant provisions relating to Mediation of Claims in the Act.

1.8. Mediation in respect of the claim was unsuccessful and as a consequence the Adjudication process which had been adjourned sine die continued.

1.9 In all twenty one Procedural Orders (POs) were issued (pursuant to s36 WHRS Act) and various Applications were dealt with by the Adjudicators. These Applications included Applications for Joinder (s33 the Act), Applications for Removal (s34 the Act), an Application to Transfer to the High Court (s58 the Act) and Applications that the Claim was Time Barred (s91(2) Building Act 1991 and s7(2)(a) the Act). All these Applications were dealt with, and were granted or dismissed (as the case may be) with reasons. The POs should be referred to for detail.

1.10 A Fourth Respondent, Ian M Stuart, who had undertaken design and inspection work relating to the basement and retaining walls was joined. A Fifth Respondent, Studorp Limited, the Manufacturer of the Harditex Monolithic Wall Cladding used on the dwelling was also joined. In due course the Fourth Respondent (Mr IM STUART) was removed (see PO 14). There was an Application to join a further Respondent STEVE MATHERS, the Architect, but this was refused as he could not be located (see PO 11).

2.0 The Hearing in May 2004

2.1 The claim was set down for hearing at the Courthouse in Te Awamutu commencing on Monday the 17th day of May 2004.

2.2 On Friday the 14th day of May 2004 a request for an adjournment was received from Counsel acting for the Third Respondent. The basis of this application was that new evidence of a very substantial nature had been introduced with reply evidence filed on behalf of the Fifth Respondent on Wednesday the 12th day of May 2004. This request for an Adjournment and a subsequent request from Counsel

for the Third Respondent for a Telephone Conference was dismissed by the Adjudicators. Subsequently the Third Respondent obtained an Order from the High Court in Auckland directing the Adjudicators to consider the request for an adjournment. The request was accordingly considered at the commencement of the hearing on Monday the 17th day of May.

2.3 After receiving submissions (both written and verbal) and evidence (written) in support of the application for an adjournment and in opposition to it the Adjudicators granted the application. They directed that the hearing should re-commence at a venue (to be determined) at Te Awamutu commencing Monday the 2nd day of August 2004. The adjournment was granted;

(a) to enable the Third Respondent to respond to the new material contained in the Fifth Respondent's reply evidence.

(b) to enable destructive testing to be undertaken;

(c) to enable the Claimant and the Fifth Respondent to respond to any new issues arising from the destructive testing and/or the responses to be filed by the Third Respondent.

2.4 During the afternoon of Monday the 17th day of May 2004 with the consent of the Claimants the Adjudicators and the Respondents and the expert witnesses (who wished to) undertook an inspection of the dwelling house.

3.0 The Hearing in August 2004

3.1 The hearing was conducted by the Adjudicators at a venue at Te Awamutu namely the Burchell Pavillion, 1 Gorst Avenue, Te Awamutu. It commenced at 10.00 am on Monday the 2nd day of August 2004 and concluded at 6.15 pm on Wednesday the 4th day of August 2004. At the conclusion of the hearing the Adjudicators directed that written closing submissions could be made and were to be received by WHRS by 5.00 pm on Wednesday 11th August. It was agreed by all the Parties that the time limit for determining the

claim (s40(1)(a) the Act) would be extended (s40(1)(b) to allow 35 working days from the time when written submissions were to be received, that is to say until 5.00 pm on Wednesday the 29th day of September 2004. All the Parties were represented at the hearing, in the following manner.

- The Claimants together with their Legal Counsel Ms McTavish and Mr Anderson.

- The First and Second Respondents (who are thought to be in the United Kingdom) were not present but the Second Respondent's father Mr Owsley who had represented them on earlier occasions was present. He advised that they had taken legal advice and had decided not to have legal representation. He advised that he was present to "observe" rather than to "take part". The Adjudicators invited him to take part and to ask questions of various witnesses in cross-examination if he wished. Other Respondents agreed to him doing so and he did take part in the proceedings to this extent although his questioning of witnesses was very limited. On that basis the Adjudicators consider that he was present as the Representative of the First and Second Respondents.

- The Third Respondent was represented by its Employee Mr Boys and by its Legal Counsel, Mr Heaney and Ms Rice.

- The Fifth Respondent was not represented by one of its Officer's but was represented by Legal Counsel Mr McKay and Ms Hayes.

3.2 Witnesses who appeared and gave evidence under oath or affirmation were;

- The Assessor – Mr Hodgson

- Claimants Witnesses.
  Mr Widdowson
  Mr Maiden
  Mr Crowther
  Mr Everton

- The First and Second Respondents Witnesses.
  Nil

- The Third Respondents Witnesses
  Mr Alexander
  Mr Boys
  Mr Hargood
  Mr Frazer
  Mr Higham
  Mr Gempton

- The Fifth Respondents Witnesses
  Mr Elliott
  Mr Longman

3.3 The third witness for the Fifth Respondent, a Mr Lee, was to have appeared to produce a report (the BRANZ Report) but it was agreed during the course of the hearing that this Report could be introduced into the record by consent (without the need for Mr Lee to appear to produce it) and it is so introduced.

3.4 A further witness (a Mr Roberts) was to have been called by the Third Respondent but Counsel for the Third Respondent elected at the hearing not to call this witness. Accordingly although this witness had submitted a brief of evidence to WHRS prior to the hearing and although this brief of evidence had been distributed to all Parties and the Adjudicators it has not been considered in respect of the making of this determination and it does not form part of the determination record.

3.5 All the witnesses (with the exception of Mr Lee) produced and signed pre-prepared briefs of evidence which had been distributed prior to the hearing to all Parties and the Adjudicators. There was a "hiccup" in respect of this process when it became apparent that the Adjudicators (and all other Parties) had only an incomplete draft of Mr Maiden's (second) evidence. However this issue was overcome by the goodwill and co-operation of all Parties. Briefs of evidence were confirmed by each witness but in accordance with prior directions of the Adjudicators was not read (in to the record). Each witness was then cross-examined and re-examined in the usual way. This included cross-examination by the Adjudicators exercising their right to adopt an inquisitorial approach pursuant to s36(1)(a) the Act.

3.6 The Assessor Mr G Hodgson produced his Report and confirmed it under oath. He was then cross-examined. Mr Heaney (Counsel for the Third Respondent) suggested that the Assessor was the Claimant's witness. This is clearly not so and the Adjudicators pointed this out to Mr Heaney. The Adjudicators took the position that the Assessor was not a witness for any Party but was there to tender evidence to assist the Tribunal.

4.0 The Agreed Facts

4.1 Certain facts were agreed upon or accepted without challenge. These were:

4.2 The dwelling house was designed by Steve Mather (not a Party as he could not be located) and was constructed by the First Respondent (Mr P Bekx).

4.3 That the First and Second Respondents are now considered to be resident in United Kingdom.

4.4. A building permit for the construction of the dwelling house was issued on the 26th of March 1992 and accordingly the construction of the dwelling house proceeded in terms of the old regime pursuant to the applicable by-laws adopted by the Third Respondent, the Waipa District Council, rather than pursuant to the Building Act 1991. Accordingly a Code Compliance Certificate was not required.

4.5 Various inspections were undertaken from time to time by the Council Building Inspector with a last inspection (referred to in the notes as a "framing inspection") on the 18th of March 1993. A note was left by the Inspector regarding an intent to return to undertake a bracing inspection ("wish to see completed sheet bracing").

4.6 Construction of the dwelling house was slow and sporadic proceeding over a number of years.

4.7 External steps from one of the decks are still absent and to that extent it may be said that the dwelling house remains incomplete.

4.8 The dwelling house was purchased by the Claimants from the Second and Third Respondents pursuant to a Sale and Purchase Agreement (produced in evidence) with settlement on the 26th of March 1999.

4.9 Over the years the Claimants have undertaken certain repair work to the dwelling house mainly in connection with the roof.

4.10 The dwelling house is a leaky building in terms of the Act.

4.11 The standard of workmanship of the Builder (Mr P Bekx) was poor. Exactly how poor and to what extent was not agreed.

4.12 No inspections by Mr Boys, the Council Building Inspector, are recorded after the inspection referred to herein on the 18th day of March 1993.

4.13 The dwelling house has deteriorated and the Claimants have suffered loss as a result of the dwelling house being a leaky building. The nature and extent of the deterioration and loss and the type of remedy needed to rectify it was not agreed. Liability was not agreed. All Parties except the First and Second Respondents agreed that the First and Second Respondents should have some degree of liability. The Adjudicators determination in respect of these matters is contained subsequently herein.

5.0 The Claim

5.1 The claim was particularised in a formal statement of claim. This outlined various (alleged) causes of action, remedial work (and the estimated cost thereof) and other costs. This was based on a substantial rebuild and with incidentals the claim at the time of submission amounted to $329,792.61.

5.2 It alleged; - against the First and Second Respondents

(a) breach of the sale and purchase agreement (breach of contract) against the First and Second Respondents;

(b) negligence - breach of a duty of care owed to future Owners of the dwelling house in respect of its construction

5.3. It alleged; - against the Third Respondent

(a) negligence - in respect of an alleged duty of care to Owners and potential Owners;

(b) a negligent approval and inspection regime.

(c) a breach of statutory duty an obligation to comply with s93(3) the Building Act 1991 against the Third Respondent.

5.4 S93(3) is the section of the Building Act wherein if reasonable progress has not been made to the satisfaction of the Territorial Authority for four calendar months a Building Consent pursuant to the (new) regime will be required. This is one of the transitional provisions wherein building commenced pursuant to the old regime

(the Building Permit regime) may be required by the Territorial Authority to be completed under the new regime (the Consent regime). The Claimants say that this is mandatory (rather than discretionary) and requires the Local Authority to so act.

5.5 It is significant that the Claimants did not formulate any claim against the Fifth Respondent. The Claimants attitude at the time of joinder of the Fifth Respondent had been "neutral". Thereafter there was no formulated claim (or allegations) by them against the Fifth Respondent.

6.0 The Responses.

6.1 The First and Second Respondents made no formal (or informal) responses to the claim and did not present evidence. Their representative, Mr Owsley, conducted very limited cross-examination but attended during the entire hearing. The Adjudicators take the position that the First and Second Respondents deny the claim and put the Claimants to proof.

6.2 The Third Respondent filed a document dated 12th September 2003 headed "Statement Of Claim by Third Respondent against First and Second Third Parties" (the Fourth and Fifth Respondents). The Adjudicators take that to be a preliminary response. It alleges the Fifth Respondent should be solely liable to the Claimants. The basic allegations are that;

(a) the Harditex technical information relevant at the time was inadequate;

(b) the product (Harditex) was inadequate (in particular that it was not rot resistant as claimed).

6.3 It was clear from the totality of all the preliminary documents, the submissions and evidence at the hearing, that there was a denial of liability by the Third Respondent on the basis that there was neither negligence nor breach of statutory duty.

6.4 The Fifth Respondent responded to the Third Respondents statement of claim (against it) by way of a preliminary response dated 12th September 2003. It denied any duty of care owed either to the Claimants or the Third Respondent.

7.0 The Evidence

7.1 It is proposed to canvas the evidence presented at the hearing only in the most general way. If there is future occasion for closer scrutiny resort can be had to the;

(a) written briefs of evidence submitted by all witnesses; and to

(b) the cross-examination of witnesses by all Parties including the Adjudicators (in terms of the Adjudicators inquisitorial function)

as per the recorded transcripts thereof retained by WHRS.

8.0 The Non-Technical Evidence.

8.1 Mr Widdowson was the only witness with no technical expertise. Mr Boys, the Building Inspector, had technical expertise but gave factual evidence as a non-expert. However he also gave expert evidence as to usual practice (of the Third Respondent) and within the Building Industry. Mr Widdowson's evidence was that at the time of purchase he and his wife outbid another Purchaser in a "Dutch Auction" type situation. Sadly the Adjudicators imagine that this is one such "Dutch Auction" that he deeply regrets winning. He indicated that at first there were no problems. The first sign of problems were some rust stains appearing on the interior walls some time after purchase. Things rapidly went from bad to worse until the dwelling house began to leak badly at many locations and to deteriorate structurally. Mr Widdowson conceded that he had not obtained a LIM Report prior to purchasing. He indicated that the only room in the house that had not suffered major leaks (until

recently) was the dining room. He indicated that that room was now leaking as well. He indicated that despite repairs particularly to the roof he believed the roof was still leaking although he could not ascertain exactly where those leaks originated.

8.2 Mr Boys, the Building Inspector (at the time of the construction), gave evidence as to the inspection regime. He said that he had approved the plans and had issued the permit. He said there had been some variation to the plans by consent and he described the inspection process that he had adopted. In particular his evidence was that at that time the Council relied totally upon Builders to request inspections from the Council. That is to say the Council was reactive, not proactive. He said that there was no system in place at that time (although there is now) for the Council to check upon a job if there had been no request by a Builder for an inspection for some time. Although of course Mr Boys did not say so the regime in operation at that time for inspections relying as it did solely upon the Builder to request and activate an inspection presupposed that all Builders were responsible. In point of fact it would seem that at that stage a delinquent Builder might build with immunity to inspection simply by not requesting one. Mr Boys indicated that at the time of the last inspection he left a note for the Builder indicating that he wished to inspect again once bracing was in place. This was in accord with his notes on the Building Permit. In fact the Builder never requested a further inspection and no further inspection was ever undertaken. Mr Boys conceded that a significant amount of cladding was in place at the time of his last inspection. As he was not undertaking a cladding inspection he took no particular regard of it and did not notice the layout of the Harditex sheets.

9.0 The Technical Experts

9.1 Mr Crowther, a Quantity Surveyor, calculated quantum for a substantial rebuild and for a repair. He gave evidence on behalf of

the Claimants and expressed doubts as to the accuracy of the quantum given by the Third Respondent's witness, Mr Alexander. In particular the preliminary sum given as an allowance for replacement of any necessary framing timber ($4,000.00) was in his opinion likely to be well short of the mark.

9.2 Mr Gempton on behalf of Livingston Construction gave evidence of an estimate to repair the dwelling house based on his inspection and information provided to him by Mr Alexander. During the course of giving his evidence he indicated that he was prepared to adopt the estimate he had given as a firm quotation. This quotation being available to be accepted at present but including provisional sums given for replacement of decayed framing, replacement of electrical services and replacement of plumbing. He was pressed on the point by one of the Adjudicators but was not prepared to give a firm quote price for the whole job even if incorporating a very significant amount for these preliminary sums. He admitted that there was a risk about that and his Company was not prepared to take that risk. His evidence was very candidly given but the weakness therein of course is that he was not prepared to place his Company in a position of risk in respect of finalising a definite quotation in respect of the whole job.

9.3 Mr Frazer, Mr Hargood and Mr Higham gave evidence as current or former Building Inspectors to Local Authorities. They gave evidence on behalf of the Third Respondent. Their evidence was that the Third Respondent and its Building Inspector, Mr Boys, had acted properly and in accordance with the usual practise of Local Authorities and the standards prevailing at the time. The Hamilton City Council Building Inspector (Mr Hargood) indicated that a Building Inspector would be required to undertake about twelve inspections a day and therefore time would be limited. It was put to him in cross-examination that Mr Boys had indicated that he only did six inspections a day. This was countered to some extent by the response that in rural areas (such as the Third Respondent's District) a Building Inspector might be required to travel longer

distances between inspections. That the time expended might be similar for six inspections as for twelve inspections.

9.4 Mr Hodgson gave evidence as the WHRS Assessor and his evidence (notwithstanding Mr Heaney's comments) needs to be seen as "neutral". There to assist the Tribunal. He is not to be seen as the Claimants witness. Significantly Mr Hodgson was the only expert who had seen the roof in its original state, it having been repaired shortly after his visit. He gave evidence of departures from the plans and of substandard building practices. He was not complimentary about the construction skills of the First Respondent. Very properly he offered no opinion about questions of liability or responsibility of any of the Respondents to the Claimants. His site visit had been undertaken on the 1st of February 2003. His report was dated the 15th of March 2003. It is reasonable to assume that the issues of weathertightness affecting the dwelling have got worse, not better. Time has passed. Mr Hodgson gave an estimate of remedial costs - $120,000.00 to $160,000.00. It is appreciated that the estimate was heavily qualified and without in any way being a reflection upon Mr Hodgson, the Adjudicators believe that it is generally accepted that the estimate is at best dated and superseded by others.

9.5 Mr Maiden and a Mr Everton gave evidence for the Claimant as expert witnesses. Their evidence was that there had been significant departure from the plans and many examples of very poor workmanship. Mr Everton agreed that at the time of this job Councils were "reactive" relying upon Builders to telephone to request inspections. He conceded that he did not know what would have happened had a Builder not requested an inspection because (in his words) he and his colleagues were all responsible Builders who obeyed the rules and always made sure inspections were requested when required.

9.6 Mr Alexander gave evidence as an expert for the Third Respondent. His evidence was lengthy and he presented it in a forthright and

confident manner. His evidence however significantly departed from the evidence of the other experts in that he maintained that the building work although not of high quality was not too bad. It was his evidence that the main problems lay not so much with the Builder but with the Fifth Respondent (the Supplier of the Harditex Cladding system). He maintained that the technical information available at the time was inadequate. In particular that it led Builders to believe that the product would not rot (indeed the technical literature said so) and that painting of the product was not necessary. Although it was put to him in cross-examination that the technical detail was in fact reasonably specific it was his evidence that Builders required this sort of information to be spelled out in great detail. By way of one example only he took the position that although the information indicated clearly that the product (Harditex) **should** only be erected vertically, the information did not say that the product **could** not be erected horizontally. He took the position that the without such unequivocal instruction Builders would often take the most practical approach. If it was a practical option on occasions to use the board horizontally that is what they would do. It does seem to the Adjudicators that perhaps Mr Alexander was not prepared to credit Building Professionals with as much intelligence or perhaps ability as he should have.

9.7 Mr Elliott and Mr Longman presented for the Fifth Respondent. Their evidence was basically;

(a) a rejection of Mr Alexander's evidence; and

(b) supporting evidence for the Claimants against both the First and Second Respondents and the Third Respondents.

9.8 Mr Roberts, a witness proposed to be called by the Third Respondent, was not called and that aspect has been previously dealt with. Mr Lee who had undertaken the BRANZ Report relating to analysis of a nail did not give evidence but his evidence (on behalf of the Fifth Respondent) was accepted (his Report) by all Parties without the need for him to be present. The Adjudicators do not consider that much turns on this. It was clear that the nail he

analysed was not a galvanised nail (as it should have been). It is difficult to see how much turns on the analysis of one nail without evidence as to what percentage of the nails used to affix the cladding may have been non-galvanised. There was no evidence on that point.

9.9 As indicated at the outset of the analysis (of the evidence) the Adjudicators have only endeavoured (here) to present the most broad picture of it. Some aspects of the evidence will be traversed in more detail further in this determination when issues of liability and quantum are considered.

10.0 The General Issue of Liability and Quantum

10.1 The Adjudicators are required to determine issues of Liability and Quantum to the civil standard. That is to say whether or not matters are established on the balance of probabilities or perhaps put another way whether or not they are more likely than not (on a fifty percent scale). The standard proof is no more and no less than that.

10.2 In reaching a determination of liability and quantum the Adjudicators are able to adopt an inquisitorial approach. They are not of course able to be influenced in any way by feelings of sympathy or concern for the position of the Claimants, Mr and Mrs Widdowson. Such feelings form no part of this determination.

10.3 The Adjudicators are further required to determine liability in terms of the law and usual practise in the industry at the relevant time of construction, that is to say around 1991 to 1993. Although the law and standards of usual practise may well now have changed such changes (if in fact they have occurred) are not here open for consideration.

11.0 The State of the Dwelling House - Causation

11.1 The dwelling house is now in a sorry state of disrepair and the Adjudicators have been mindful and careful not to confuse this with the issues of weathertightness which they are called on to determine. There appeared to be general agreement however that the following issues were a major cause of the lack of weathertightness.

11.2 The Roof. The roof had been leaking. Repairs have been done but Mr Widdowson believes it is still leaking. The pitch of the roof is generally at minimum angle to shed water effectively. The internal guttering allows ponding and at least some of the rain hoppers do not have overflow outlets and probably allow water to access back in to the roof and ceiling if and when the hoppers become full to capacity.

11.3 The Decks. The dwelling house has three decks. There are a number of issues associated with the decks.

(a) General Issues – There is no fall away from the dwelling house to allow water to drain away. The decks are level – or worse – are sloped towards to the dwelling house.

(b) The Main Deck

(i) There is no adequate weathering step from the main deck into the living room. The plans detail a 25mm step but (it was agreed) this should have been 50mm. Worse still had the plans been followed (they were not) and tiling added to the deck this would have compounded the problem.

(ii) The saucer shaped scupper which (in terms of the plans) should have been incorporated on the deck (at its extremity) to allow for the collection and egress of water as being omitted. No alternate means for

water ingress (eg. drain through the base of the balustrading) has been provided.

(iii) The deck has not been waterproofed – allowing water to egress areas below.

(c) <u>The Other Decks</u>:-

(i) The deck adjacent to the main bedroom is butynol covered, but because it is not sloped ponding occurs and the covering has failed allowing water to egress the areas below.

(ii) The third deck is over the garage and rumpus room and is concrete (painted) but water is (again) egressing areas below.

11.4 Harditex Cladding. At various locations this is finished hard down onto horizontal deck surfaces thus enabling moisture to enter the building envelope by capillary action. An appropriate separation of parallel and horizontal surfaces has not been allowed for. It is certain that some or all of the vertical and horizontal control joints which should be incorporated within the Harditex cladding system have been omitted. It is not possible to determine the exact position relating to the control joints without removal of the cladding. These joints are intended to limit cladding area to 25m^2 or 5400 mm (linea area). They provided structural breaks (see paragraph 92 – 100 Elliott evidence 12/05/04). There is extensive cracking of the harditex cladding and the coatings.

11.5 Top surfaces of the balustrades have been finished with a cladding product (probably Harditex). However waterproof membranes and/or flashings are absent. The cladding product has failed here. Water has ingressed and there is extensive rot in the framing of the balustrades.

11.6 Water has ingressed the dwelling house;

(i) Through the roof area.

(ii) Through decks and balustrade deck joints into the rooms below.

(iii) By capillary action where no appropriate gap has not been left between horizontal and parallel surfaces.

(iv) Failure of balustrade and parapet caps (un-flashed or membraned).

(v) Via the extensive cracking of the cladding.

(vi) Via the door to the living room where there is an inadequate weather step - allowing water to egress.

11.7 Cladding has deteriorated by rotting. It is not possible to determine whether this occurred because of a delay in applying the coating to the cladding or simply as a result of the general water ingress.

11.8 It is known that the First Respondent, Mr Bekx, undertook the construction of the dwelling house and that it took him a long time. It is not known exactly how long. It is also not known with any degree of certainty how long the entire cladding operation took or what delay there was if any between the completion of the cladding and the application of the coating and the painting thereof. It is known that in some areas the framing timber had a weathered look about it suggesting that it took Mr Bekx quite some time to affix the cladding. The Adjudicators take the view that there were almost certainly extensive delays at all phases of the construction.

11.9 It is not known who applied the coating or undertook the painting thereof. No evidence was led at the hearing as to who applied the coating or as to the adequacy of the coating.

12.0 Liability of First and Second Respondents

12.0 The Claimants allege that both the First and Second Respondents are liable (to them) – in contract – in particular the breach of clause 6.1(8) of the Sale and Purchase Agreement. That they caused or

permitted work to be done which was not in compliance with the building permit.

12.1 There was no effective defence advanced to this claim or indeed any of the other claims against either of the First and Second Respondents. There was general consensus from all Parties to the Adjudication other than the First and Second Respondents that the First and Second Respondents could (and indeed must) be held liable both in breach of contract and in negligence. The Adjudicators take the view that (notwithstanding) the Claimants are put to proof and must establish the liability of the First and Second Respondents on the balance of probability.

12.2 The Adjudicators are persuaded that;

(a) There has been a breach of clause 6.1(8) of the Sale and Purchase Agreement –

"where the vendor has done or caused to be done on the property any works for which a permit or building consent was required by law, such permit or consent was obtained for those works and they were completed in compliance with that permit or consent and where an appropriate code compliance certificate was issued for the works."

These were in fact significant departures from the plans in respect of which the Building Permit issued. Some of these departures affecting weathertightness. The most significant of these departures (affection weathertightness) are;

(i) Lack of dish drain (main deck);

(ii) Lack of fall on decks;

All these departures whether deliberate or simply a result of poor building practice result in a breach of what must be an implied condition of the Building Permit – to build in accordance with the submitted plans – and also the applicable model By-law NZS1900-1984 which required the dwelling to be weathertight.

12.3 There were other departures from the plan some quite significant. For example the substitution of a large wall area with a window. However these are not weathertightness issues.

12.4 The Claimants also claim against both the First and Second Respondents in tort in respect of breach of a duty of care owed to future owners of the house. In particular to build in accordance with the permit and the applicable By-laws and to build to the standards reasonably expected of a reasonably competent builder. It is clear a builder owes a duty of care (in the tort of negligence) to a subsequent Purchaser and can thus be liable (to that person) for negligent construction – see Bowen v Paramount Builders Ltd [1977] INZLR 394, Mt Albert Borough Council v Johnson [1979] 214ZRL 234 – other WHRS Determinations viz 0003 – Badcock.

12.5 The Second Respondent, Mrs Bekx (or Ms Owsley as she then was), was a joint owner of the dwelling and jointly developed it with Mr Bekx (the First Respondent) However there was no evidence led that she actually actively undertook any building work or that she knew or ought to have known the work was substandard. For that reason a claim in tort against her must fail.

12.6 Different considerations apply in respect of the First Respondent, Mr Bekx, who undertook the actual construction work. All the experts (with the exception of Mr Alexander) were of the view that his overall performance as a builder was extremely poor. Mr Alexander took the view that whilst not an example of good building practise the standard was acceptable. The Adjudicators prefer the view of the majority of the experts. Mr Alexander's evidence is out of line with his professional colleagues. He is well outnumbered. Although (if viewed on an individual basis) each failure of the builder might in itself be seen as reasonably minor (although the Adjudicators have some difficulty with that concept) perhaps to be excused as a "one-off, the totality of a number of shortfalls result in a dwelling house constructed well below an acceptable standard.

12.7 Although the dwelling house was constructed prior to the implementation of the Building Act 1991 – which provided for a fifty year durability – it is the Adjudicators view that the dwelling house falls well below any acceptable standard of durability. The dwelling house has been constructed for approximately ten years. From a distance it may look in reasonable condition but on any close inspection it is obvious that it is a dwelling in the process of "disintegration". In the absence of an explanation being advanced for the problems, which would excuse the Second Respondent, the doctrine of res ipsa locquitur (the facts speak for themselves) applies. A dwelling house properly built by a competent builder simply could not fall into such a state of disrepair and lack of weathertightness in such a short period of time.

12.8 Examples of the First Respondent's negligence as they affect weathertightness have already been given in this determination in the Chapter referenced "The State of the Dwelling House". There is no need to repeat them. They are all examples of bad building practise or be it incompetent building practise.

12.9 The First Respondent has had adequate opportunity to appear or to be represented to justify his position but has chosen not to do so. The claim against the First Respondent in negligence for breach of duty of care must succeed.

13.0 Liability of Third Respondent

13.1 The Claimants allege that the Third Respondent (WDC) is liable (to them) in respect of a breach of a duty of care (the tort of negligence) and in respect of breach of a statutory duty, in particular a breach of Section 93(3) of the Building Act 1991. Each of these claims and the defence raised by the Third Respondent in respect thereof are now considered in detail.

13.2 The Claimants allege that WDC's owed a duty of care to ensure that when the Claimants purchased the property they could safely rely on WDC having carried out its duties and obligations in a proper and careful manner and as such owed a duty of care to ensure that the dwelling erected had been constructed in accordance with the building permit issued by WDC, the relevant building code and the relevant by-laws (page 20 Claimants submission).

13.3 The Claimants say that WDC's inspection regime was deficient because the inspections carried out were not adequate to ensure that the construction complied with the WDC's by-laws. They alleged that a reasonably prudent Building Inspector would not have overlooked;

(a) the omission of the dish-shaped scupper drain in respect of the main deck.

(b) the lack of an appropriate weathering strip between inside and outside environment main deck – living area and the lack of a capillary break.

(c) the substitution of building materials.

(d) the failure of the Builder to construct the dwelling with reasonable skill and care.

(e) failing to make further inspections notwithstanding the leaving of a note and noting the building permit to the effect that further inspections would be required.

(f) inadequate falls from decks.

(g) ineffective drainage systems.

13.4 The Claimants allege that although the relevant by-law required the permit to be approved by "the Engineer". It was in fact approved by the Building Inspector who conceded in evidence that he was not "the Engineer".

13.5 The Claimants allege that WDC also breached its statutory duty in that pursuant to Section 93(3) Building Act 1991 where *reasonable progress of construction alteration demolition or removal to the satisfaction of the Territorial Authority concerned has not been*

made for four calendar months then those subsections shall cease to apply and building consent under the Act shall be required in respect of any further construction alteration demolition or removal. Section 93 is what is known as the transitional section linking the old building permit regime with the new building consent regime established by the Building Act 1991. This enabled construction (for the purposes of this Adjudication) commenced under the old permit regime to continue under that regime (rather than the consent regime) but in terms of sub-section 3 required a building consent to be obtained (in substitution for a building permit) where if to the satisfaction of the Territorial Authority reasonable progress had not been made for four months.

13.6 The difficulty with implementation of Section 93 (3) Building Act 1991 from the Claimants point of view (to trigger an allegation of breach of statutory duty) is that the sub-section only imposes a mandatory obligation upon the Territorial Authority (to require a building consent to be obtained) if the Authority is itself satisfied that reasonable progress has not been made. There is no external test in respect of reasonable progress. It is left to the Authority to determine this. Something active is required of the Authority. It is not sufficient for the Claimants to allege that any reasonable Authority would conclude that there had not been reasonable progress. If this was the test contemplated by the sub-section then this (more or less) is what the sub-section would say. It does not. In respect of the construction of the Widdowson dwelling it has been accepted that progress was slow and sporadic and there is evidence (Mr Hodgson) that the WDC and its Building Inspector were aware of this. However there is no evidence that the WDC ever considered that "reasonable progress" was not being made. That aspect it seems was simply never considered. Therefore the Adjudicators consider that the claim by the Claimants against the WDC in respect of breach of statutory duty must fail.

13.7 Linked to the allegation of breach of statutory duty is the allegation that WDC breached its own by-law by permitting the Building

Inspector, Mr Boys, to issue the permit and consent to various variation thereof when the by-law clearly required "the Engineer" to do this. This was not a submission which was developed to any great degree at the hearing, nevertheless the Adjudicators appreciated its significance. Were it not for the effect of Section 91(2) of the Building Act 1991 *Civil proceedings relating to building work may not be brought against any person ten years or more after the date of the act or omission on which the proceedings are based* this aspect would have required determination by the Adjudicators and for future guidance the Adjudicators can indicate that the likely determination would have been in favour of the Claimant. However in respect of the issuing of the permit (not the workmanship or the act or omissions of inspection) the ten year rule clearly applies. The permit was issued on the 26th of March 1992 and the application was made on the 3rd of December 2002 some eight (plus) months outside the ten year period.

13.8 The claim by the Claimants against WDC in respect of liability in the tort of negligence cannot be so readily disposed of. In essence the Claimants say that the inspection regime adopted by WDC was flawed in that the inspections actually undertaken fell short of the standard of care which could be expected of a reasonable Building Inspector. In addition a reasonable Inspector would have undertaken further inspections, in particular the inspection signaled by the notation on the permit. To counter this WDC alleges that;

(a) there was no duty on WDC to inspect, simply a power to inspect if desired.

(b) that in any event the inspections were carried out properly and therefore were not negligent. In particular the inspection regime must be considered alongside inspection regimes adopted by other Councils at the time.

13.9 That the claim is statute barred against the Council by the ten year limitation defence offered by Section 91 of the Building Act 1991.

13.10 If WDC is considered liable then any award should be reduced to the extent that it is fair and reasonable to do so having regard to the Claimant's failure to obtain a pre-purchase building report and/or a LIM and/or to undertake proper maintenance. That is to say a defence of contributory negligence.

13.11 WDC claims that if it is liable to the Claimant there should be an apportionment of liability between it and the First Respondent (submissions filed on behalf of WDC did not suggest that the apportionment should relate also to the Second Respondent) and that apportionment should be 80 percent to the First Respondent as Builder.

13.12 For convenience it may be preferable to deal first with what WDC referred to in its closing submissions as the affirmative defences (contributory negligence and the ten year rule).

13.13 It is clear that the ten year rule applies. Refer Invercargill City Council v Hamlin [1994] 3 NZLR 513 at 518 *the limitation defence is now available to a Local Authority in Building Construction cases after ten years from the act or omission on which the proceedings are based*. It is clear that a claim based on the issuing of the building permit (already dealt with prior herein) must fail as being outside the ten year limitation period. That however is not the principle limb of the Claimants claim against the WDC. That claim is based on how the tort of negligence relates to the inspection process (as the Adjudicators understand it). That is to say the inspections themselves or the failure to inspect. That process occurred within the ten year limitation period. To suggest that the inspection process itself relates back in some way to the issuing of the permit must in the Adjudicators view be flawed. Certainly the permit needed to issue to trigger the inspection process but it also needed to issue to trigger the building process. The inspection process is related to the issuing of the permit in the same way as the actual construction process by the First Respondent. The Adjudicators note that the submissions filed on behalf of WDC do

not suggest that the actual construction work, thus the liability of the Builder, is saved by the limitation period.

13.14 WDC suggests that the Claimants contributed to their loss by a failure to obtain a pre-purchase report and/or a LIM report and by a failure to maintain.

13.15 In 2004 the obtaining of LIM reports and pre-inspection building reports are relatively common place. The Widdowsons however purchased this property in early 1999. The Sale and Purchase Agreement is undated but Mr Widdowson's evidence was that negotiations took place in February 1999. Settlement occurred on the 26th of March 1999. The issue of contributory negligence must be determined according to the standards of reasonable conduct at that time in the same way as the Third Respondent's allegations (or otherwise) to inspect must be so determined. The Adjudicators note that no evidence was produced at the hearing to suggest what may or may not have been reasonable in 1999 as regards the obtaining of a LIM report and/or a pre-purchase building report. All that occurred was a concession from Mr Widdowson under cross-examination by Counsel for WDC that he had not obtained either. It is against this vacuum of evidence that the Adjudicators must determine the issue. The Adjudicators consider that the conveyancing practise of obtaining LIM reports and/or pre-inspection pre-purchase building reports is something which has developed and continues to develop as a recent phenomena. In the late 1980's and early 1990's LIM reports and/or pre-inspection building reports were in the Adjudicators view not as common as they are now. This especially so in relatively small rural towns like Te Awamutu. One of the Adjudicators practices in a multi-disciplined legal practice (including conveyancing) in a small rural town and the Adjudicators draw upon his knowledge. The Adjudicators are not persuaded (from their own knowledge) and in view of the complete lack of evidence thereon at the hearing that it was in any way unreasonable for the Claimants at the time of purchase not to obtain a LIM report or a pre-purchase building

report. The Adjudicators also note that no evidence was led as to what might have been discoverable had the Claimants obtained either the LIM or the pre-purchase inspection report. It is by no means clear that anything of significance would have been determinable from either of these processes.

13.16 The Adjudicators are not convinced that failure to maintain (on the part of the Claimant) is of any significance. There was evidence of repair work (undertaken by the Claimants) – in particular to the roof and upper balconies. Simple maintenance in the circumstances (for example painting) would have been a complete waste of time and money.

13.17 The principle issue relating to the Claimants claim against the Third Respondent, WDC and the WDC's defence to that claim is in the Adjudicators view the issue of whether or not at the time the dwelling house was constructed there was a duty of care in tort to inspect and if so whether that duty was fulfilled. Shortly put whether there is liability upon WDC in negligence. The Claimants position is that there is liability because there was a duty of care to inspect with reasonable care which was not fulfilled. The WDC's defence is that there was no duty but merely a right to inspect and that further the inspection process complied with the standards of reasonable care appropriate at the time.

13.18 Notwithstanding submissions to the contrary the Adjudicators consider that it is established law that Territorial Authorities owed a duty of care in respect of the inspection process prior to the new regime established by the Building Act 1991. This is the position confirmed by a number of Authorities perhaps the most notable being Invercargill City Council v Hamlin [1994] 3NZLR 513 and Stieller v Porirua City Council [1986] 1NZLR 84. It is significant that both these Authorities dealt with the construction of dwelling houses prior to the Building Act 1991. In Hamlin the dwelling was constructed in 1972 and in Stieller in 1977. Hamlin *It is settled law that Councils were liable to houseowners and subsequent owners*

for defects caused or contributed to by Building Inspectors negligence. In Stieller at page 94 *A further point made on behalf of the Council by Mr Hancock was that the standard code did not make inspections by the Council mandatory at the stage where the exterior of the house was being clad in weatherboard. … Mr Hancock said that the Judge had failed to take into account that it might be common practise for Local Authorities to make no inspections at all at certain stages and yet it might be fixed with liability for work done thereafter. The short answer to this submission is that the Council's fee for the building permit is intended to include its charges for making inspections in the course of construction and it does not limit these in number or by stages.* This in the 1986 Judgement relating to a construction in 1977. It is thus clear that there was a duty pursuant to the old regime to inspect and to comply with a reasonable standard of care. The Authorities establish this clear.

13.19 The duty of care owed by the Territorial Authority in carrying out a building inspection is that of the reasonably competent Building Inspector measured against the reasonable standards of the time. That is to say the standards in the mid-1990s, not the standards of 2004. The duty does not impose upon the Territorial Authority the obligations of a Clerk of Works or of an Insurer. The obligations are less than this. – see Sloper v WH Murray Ltd & Maniapoto County Council – DC Dunedin A31/85 *A Local Authority is not an Insurer nor is it required to supply a Builder with the services of an Architect, an Engineer or a Clerk of Works.*

13.20 It was submitted on behalf of WDC that the same number and type of inspections were carried in relation to similar projects by other Councils. Limited evidence was heard to confirm this and that evidence limited as it was, was unchallenged. The evidence was that inspections were arranged or pre-booked by Builders. The evidence went further than this however and was that (limited as the occasion might be) it was open to a Building Inspector to inspect at any time. That is to say there was no need for reliance upon the

Builder to prearrange inspections. Indeed as a matter of logic that must follow and must have followed in the mid-1990's. To do otherwise would create an environment where the Builder rather than the Territorial Authority had complete control of the process. The more delinquent the Builder the less likely to request any inspections leading to an almost inevitable position (as in the case here) where a dwelling would be completed without the checks and balances of that process.

13.21 The most significant aspect of the evidence in respect of this claim as it relates to the inspection process is the notation on the permit *Framing inspect – left note for Owner wish to see completed sheet bracing.* That is the last written evidence of an inspection although it does seem that there was probably a drainage inspection some time later. It is both telling and damming in that it is a clear indication that the Building Inspector expected in early 1993 to be called back to undertake a bracing inspection but he never was and no further inspections apart from apparently the drainage inspection ever occurred.

13.22 At that point the inspection process changed from a passive process – of reacting to the Builder's request. It became an active process – of requiring inspections. The Inspector saw a positive need for at least one further inspection and it is difficult to understand why (save for simple forgetfulness or lack of effective monitoring and call up systems) the Inspector did not run his own check upon progress. This should have occurred when it became obvious he had not heard from the Builder for a reasonable time.

13.23 Refer Peters v Muir [1996] DCR – 205 at 218 in respect of a house built in the 1970s *A Purchaser is reasonably entitled as a matter of law and practise to expect that the Local Authorities Building Inspector will have exercised some oversight and ought to have ensured that the building was constructed in reasonable conformity with the requirements of the by-laws and good building practise.* At 220 *It is difficult to resist the conclusion that had the Building*

Inspector been reasonably competent he must have concluded that Mr Muir as a Builder was not competent. The comments in Peters v Muir go to the crux of the matter.

13.24 The First Respondent was clearly a negligent and/or incompetent Builder. All the evidence with the possible exception of the evidence of Mr Alexander points to this and all the Parties to the Adjudication accept that he was incompetent and should be liable in negligence to the Claimants significantly even the WDC (whose witness Mr Alexander was) accepts this. Applying the Principle (Peters v Muir) it is difficult to conclude that the Building Inspector should not have detected this lack of competence and taken steps to control it or to stop the building process altogether.

13.25 It seems to the Adjudicators that at the last inspection undertaken the Inspector failed to notice a number of significant departures from the good building practise and from the plans which (among other things) affected weathertightness. In particular these were:

- The lack of the dish shaped drain on the main deck.
- The lack of an effective weathertight step between the main deck and the interior of the dwelling.
- The lack of control joints and the patchwork nature of the cladding in respect of that portion of the cladding completed at the time of the inspection.

13.26 There were other aspects which the Inspector also failed to notice but these we were not so obvious. In particular they include the limited fall to the roof line and the lack of fall on the decks. The Adjudicators accept that these aspects would not have been obvious to the Inspector. However had the Inspector noticed the other aspects which should have been obvious, it is reasonable to conclude that he would then have been put on notice that many aspects of the construction might be substandard. Thus had he noticed the obvious defects he could reasonably be expected to have conducted a far closer more intense inspection and thus probably to have noticed the other defects less obvious at first. This

failure to notice is the very point made in Peters v Muir particularly at page 214. Dealing with the issue of inspections the Court said *The Council had pleaded that it was under no duty to inspect the building and that is probably a correct statement of the law at the time. But once it be proved that there was in fact inspection then subject only to the next point to be dealt with the liability of the Council in the event that the inspection be negligent is clear.*

13.27 In reliance on the Hamlin decision the Adjudicators consider that there was a clear duty to inspect at the relevant time of the construction but in any event in reliance on the Peters decision once an inspection occurred (whether or not there was actually a duty to inspect) there was a requirement to perform the inspection and complete the inspection process competently. That clearly did not happen. On the last inspection there were significant examples of incompetence or negligence *"there to be seen"* by the Inspector and they were not seen. There was also a trigger point at that time for a further inspection which was never undertaken. The Inspector relied one hundred percent upon the Builder to request a further inspection and did nothing when that did not occur. There should have been a follow up procedure. Indeed there was evidence that there now is such a procedure. Had there been a follow up procedure and an inspection at a later stage that would have been a further opportunity for the Inspector to detect the incompetent and/or negligent workmanship of the Builder. Especially issues relating to the cladding which at the time of the last inspection was only partially in place. The Adjudicators find that the inspection process was negligent and accordingly there was a breach of the duty of care owed to the subsequent Purchasers, the Widdowsons.

14.0 Liability of the Fifth Respondent

14.1 The Fifth Respondent, Studorp Limited, was joined to the Adjudication at the request of WDC. There are a number of issues to be determined in respect of Studorp.

- Is there in fact any claim by the Claimant against Studorp.
- Is there any liability by Studorp to the Claimant.
- Is there any liability by Studorp to the Third Respondent WDC.

14.2 The Adjudicators (pursuant to Section 29 WHRS Act) are required to determine the liability of Studorp to the Claimants. They are not required to determine the liability of Studorp to the other Respondents but they may do so if they wish.

14.3 The relationship between the Claimant and Studorp is a curious one. At the hearing Studorp of course defended its own position but at times appeared almost to be an ally of the Claimant in respect of the Claimant's claim against the first three Respondents.

14.4 The most significant point however is that there was no point of time at which the Claimant actually levied any claim whatsoever against Studorp. When Studorp was joined at the request of the Third Respondent the Claimants position was neutral. The Claimant neither supported nor opposed the Application to Join. Joinder seemed appropriate in the circumstances to the Adjudicators. It is an exercise in simplistic logic to assume that once joined the Claimant would in fact pursue a remedy against Studorp if for no other reason than the more potential Respondents from which to claim compensation the better. However that did not happen. The Claimants formal documents in particular the Statement of Claim did not suggest that Studorp owed any liability to the Claimant. The pre-prepared Briefs of Evidence and Submissions including Final Submissions made no reference to possible liability and there was no reference to possible liability made viva voce by any of the Claimants' witnesses at the hearing.

14.5 It is quite clear therefore that notwithstanding the joining of Studorp, there is no claim for any remedy against Studorp by the Claimant. It is not the task of the Adjudicators to *"run the claim"* and in the event that there is in fact no claim at any stage of the proceedings levied against a Respondent by a Claimant (as is the situation here) the

Adjudicators are not going to take it upon themselves to grant a remedy. In respect of this claim however that is not the end of the matter as there remains the issue of liability between Studorp and WDC.

15.0 Liability of Fifth Respondent to Third Respondent

15.1 The Fifth Respondent, Studorp Limited, was joined at the Application of the Third Respondent (WDC) on the basis that either the Fifth Respondent was liable to the Claimant directly or alternatively was liable to it (WDC).

15.2 The Adjudicators are required to determine liability of Parties to the Claimant. They are not required to determine the liability of the Respondents one to another although pursuant to Section 29 WHRS Act they may do so if they wish. In respect of this claim the Adjudicators choose not to determine the issues of liability (if any) between Studorp and WDC. Effectively that is an end of the matter but the Adjudicators recognise that it may be helpful to make some comment or be it non-binding comment on the position of Studorp as they see it. The following comments are advanced on that basis.

15.3 WDC's allegations against Studorp appear to the Adjudicators in the main to be based on an allegation that the relevant technical data made available by Studorp to the Building Trade was misleading and deficient. As such it could not be relied upon to provide adequate guidance and assistance to a reasonably competent Builder. In particular that the product would not rot, that it did not need to be painted and that it was reasonable to assume from the data that it could be finished hard down on the vertical to another horizontal building surface.

15.4 Mr Alexander who gave evidence for WDC in particular advocated the inadequacy of the Studorp technical data. The Adjudicators regard it as significant that the other expert witnesses who gave

evidence for the Claimant and for Studorp did not support Mr Alexander's position. Where there is conflict between Mr Alexander's evidence and the evidence of other experts the Adjudicators prefer the other evidence. It seemed to the Adjudicators in particular that Mr Alexander was prepared to credit Builders with a very minimal degree of intelligence. He took the position that Studorp as a Product Manufacturer needed to spell out in words of one syllable, (if it can be put that way) to Builders and those in the trade almost every aspect of dealing with the product. Interestingly he did not maintain this position when dealing (briefly) with technical material (or the lack of it) provided by a window manufacturer. He appeared to give Builders little credit for their own expertise and training and to credit them with limited intelligence. By way of example he considered that there was inadequate technical information to advise Builders that the (Harditex) product needed to maintain a capillary gap between vertical and horizontal surfaces. Similarly that the product was not in itself a satisfactory product to be used without more as a *"cap"* for balustrades or parapets. Frankly it seems to the Adjudicators (and one of the them has no technical building expertise) that those two points would have been self-evident to any competent Builder, in fact probably self-evident to almost anyone (be they a competent Builder or not) with even average intelligence.

15.5 Studorp maintained that the technical information was a guide only. It said it was supplied to trade suppliers rather than to *"jobbing"* Builders. That anyone who felt out of their depth or unsure about how to use or affix the product was advised to contact Studorp on a nominated telephone number for further information. That competent tradesmen would be expected to have the degree of competence and ability sufficient to enable them to use the product so that it maintained its integrity as a building material.

15.6 The Adjudicators consider that on the evidence presented to them there was sufficient technical information available to enable a reasonably competent Builder to use the Studorp product, Harditex,

in such a way as it maintained its integrity as a cladding product. That the product failed on the Widdowson house is in the Adjudicators view directly attributable to the incompetence of the Builder and the negligent inspection process (WDC). It was not due to failure of Studorp to supply a product that was either not up to the task (if affixed properly) or a failure to supply the technical detail to enable a reasonably competent Builder to use the product correctly.

15.7 It follows therefore that had the Adjudicators chosen to make a determination of liability between Studorp and WDC they would have determined that there was no liability. It further follows that had the Adjudicators considered that there was a claim by the Claimant against Studorp which required to be determined the Adjudicators would have determined that there was no liability as between Studorp and the Claimant.

16.0 Quantum

16.1 The main issues are: what is the extent of the remedial work required which includes the issue of rebuild above concrete level or repair and reclad; what remedial work is within the jurisdiction of the Adjudicators under the WHRS Act; and, what is a fair value of the remedial work?

16.2 The "Statement of Claim" sets out the value of the claim as:

Details of Loss

Cost of reconstruction work to remedy defects as set out in the Crowther Report filed with this statement of claim:	$ 231,000.00
Inflation Cost – prior to reconstruction as per Crowther brief of evidence	$ 9,000.00

Inflation Cost – during construction as per Crowther brief of evidence	$	4,750.00
Design Fees as per Crowther brief of evidence	$	14,000.00
Supervision as per Crowther brief of evidence	$	7,500.00
Sub – total	**$**	**266,250.00**
Plus GST	$	33,281.25
Total Cost of Recommended Remedial Work	**$**	**299,531.25**
Reimbursement of the cost of repairs to date:	$	4,962.63
Costs of mortgage repayments ongoing while Claimants relocate and pay for temporary accommodation for relocation while remedial work is being carried out $323.00 x 26 weeks)	$	8,398.00
Costs of relocation of office telecommunications to allow Mr Widdowson to carry out his job:	$	509.44
Waipa District Council Rates (33.33 x 26 weeks):	$	866.58
Insurance being $93.12 per month x 6 months for period of relocation due to loss of quite (sic) enjoyment:	$	558.72
Reimbursement of medical expenses incurred by the Claimants as a consequence of the water penetration of resulting toxins in the house:	$	3,500.00
Cost of expert reports to establish the extent of damage of the property:	$	6,093.19

Cost for removal and return of furniture whilst remedial work carried out:	$	5,612.00
Total Loss	**$**	**330,031.81**

16.3 The "Final Submissions on Behalf of the Claimants" does not address the amount claimed although they do state at section *"It is submitted that judgment should be entered in favour of the Widdowsons against the first, second and third respondents in accordance with the statement of claim filed and ---"*

16.4 The Claimants claim is based on the Crowther estimate which in turn is based on the conclusions of the report prepared by Richard Maiden (the Prendos Report). The Prendos report concludes *"I would strongly recommend that the timber frame section of the building is removed and the whole reconstructed."* The "Final Submissions on Behalf of the Claimants" state *It is submitted that pure economics dictate the most practical option is demolish this house back to its concrete block work and rebuild it on the basis of the detailed cost estimate submitted by Ian Crowther."*

16.5 The Third Respondent advanced that the remedial work required to make the dwellinghouse weathertight was stripping and recladding the exterior and replacing any affected framing timber during that process. It was also acknowledged that the windows and doors at the South East elevations where facing the deck would require an upstand below them and this would require the heads also to be raised.

16.6 Mr Alexander in his brief of evidence stated *"I have already said however, based on the evidence that is available at present, that demolition and rebuilding may not be justified."* In his second brief of evidence Mr Alexander states that *"I can see no justification for replacement of the roof".* And at paragraph 79 summarises his opinion of repair recommendations which is only re-cladding with

replacement of wet or decayed framing and waterproofing of the ground floor concrete deck.

16.7 Mr Brian Gempton of Livingstone Bros Ltd costed the remedial work which Mr Alexander considered necessary and his estimate was originally $109,856.25. In evidence Mr Gempton added $1,800.00 plus GST for raising the doors which results in a total of $111,881.25. Mr Gempton stated at the hearing that Livingstone Bros Ltd would be prepared to make this a firm price. However the firm price includes three provisional sums for replacement framing, electrical and plumbing work. The price is therefore not firm as the extent of replacement of framing is one of the "risk" items. Mr Alexander gave his opinion that the allowance of $4,000.00 for replacement of framing was adequate. Mr Hodgson and Mr Maiden were of the opinion that $4,000.00 was an inadequate allowance. Having considered the evidence and heard the examination and cross examination of all of the witnesses the Adjudicators agree that an allowance of $4,000.00 is inadequate.

16.8 The closing submissions of the Fifth Respondent states in paragraph 155;

"Studorp submits however that the quantum issues narrowed considerably at the trial to the point where it was no longer tenable to suggest, on the balance of evidence, that the house needed to be demolished. The ability to overcome the problems with step down to the main concrete deck was demonstrated and, in the face of the evidence from Mr Gempton, the only issue of any real difficulty involved the extent to which an allowance needs to be made for the few matters excluded from his quote."

The Adjudicators generally agree with that submission however they do not consider the matters excluded are "few" and the extent of remedial work to the framing and the provisional amounts for the plumbing and electrical have to be carefully considered.

16.9 Mr Gempton in his estimate states;

"The following works are specifically excluded from this estimate:-

- *Carpet removal and replacement*
- *Any work to the lower floor level – masonry construction*
- *Any work to roofing and gutters*

16.10 Other exclusions mentioned in the evidence that should be taken into account are;

- Removal of some windows and replacement of jamb liners
- Rate used for balustrade walls
- Scaffolding allowance
- Basement tanking problem
- Tiles to door thresholds
- Supervision
- Professional fees
- Consequential replacement of interior linings and trim and redecoration.

As Mr Gempton confirmed that Livingston Bros Ltd were prepared to carry out the work as a firm price, excluding the provisional items, the Adjudicators consider that items such as scaffolding and the rates used by Mr Gempton should not be adjusted.

16.11 The Adjudicators consider it is a reasonable approach to use the estimate of Mr Gempton as a base and then make any adjustments for exclusions that the Adjudicators consider after hearing the evidence should be included and for items in the Crowther estimate that they consider are still relevant.

16.12 Mr Alexander in his brief states that he has estimated that to clean and paint the house including access and GST would cost about $6,000.00. It is reasonable to claim that there is betterment associated with the new external finish but the Adjudicators do not consider the estimate of Mr Alexander to be realistic as it is for the stand alone cost of painting the house. The method of valuing the

betterment factor would be a percentage of the cost of the painting as part of the total remedial work. They have included a fair cost based on the area as stated in the Livingstone Bros Ltd price. They have also made a deduction for a betterment element in the carpet.

16.13 The Adjudicators have calculated that the value of the remedial works as $158,618.25 as follows:

Cost of remedial work as set out in Livingston Bros Ltd estimate:		$ 97,650.00
Work to raise windows and doors including a a concrete upstep		$ 3,200.00
Sub – total		**$100,850.00**
Less: Provisional Sums		
	Framing	$ 4,000.00
	Electrical	$ 2,000.00
	Plumbing	$ 500.00
Sub-Total		**$ 94,350.00**
Allowance for removal and replacement of adversely affected or decayed framing:		$ 7,500.00
Allowance for consequential replacement of internal linings and trim and re-decoration		$ 5,670.00
Allowance for removing and re-fixing electrical outlets and fittings and any alterations to wiring:		$ 2,000.00
Allowance for removing and re-fixing plumbing units, taps, traps etc and re-fixing and for any alterations to pipework:		$ 2,000.00

Allowance for removal and re-fixing of joinery fittings and for repairs:		$ 3,221.00
Allowance for removal and replacement of carpets:		$ 12,415.00
Waterproofing to basement wall, remove and re-fix basement windows and re-decorate:		$ 1,822.00
Repairs to games room basement ceiling and re-decorate:		$ 603.50
Allowance for work to roof and gutters to make dwellinghouse weathertight:		$ 5,000.00
Sub – total		**$134,581.50**
Inflation Cost – during construction:		$ 2,230.00
Design & Documentation Fees:		$ 6,500.00
Supervision:		$ 5,000.00
Sub – total		**$148,311.50**
Less:	Allowance for betterment on carpet:	$ 5,207.50
	Allowance for betterment on external Painting	$ 2,940.00
Sub – total		**$ 140,164.00**
Plus GST		$ 17,520.50
Total Cost of Remedial Work		**$157,684.50**

16.14 The "Statement of Claim" included other items. The "Closing Submissions of Third Respondent" lists the items at paragraph 99. At paragraph 105 the claim for medical expenses is challenged on the basis that it is precluded by Section 317 of the Injury Prevention, Rehabilitation, and Compensation Act 2001. And that there was no evidence adduced as to the Quantum. Also at paragraph 103 it is stated that the claim should be limited to remedial costs and the reimbursements of costs of repairs to date.

16.15 The claim for $4,962.63 for costs of remedial work to date was not challenged and the Adjudicators allow the claim.

16.16 The claims for costs of mortgage payments of $8,398.00, Council rates of $866.58 and insurance $558.72 are all reasonably foreseeable costs incurred as a result of the remedial work. It would be impractical to occupy the property when the external walls are stripped. Documentary evidence was included with the "Statement of Claim" as to the quantum of the various claims. The claims are all based on 26 weeks which was the Crowther estimate of the time required to rebuild. The Adjudicators estimate the time for the remedial work to be carried out to be 17 weeks and therefore we allow the amounts claimed adjusted for a 17 week period.

16.17 Costs of relocation of office telecommunications of $509.44 to allow Mr Widdowson to carry out his job are claimed. The Adjudicators are satisfied that this claim is reasonable and the amount is reasonable and the Adjudicators allow the claim.

16.18 As regards the claim for $3,500.00 for medical expenses there is a copy of a letter from Dr Louise Walker the doctor for the Widdowson family. It states that the family has spent well in excess of $3,500.00 over the past three years with diagnostic tests and other related medical expenses. Doctor Walker's letter is specific. It refers to stress related conditions, depression and anxiety disorders. The Doctor considers that these conditions relate directly to *"the immense strains that they are under due to their physical*

environment" and refers to treatment over *"the last two to three years"*. It was submitted that a claim of this type is precluded by Section 317 of the Injury, Prevention, Rehabilitation and Compensation Act 2001. The Adjudicators do not agree. Section 26 of that Act defines personal injury and that definition excludes injury caused or sustained by a gradual process. Significantly also stress is excluded from the definition. Here the process giving rise to the injury has clearly been a gradual one. While compensation for the stress and worry inevitably involved in litigation is not compensateable it is well established that pain, suffering and the distress arising from the circumstances of the claim (rather than the litigation surrounding the claim) is compensateable. This principle is well established and the authorities were summarised in WHRS Determination 00119 – McQuade - at page 33 and WHRS Determination 00026 – Putman – at page 58 (although here dealing with general damages). Compensation under this head relate to stress suffered as a result of the facts upon which the claim is based, not upon the issue of the litigation of the claim and the Widdowson medical expenses fall squarely within that principle. The Adjudicators do not consider that this claim is excluded by Section 317 of the Injury Prevention, Rehabilitation and Compensation Act. Further more the claim is a specific one (re-imbursement) for quantified medical expenses – not a claim for a "rounded" sum by way of general damages.

16.19 A claim is made for $6,093.19 for the cost of expert reports to establish the extent of damage to the property. In support of this claim copies of the invoices from Prendos Ltd and Crowther & Co were included with the Statement of Claim. It is reasonably foreseeable that the Owners would need to seek professional advice when faced with the problems with this dwellinghouse. The Adjudicators consider the charges reasonable and allow this claim.

16.20 A claim is made for $5,612.00 for costs of removal and return of furniture whilst remedial work is carried out. The Adjudicators assume the claim also includes the cost of storage. With the extent

of remedial work being less than the complete re-build it could be said that all furniture may not have to be removed. However the building may be in a state where the interior is insecure and there will be times when the interior will be exposed to the weather. There will be costs involved in moving furniture and it would be practical to remove some furniture for the duration of the remedial work. No evidence was given as to the calculation of the value of this claim. The Adjudicators consider it is reasonable for a claim for the cost of removal, storage and return of some furniture and allow 50% of the claim.

16.21 The total Quantum is therefore:

Total cost of remedial work:	$157,684.50
Reimbursement of the cost of repairs to date:	$ 4,962.63
Costs of mortgage payments ongoing while Claimants relocate and pay for temporary accommodation for relocation while remedial work is being carried out ($323.00 x 17 weeks)	$ 5,491.00
Costs of relocation of office telecommunications to allow Mr Widdowson to carry out his job:	$ 509.44
Waipa District Council Rates (33.33 x 17 weeks)	$ 566.61
Insurance being $93.12 per month x 4 months for period of relocation due to loss of quite (sic) enjoyment:	$ 372.48
Reimbursement of medical expenses incurred by the Claimants as a consequence of the water penetration and resulting toxins in the house:	$ 3,500.00
Cost of expert reports to establish the extent	

of damage to the property:	$ 6,093.19
Costs for removal and return of furniture whilst remedial work carried out:	$ 2,806.00
Total Loss	**$181,985.85**

17.0 Liability of the First, Second and Third Respondents to the Claimant and to Each Other

17.1 The Adjudicators consider that the First and Second Respondents, Mr and Mrs Bekx, are both liable to the Claimant in contract. Further that the First Respondent, Mr Bekx, and the Third Respondent (WDC) are both liable to the Claimants in respect of breach of duty of care in the tort of negligence.

17.2 Each negligent Party (tort feasor) that is to say Mr Bekx and WDC is one hundred percent liable to the Claimant for the loss assessed but there can be an apportionment of liability between them such that although each must compensate the Claimant for the Claimants entire loss there can be a recovery one against the other of them in proportions pursuant to Section 17(1)(c) of the Law Reform Act 1946.

17.3 This apportionment is well established and is of course the exact point made in the final submissions for WDC in particular item 4, page 3. Therein Counsel for WDC submitted that if there was liability upon WDC (which was not accepted) then Mr Bekx the First Respondent should bear eighty percent liability. The Adjudicators agree.

17.4 Although this apportionment is not challenged the appropriate decision to look to for guidance is Mt. Albert Borough Council v Johnson [1979] 2 NZLR 234 at 241. Here incidentally in respect of building work undertaken in the late 1960s a Builder was held liable

to a subsequent Purchaser for failure to ensure that foundations went down to solid. The Council was also held liable for failing to observe the inadequacy of the foundations upon inspections. The primary liability rested with the Builder and a fair and equitable apportionment between the Builder was 80 percent – 20 percent. On that basis the Council being entitled to recover 80 percent from the Builder.

17.5 The Claimants cannot of course recover twice. They are entitled to the Quantum awarded in this determination and may recover either from any of the First or Second or Third Respondents.

17.6 If the Claimants recover from the First Respondent then the First Respondent is entitled to recover twenty percent of any such recovery from the Third Respondent. That is to say if the Claimant recovers $181,985.85 being the whole of the Quantum then the First Respondent is entitled to recover $36,397.17 from the Third Respondent (twenty percent thereof). It follows that the amount of the recovery will change (proportionately) if the Claimants recover from First and Second Respondents equally.

17.7 If the Claimants recover $181,985.85 from the Third Respondent then the Third Respondent is entitled to recover $145,588.68 from the First Respondent (eighty percent thereof).

18.0 Costs

18.1 The Claimants seek an award of costs against the Third Respondent, WDC. To succeed pursuant to Section 43 WHRS Act the Claimants must show either bad faith or that allegations or objections were without substantial merit.

18.2 The claim for costs does proceed on that basis and in particular related to additional costs totaling $16,671.78 which the Claimants submit they have incurred as a result of the last minute adjournment

granted in May 2004 at the request of WDC. The submission was that the last minute request for an adjournment was no more than a tactical move by WDC *(to allow time to file evidence that should have been filed in accordance with the timetable).*

18.3 Although the Adjudicators have considerable sympathy for the position that the Claimants found themselves in at the last minute they do not agree. The adjournment was granted because when the Fifth Respondent filed evidence and submissions in reply, it filed significant new evidence which reasonably needed to be addressed by the Third Respondent (and for other Parties).

19.0 Result Pursuant to Section 42 WHRS Act

19.1 The Adjudicators now order:

19.2 That the First Respondent, PETER FRANCES BEKX, pay to the Claimants, DAVID JOHN WIDDOWSON AND ANGELA PHYLLIS WIDDOWSON the sum of $181,985.85.

19.3 That the Second Respondent, DEBBIE ANNE BEKX, pays to the Claimants, DAVID JOHN WIDDOWSON AND ANGELA PHYLLIS WIDDOWSON the sum of $181,985.85.

19.4 That the Third Respondent, THE WAIPA DISTRICT COUNCIL, pay to the Claimants, DAVID JOHN WIDDOWSON AND ANGELA PHYLLIS WIDDOWSON the sum of $181,985.85.

19.5 That if the First Respondent pays an amount to the Claimants pursuant to this determination then the First Respondent, PETER FRANCES BEKX is entitled to recover twenty percent thereof from the Third Respondent, THE WAIPA DISTRICT COUNCIL.

19.6 That if the Third Respondent, THE WAIPA DISTRICT COUNCIL, pays to the Claimants, DAVID JOHN WIDDOWSON AND ANGELA

PHYLLIS WIDDOWSON, the sum of in respect of this determination then the Third Respondent shall be entitled to recover eighty percent thereof from the First Respondent, PETER FRANCES BEKX.

19.7 Notwithstanding submissions from the Parties and the Claimant and the Fifth Respondents to the contrary, the Adjudicators do not believe that there is a case for an order for costs pursuant to Section 43 WHRS Act and none are awarded.

20.0 Notice Pursuant to Section 41(1)(b)(iii) WHRS Act 2002

20.1 The statement is made that if an application to enforce this determination by entry as a Judgement is made and any Party takes no steps in relation thereto the consequences are that it is likely the Judgement will be entered for the amounts for which payment has been ordered and steps taken to enforce that Judgement in accordance with the law.

DATED this 15th day of September 2004.

Timothy Scott
For Timothy Scott & George Douglas
Adjudicators