IN THE WEATHERTIGHT HOMES TRIBUNAL

Claim No: 04734

UNDER	the Weathertight Homes Resolution Services Act 2002
IN THE MATTER	of an Adjudication
BETWEEN	**NEVILLE WILLIAM WILSON and PAUL CECIL WASHER as TRUSTEES for THE NEVILLE WILSON FAMILY TRUST** Claimant
AND	**PAUL WELCH and SUZANNE WELCH** First Respondents
AND	**ROBIN BAILLIE** (Removed) Second Respondent
AND	**GRANT KNOWLES** Third Respondent
AND	**GIANNI MARCHESAN** Fourth Respondent
AND	**GRAEME JOHNSON** (Note served and Removed) Fifth Respondent
AND	**GARY POTTER** (Not served and Removed) Sixth Respondent

Hearing:	10 March 2008
Appearances:	R Kettelwell, counsel for claimants P Welch, self represented V Whitfield, counsel for the third respondent G Marchesan, self represented
Determination:	28 March 2008

DETERMINATION OF ADJUDICATOR

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INTRODUCTION

[1] Neville William Wilson and Paul Cecil Washer as trustees for The Neville Wilson Family Trust (the claimants) are the owners of a property at 24A Milton Road, Tauranga. They purchased the property in October 2001 from Paul Louis Welch and Suzanne Joan Welch, the first respondents. When attempting to sell the property in early 2005 the claimants discovered the house was a leaky home.

[2] They arranged for an expert to carry out an inspection and then contracted Dominic Sidebottom to undertake some remedial work to the value of $30,872.08.

[3] Further investigations however suggested the property stilled leaked and the claimants filed a claim with the Weathertight Homes Resolution Services on 12 June 2006. The assessor, in his report dated 8 September 2006, concluded there was further work required to the first floor north elevation and that work was estimated to cost $41,265.00.

[4] The claimants subsequently filed a notice of adjudication including Paul Louis Welch and Suzanne Joan Welch, the previous owners as the first respondents, Robin Baillie the architect and designer of the property as the second respondent and Grant Knowles the builder of the home as the third respondent. Gianni Marchesan the director of Europlast Coating Ltd, the company who carried out the plastering work was subsequently added as the fourth respondent.

[5] The week prior to adjudication a settlement was reached between the claimants and Robin Baillie and they withdrew their claim against him. Mr Baillie has been removed from the claim as no respondent has opposed his removal.

CHRONOLOGY

[6] It is helpful to provide a brief history of the events that have led up to this adjudication.

April 1997	The Welch's purchase the bare land and plans to permit stage from architect Robin Baillie.
10 October 1997	Building consent issued.
19 June 1998	Code Compliance Certificate issued.
26 October 2001	Welchs agreed to sell property to claimants.

Early 2005	Claimants discover they have a leaky home.
Mid 2005	Remediation work carried out by Dominic Sidebottom.
12 June 2006	Claimants file application with WHRS.
8 September 2006	WHRS assessor's report published.
27 March 2007	Notice of adjudication filed.
19 October 2007	Adjudicator assigned to claim.
10 March 2008	Hearing

BACKGROUND FACTUAL BASIS TO CLAIM

[7] The following factual basis to this claim was agreed to by all parties except as indicated.

[8] Mr and Mrs Welch purchased a section at 24A Norton Road, Tauranga from Robin Baillie. Included with the purchase price were plans to permit stage also drawn by Robin Baillie.

[9] Mr Welch contracted Grant Knowles to build the house on a labour-only contract. There is some dispute as to the exact terms of that contract which I will deal with later in this decision. Mr Welch also contracted directly with all the other sub-trades involved in the construction of the house including Europlast Coating Ltd. Gianni Marchesan the fourth respondent was the director of Europlast Coating Ltd and was the person with whom Mr Welch entered into contract negotiation. Mr Marchesan did not undertake the plastering work himself but used sub-contractors or employees to do the work. He however supervised the work and was responsible for arranging materials. He advised he visited the site daily during the time his company was undertaking work on the property.

[10] After the house was completed, but before the Code Compliance Certificate was issued, Mr Welch had a wooden deck built at ground level abutting up to the north-facing wall. This deck was not included in the original plans.

[11] No building consent was obtained for the wooden deck but it was in place at the time of the final inspection, which was undertaken by Bay Building Certifiers Ltd. A Code Compliance Certificate was issued on 19 June 1998.

[12] In October 2001 Mr and Mrs Welch sold the property to the claimants. At the time of the sale they were not aware of any potential weathertightness issues. They believed they had a well-built weatherproof house as the house had been constructed using treated timber for its framing. In addition they believed all necessary building consents and certificates had been obtained.

[13] The claimants first became aware of possible leaks in early 2005 when a soft spot was identified on one of the decks. They commissioned Building Surveying and Services Ltd to inspect the property and to provide a report on its condition. That report identified various defects with the property, which were causing or had the potential to cause water ingress.

[14] More intensive investigation was subsequently undertaken by Building Surveying and Services Ltd, which recommended the following remedial work:

- Re-working the balustrade walls on the first floor balcony.
- Removing the handrails on the balcony that penetrated through the top of the balustrade walls.
- Installing a 15% slope to the top of the balustrade walls.

- Re-designing the deck overflow and drainage system.
- Replacing the butyl deck.

[15] The claimants then engaged Mr Dominic Sidebottom to carry out the suggested repairs. In addition to the work outlined above Mr Sidebottom also increased the height of the balustrade, which was necessary due to the removal of the handrails.

[16] The cost of the work done by Mr Sidebottom was $30,892.50 including the amounts paid to the other trades people who undertook work. Both Mr Marchesan and counsel for the third respondent believe the amount paid for plastering and exterior re-painting was excessive. However, they provided no alternative detailed costs or quotes for the work that was done. After considering all the evidence presented, particularly the information provided by Mr Sidebottom, I am satisfied that the repair costs of $30,892.50 for the remedial work done in 2005 was reasonable and necessary.

[17] Mr Sidebottom identified the following causes for the water ingress and subsequent damage that had occurred:

- Balustrade was a flawed design.
- The decking membrane had been poorly finished to the outer edges of the rainwater head and this was compounded by little or no fall to the outflow pipe.
- Problems with the flashing work undertaken by the roofer.

[18] All parties and their witness agreed that these were the main causes of the damage remedied in 2005.

[19] After the repairs were carried out the claimants put the house back on the market. However, agreements fell through because of unfavourable reports from builders. The claimants accordingly filed a

claim with the Weathertight Homes Resolution Services Act and Jerome Pickering was appointed as the assessor to carry out an investigation of the property.

[20] His report concluded that there was one main area of further damage caused by water entering the dwellinghouse primarily on the outside and inside walls of bedrooms 2 and 3 and the garage. There was damage to the interior wall of these rooms and the lower wall frame and inside the wall was found to be fungus infected with rot well established in the timber bottom plate.

[21] The repair work recommended by the assessor included:

- Removing the exterior cladding and building paper along the north wall outside bedroom 2 and the garage up to the line of the planted-on moulding at first floor level.
- Removing rotten and fungus infected timber.
- Drying the sound timber and install newly treated framing.
- Installing a control joint along the line of the planted-on moulding
- Replacing the fibre cement wall lining.
- New mouldings around the windows to match the existing mouldings.
- Applying a texture plaster finish.

[22] The estimated cost for that work was $41,265.00 including GST. None of the parties disputed the extent or cost of the repair work as estimated by the assessor.

[23] The causes of the damage as identified by the assessor included:

- There is no protective overhang at the top of the parapet wall to deflect the weather – design fault.
- The boundary fence is located quite close to this wall and shadows the lower section of the wall.

- A timber deck abuts the wall at the base. Water running down the wall has accumulated under the deck allowing moisture to wick up between the concrete foundation wall and the cladding thus causing damage to the bottom plate and other wall framing.
- The presence of internal down pipes which penetrate the wall.

[24] Apart from Mr Welch, all other parties agreed on the causes of the water entering the dwellinghouse as identified by the assessor. Mr Welch did not believe the construction of the timber deck was a contributing factor and did not agree that water could be forced up from below to the extent where water damage was evident on the walls. Both Mr Pickering and Mr Knowles however provided clear evidence that wind together with the capillary action of water could cause moisture to come up from the deck area to a level above the waterproof lining and then track down into the interior walls. Together with Mr Wilson they provided information establishing that the wind affect on the timber deck was significantly greater than Mr Welch stated.

[25] I am accordingly satisfied that the location and construction of the wooden deck is a significant cause of water entering the dwelling and it contributes to the damage to the north wall by bedrooms 2 and 3 and the garage.

THE CLAIM

[26] The original claim made by the claimants was for remedial work of approximately $90,000.00. This claim was amended in a revised statement to $71,000.00. On 5 March at a pre-hearing teleconference, the claimants' counsel advised that the claim would

be reduced to approximately $56,000.00 if the parties consented to the removal of the second respondent. However on the morning of the hearing he sought to amend the claim again to $69,788.60, exclusive of costs, calculated as follows:

Remediation costs to date.	$30,8720.00
Assessor's estimate of further work.	$41,265.00
Building Surveying Services Ltd costs.	$573.75
Interest on the remediation work to 31 March 2008.	$6,710.74
Building costs inflation on WHRS estimate for a 2½ year delay.	$5,367.03
Less reduction of claim	$15,000.00
TOTAL	$69,788.60

[27] The amendment of the claim to include the cost of inflation of $5,367.03 was opposed by the respondents on the basis that they had no prior notice of this nor did they have the opportunity to consider or respond to the evidence filed that morning in support of that claim. I also note that the inflation costs were calculated on the basis of a 2½ year delay although the assessor's report was prepared some 18 months prior to the hearing, not 2½ years.

[28] As I indicated at the hearing, it is not appropriate for claimants to amend their claim on the morning of the hearing. Adjudication of claims is expected to proceed on a "no surprises" basis with all parties having adequate notice of the claims and defences with no new issues being raised at the hearing. The

adjudicator however always has discretion as to whether to allow such an amended claim.

[29] In determining whether it is appropriate to do so, I have taken into account the fact that three working days before the hearing the respondents gave their consent to the removal of Mr Baillie as a party to these proceedings on the clear understanding that the claim was being reduced to $56,000.00. This matter was particularly important to Mr Welch who contacted the case manager subsequent to that teleconference to confirm that in fact the claim would be reduced to $56,000.00 if he did not oppose the removal of Mr Baillie. If at that stage Mr Welch had been advised that the claim had not been reduced to $56,000.00 but was going to be $69,000.00 he could well have opposed the removal of Mr Baillie.

[30] It would accordingly be unfair to allow the claimants to increase their claim as requested on the morning of the final hearing. The claim for interest and inflation is accordingly not allowed. The claim is limited to the sum of $56,000.00 being the amount confirmed at the teleconference on Wednesday 5 March 2008.

[31] The claim against the first respondents, Mr and Mrs Welch, is based on two separate grounds. First the claimants allege breach of contract by Mr and Mrs Welch, relying on the warranty provided by them in the sale and purchase agreement signed in October 2001. In addition they seek to recover in tort alleging Mr and Mrs Welch breached their non-delegable duty of care owed to the claimants as successive purchasers as they were the builder-developers of the property.

[32] The claim against the third respondent, Mr Knowles is in tort, and alleges that as the actual builder, he failed to carry out the construction work in a proper and workmanlike manner. In addition it

alleges that he failed to properly supervise the sub-contractors and ensure they carried out their work in a proper manner.

[33] The claim against the fourth respondent, Gianni Marchesan, is also based on tort and on his personal liability as a director. He is a director of Europlast Coating Ltd, the company that undertook the plastering work on the dwelling. The claimants say he is personally liable to them because although the work was done in the name of his company, his "hands-on role" with the work was such that he assumed personal responsibility for it.

THE POSITION OF THE FIRST RESPONDENTS

[34] Mr Welch denied any liability in either contract or tort. He stated he was completely unaware of any potential leaky issues with the dwelling at the time he sold it to the claimants. He noted that he had obtained all the necessary consents and permits when the building was constructed and had obtained a Code Compliance Certificate on the completion of the dwelling. He accepted that the wooden deck was not included in the plans but advised it had been built by the time the final inspection was done and the inspector had actually stood on the deck inspecting the property and had commented on it. He believed he had fulfilled his responsibilities and undertakings in clause 6 of the agreement for sale and purchase and therefore was not liable in contract.

[35] In relation to the claim in tort, Mr Welch denied that he was the builder or developer of the property. He advised that the house had been built for him and his wife to occupy and was not a commercial or moneymaking endeavour. Mr Welch acknowledged that he directly contracted all the sub-trades but did not believe this made him a developer or head-contractor. He said that he

understood that Mr Knowles had accepted responsibility for supervision of the sub-trades.

THE POSITION OF THE THIRD RESPONDENT

[36] Mr Knowles accepts that he owed a duty of care to the claimant as subsequent purchasers but denied that he had breached that duty of care. He submitted he had no involvement with any of the defective work and that the claimants had failed to detail anything he had done wrong.

[37] Mr Knowles further submitted that he had been contracted by Mr Welch on a labour-only contract and was responsible for the building work only. He noted he was not the head-contractor and nor had he taken, or been paid to take, any supervisory responsibility for the sub-trades. He acknowledged that he had advised Mr Welch that he wanted to have some authority over the sub-trades in relation to the work they did that affected his work. He also accepted that he took some responsibility for organising when various other contractors should attend the property. However he did not contract with any of these people directly nor was he responsible for supervising their work.

THE POSITION OF THE FOURTH RESPONDENT

[38] Mr Marchesan denied any personal liability. He advised that it was his company that contracted with Mr and Mrs Welch to do the plastering work on the house and he provided invoices and documents to support this. He also advised he did not personally undertake any plastering work on the property as this was all carried out by people who worked for him. He acknowledged he visited the property on a daily basis while work was being done, managing all

materials and doing some inspection or supervision of the plastering work.

[39] Mr Marchesan further denies that the plastering work was a cause of the problems subsequently identified, and notes that the claimants have not pointed to any defective plastering work or demonstrated that the plastering work in any way caused or contributed to the leaks.

DISCUSSION

Liability of the First Respondents – Paul and Suzanne Welch

[40] When Mr and Mrs Welch sold the property to the claimants they signed a standard form sale and purchase agreement issued by the Real Estate Institute of New Zealand and the Auckland District Law Society. This agreement included the following clause:

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

[41] Mr and Mrs Welch gave the undertaking believing that all building work had been carried out with all necessary permits and consents and that they therefore had met all obligations imposed under the Building Act 1991. The Building Act however requires all work to comply with the New Zealand Building Code. The Code contains mandatory provisions for meeting the purposes of the Act, and is performance-based. That means it says only what is to be achieved but not how to achieve it.

[42] It is not necessary to go into detail about all of the provisions of the Building Code in this decision. However in summary, water ingress or leaks into a building contravene parts of the Building Code, in particular E2, E3, B1 and B2 of the Code. The claimants are alleging that Mr and Mrs Welch breached the warranty given in clause 6.2(5)(d), as they cannot have complied with all the obligations imposed under the Building Act 1991 as the house leaks.

[43] I accept that Mr and Mrs Welch caused or permitted building work on the property for which a building consent was required. However they obtained the required permits and consent, that work (other than the construction of the wooden deck) was completed largely in compliance with those permits and consent and the appropriate Code Compliance Certificate was issued for those works. It is likely that no permit was required for the deck and the building certifier issued the Code Compliance Certificate knowing it had been built. Accordingly the issue is whether Mr and Mrs Welch complied with all the obligations imposed under the Building Act 1991.

[44] Mr Welch submitted that it was unreasonable for any homeowner to be liable under the warranty provisions of the agreement for sale and purchase when they had done all that was required of them to obtain the consents, permits and certificates when the building was carried out.

[45] The claimants' argument is that knowledge or intent is not required for this warranty to be breached. They advise that provided there is evidence that the construction did not comply with the Building Code, the Welch's must take some responsibility for the non-compliance. They also claim that the role the Welch's had in the construction of the dwelling means they have breached the warranties under the sale and purchase agreement.

[46] I find that Mr and Mrs Welch did have responsibility for ensuring the workmanship of the sub-contractors. In addition they were directly responsible for the design and construction of the wooden deck. In both these areas they failed to ensure all the obligations imposed under the Building Act 1991 were complied with and as a result the house leaks. They therefore breached clause 6.2(5)(d) of the agreement for sale and purchase.

[47] As an alternative claim against Mr and Mrs Welch, the claimants say that the Welch's were the builders or developers of the house, or had a role as the head-contractors, and are liable to them in negligence. The claimants say the Welch's arranged for the building consent and Mr Welch sub-contracted most of the work to different tradespeople on labour-only contracts. In particular the carpentry work was done on a labour-only contract as was the waterproofing, roofing, plumbing and plastering. The Welch's were responsible for supplying materials and co-ordinating and managing the construction process.

[48] The law is clear. Those who build or develop properties owe a non-delegable duty of care to subsequent purchasers, and that duty arises where a person assumes legal responsibility by giving directions in relation to the construction of a dwelling at an operational level and/or having direct involvement in matters of construction of the dwelling which give rise to damage or loss. This has been clearly established in New Zealand and in particular I refer

to ***Lester v White*** [1992] 2 NZLR 483 and ***Chase v veGroot*** [1994] 1 NZLR 613.

[49] The key issue here is whether the role of Mr and Mrs Welch in the construction of the home was that of a builder or developer or head-contractor. Mr Welch says that as the owners of the property they owe no duty of care to subsequent purchasers. He says as owners they employed contractors to carry out the building work and they did not become builders or developers. Whilst not referred to by Mr Welch, it would appear he is relying on such decisions as ***Mowlen and Mowlen v Young*** (HC Tauranga, AB 35/93, 20 September 1994). In that case the owner was found not to be a builder or developer when he employed a contractor on a labour-only basis to construct a retaining wall.

[50] In determining whether Mr and Mrs Welch owed a duty of care to the claimants I need to consider:

- Were the Welch's developers?
- Were the Welch's builders?
- Did the Welch's control any part of the building work?

[51] The claimants allege that Mr and Mrs Welch were developers as they purchased the section and developed the property by arranging for the house to be built to their requirements. They further say the Welch's were not only involved as the organisers of the various contractors who actually built the house but also as persons who did some of the work, such as the exterior painting. Mr Welch on the other hand submits that they were normal residential property owners who engaged contractors to build a house, which they intended to be their home. They were not in the business of developing or building homes and this was not a commercial operation.

[52] I accept that the normal understanding of the word "developer" is a person or company that carries out development work in the course of normal business. Although Mr Welch had built a home before, I am satisfied that Mr and Mrs Welch did not undertake the construction of the house primarily as a commercial operation. They cannot therefore be classified as residential property developers and I think it is misleading to categorise them as such.

[53] I will now consider whether the Welch's were builders of their own house and as such owe a duty of care to the claimants. This claim is based on allegations that Mr Welch was closely involved with the building work, that he employed the tradespeople who carried out work on labour-only contracts, and that he actually carried out some of the work himself, although this was only the painting work. It is not suggested that Mr and Mrs Welch were actively involved in doing the physical construction work but it is submitted that they were organising and controlling the work, or at least substantial parts of the work.

[54] Mr and Mrs Welch purchased an empty section together with house plans that were drawn by the previous owner. It is unclear whether it was Mr Welch or Mr Baillie who applied for the building consent. However it was Mr and Mrs Welch who arranged for a suitable builder. As they were aware of his good reputation and had used him for building work in the past, they engaged Mr Knowles. They entered into a labour-only contract with Mr Knowles. In addition they directly entered into labour-only contracts with a number of other tradespeople including the plasterer, the plumber, the roofer and the tradespeople who applied the butyl and waterproofing materials to the deck.

[55] As the Welch's entered into a contract with the builders who carried out much of the building work, they clearly were not builders in this sense. I also find that they should not be liable for any

defective work that may have been done by the builder. However there is no evidence that there was in fact any defective work done by the builder.

[56] At issue therefore is whether Mr and Mrs Welch should be liable for defects from work carried out by the separate contractors. Mr Welch said he believed Mr Knowles was liable for any work done by the separate contractors. However I do not accept that Mr Knowles was ever contracted to supervise the entire building contract as that is not what he had agreed to do. I find in this case the Welch's were responsible for making sure that any separate contractors built in accordance with the Building Code.

[57] It was Mr and Mrs Welch's decision to employ the various sub-contractors on labour-only contracts. Presumably they did this to save money so that they did not have to pay the margin for a head-contractor to supervise the construction. In doing this they put themselves in the position, whether knowingly or not, of having to take some responsibility for ensuring the work done by the sub-contractors was done in a workmanlike manner. It was not in the building contract they entered into with Mr Knowles, and they did not organise anyone else to carry out this management and supervision role. Therefore Mr and Mrs Welch retained the responsibility for ensuring the tradesmen carried out their work in accordance with the Building Code and for taking reasonable steps to ensure the work was done properly.

[58] I therefore conclude that whilst Mr and Mrs Welch were not builders in the traditional sense, they did have a considerable amount of control over some parts of the building work. This included the work of the applicators of the decking membrane, the roofer and the plumber. All of these have been identified as causes for the leaks.

[59] In addition it was Mr and Mrs Welch who decided to construct the wooden deck on the north wall of the house. The evidence clearly establishes that this was done at the instigation of Mr and Mrs Welch who in effect designed it and arranged for it to be built. It is the location and construction of the deck that is the major contributing factor to the additional work that needs to be done on the dwelling as outlined in the assessor's report.

[60] I conclude that Mr and Mrs Welch were negligent in the organisation and supervision of the different contractors that were engaged in the construction work and therefore were in breach of the duty of care that they owed the claimants. The negligence or breach led to water penetration, which resulted in damage. They are therefore liable for the full amount of the claim being $56,000.00.

Liability of Third Respondent – Grant Knowles

[61] No evidence was provided during the course of the adjudication to even suggest any of the work personally undertaken by Mr Knowles was defective or in any way contributed to the leaks. Counsel for the claimants accepted this at the end of the hearing and acknowledged that the only possible claim they could have against Mr Knowles was on the basis of any supervisory responsibility he had for the work of the sub-contractors. I note that in the initial documentation provided by the claimants, they suggested that Mr Knowles was a labour only contractor. This clearly suggests that he had no responsibility for the work of the sub-contractors on site.

[62] Mr Welch however subsequently provided information which suggested that Mr Knowles had a supervisory responsibility for the sub-contractors. In his evidence at the hearing Mr Welch accepted that he had a labour-only contract with Mr Knowles but believed that written into that contract was a provision that Mr Knowles would take supervisory responsibility over the sub-contractors. Mr Welch no

longer had a copy of that document and was a little unclear in relation to exactly what it provided.

[63] Mr Knowles denied ever taking responsibility for the sub-trades. He advised he was paid at a labour-only contract rate and was not appointed as a head-contractor. He said no margin was built into the labour-only contract to do the additional work of supervising any sub-contractors. He also advised that all the sub-trades contracted directly with Mr Welch. It was Mr Welch who entered into agreements with them, invoices were submitted to Mr Welch and Mr Welch paid them.

[64] Mr Knowles accepted that he had asked to have the authority to be able to organise the timing of sub-trades' visits to the property particularly in relation to work that affected his work. He was also quite clear that he was not prepared to put himself in a position where any sub-contractors did work that had the potential of undermining the integrity of his work. Mr Knowles however stated that it was made clear on more than one occasion throughout the course of the construction that the sub-trades were not answerable to him but were answerable to Mr Welch. He gave specific examples of this on being questioned at the hearing.

[65] After considering all the evidence provided, I conclude Mr Knowles was engaged on a labour-only contract and had no responsibility for the quality of the work of any of the other contractors or trades. It would be inconceivable for Mr Knowles, on a labour-only contract, to agree to assume responsibility for all the sub-contractors. Not only is this contrary to usual building practice, it is not supported by the facts of this case. All the sub-contractors contracted directly with Mr Welch and I do not accept that Mr Knowles ever agreed to, or was contracted to, provide supervision or take responsibility for the workmanship of the other contractors who worked on site.

[66] Accordingly I conclude that although Mr Knowles owed a duty of care to the claimants as subsequent purchasers, he did not breach that duty of care. He had no involvement in any of the defective work. Accordingly the claim against Mr Knowles is dismissed.

Liability of the Fourth Respondent – Gianni Marchesan

[67] Mr Marchesan was the director of Europlast Coating Ltd, the plastering company employed to carry out plastering work on the dwelling. That company no longer exists and the claim against Mr Marchesan is based on his alleged personal responsibility as a director of the company.

[68] It has been accepted that directors can be personally liable if they actually carry out the negligent or defective work (see ***Dicks v Hobson Swan Construction***, HC Auckland CIV 2004-404-1065, 22 December 2006). In addition, it is also accepted that directors can have personal liability if they control the negligent or defective work (see ***Hartley v Belemi,*** HC, Auckland, 2006-404-002589, 29 March 2007).

[69] However for some personal liability to arise in the context of this case there needs to be some evidence that the work done by Europlast Coating Ltd was defective and contributed to the subsequent leaks. There is nothing in all the information and evidence provided in the adjudication that in any way implicates or indicates that the plastering work as being defective or contributing to the leaks.

[70] Accordingly whilst Mr Marchesan may have owed a duty of care to the claimants as a director who controlled and supervised the plastering work done on the house, there is no evidence that he

breached that duty of care. Accordingly the claim against him also fails.

ORDERS

[71] The claimants' claim is appropriate to the extent of $56,000.00 as set out in paragraph 30.

[72] There has been negligence and breach of contractual duties on the part of Paul Welch and Suzanne Welch the first respondents causing water entry and damage for which they have liability for the sum of $56,000.00. I accordingly order Paul Welch and Suzanne Welch to pay Neville William Wilson and Paul Cecil Washer as Trustees for the Neville Wilson Family Trust the sum of $56,000.00 forthwith.

[73] There has been no negligence established by the claimants against Grant Knowles or Gianni Marchesan the third and fourth respondents. The claims against them are accordingly dismissed.

[74] Counsel for the third respondent requested that costs be reserved pending the issuing of the final determination. That request is granted. Any applications for costs should be made in writing and filed within 10 working days of this determination. Any submissions or applications received will be circulated and all parties will have a further 10 working days to respond to them. A decision will then be made on the papers.

DATED this 28th day of March 2008

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P A McConnell

Adjudicator