David Jason & Fleure Diane Hartley v Brent Balemi, Manukau City Council, Frans Kamermans Architects Ltd, Balemi & Balemi Ltd (in liquidation) & Joe Kaukas

UNDER the Weathertight Homes Resolution Services Act 2002 ("the Act") **IN THE MATTER OF** an appeal pursuant to sections 44 and 45 of the Act from a determination of Adjudicator A M R Dean dated 11 April 2006

JUDGMENT OF STEVENS J : High Court of New Zealand, Auckland Registry. 29th March 2007

Result

[1] This is an appeal brought under s 44 of the Weathertight Homes Resolution Services Act 2002 (the WHRS Act) against a decision of Mr A M R Dean as Adjudicator (the Adjudicator) dated 11 April 2006. The result is that the appeal is allowed in part. The decision of the Adjudicator on contributory negligence is set aside and the orders made are varied to the extent set out in [149]-[152] below.

[2] The cross appeals brought by Mr Balemi and Frans Kamermans Architects Ltd (the Architect) fail. The cross appeals by the Manukau City Council (the Council) and Mr Joe Kaukas (the Plasterer) were not pursued at the hearing.

Introduction

[3] The Adjudicator's decision followed a three day hearing and comprised a 91 page statement of the Adjudicator's reasons (the Determination).

[4] The case concerns a three level solid plaster clad house at 34B Oakwood Grove, Eastern Beach. The house had been constructed between January 1998 and January 1999. A Code of Compliance Certificate was issued by the Council on 3 March 1999. The first owner, a Mrs Grace Mak, acquired the property in March 1999. It was purchased by the appellants, Mr and Mrs Hartley (the Hartleys) in April 2003. Soon after purchase, the Hartleys experienced significant leaking. Ultimately, the Hartleys filed a claim with the Weathertight Homes Resolution Service (WHRS) contending that the provisions of the WHRS Act applied to the house.

[5] An assessor completed a report on the house, which lead to a claim evaluation by an evaluation panel. It found the claim to be an eligible claim under the WHRS Act. The Hartleys then referred the claim for adjudication. The Adjudicator determined in summary that:

a) The house leaked substantially and as a result had suffered extensive damage necessitating considerable remedial work; and
b) The reasonable cost of the required remedial work was $284,685; and
c) The Hartleys were entitled to cover for loss of rental during the period of remedial work amounting to $20,800; and
d) The Hartleys were not entitled to general damages; and
e) The Hartleys were entitled to recover the sum of $90,564 on the basis that they should bear a substantial contribution in respect of the damages because they had not taken reasonable steps to mitigate their losses and because of their failure to undertake a proper pre-purchase inspection. The overall contribution was set at 66.6% of the damages suffered; and

Liability was imposed on the builder Balemi & Balemi Ltd, Mr Brent Balemi (a director and shareholder in that company), the Council, the Architect and the Plasterer in varying amounts.

[6] The Hartleys have appealed against these findings of the Adjudicator. They came to this Court with a deep sense of grievance at the limited recovery that they secured as a result of the WHRS processes. Dealing solely with the repair costs, the Hartleys were held entitled to recover $83,631 which is less than 30% of the cost of repairs which have been assessed by the Adjudicator at $284,685. Once the repairs to the house are completed, they say they will be out of pocket by in excess of $200,000, without taking into account the substantial legal and other costs incurred in pursuing this matter.

Factual background

The events prior to construction

[7] The original developer of the house was a company called Balemi Enterprises Ltd (BEL). As the original owner of the land on Oakwood Grove, BEL was also the force behind the subdivision, subsequent planning and the building of the house. BEL was originally the seventh respondent in these proceedings, but went into liquidation on 14 November 2005. As a result, BEL is no longer a party to the proceedings. During the construction process, BEL was controlled by Mr Jack Balemi, the father of the first respondent, Mr Brent Balemi. The sole directors and shareholders of BEL are William John (Jack) Balemi and Edna Allison Balemi.

[8] On 21 April 1997, BEL engaged the Architect to prepare a design and building consent drawings. During the rest of 1997, the pre-building process continued, including the preparation of the plans, applications for building consent and approval by the Council. Mr Brent Balemi was instrumental in this process, including applying for the first building consent on 30 October 1997 (mistakenly) on his own behalf.

Construction of the property

[9] Construction began in March 1998. BEL had engaged Balemi & Balemi Ltd (BBL) as the builder on a cost reimbursement contract. This meant that BBL submitted fortnightly invoices to BEL for the costs incurred in the building process, including labour, materials and specialist subcontracting work. In short, as the Adjudicator put it at 8.3.2 of his Determination, BBL organised, managed and supervised the construction work. BBL went into liquidation in February 2006.

[10] Mr Brent Balemi (Mr Balemi) is a director and shareholder of BBL, along with Ms Rebecca Balemi. Mr Balemi was the sole employee of BBL. There is some level of disagreement about Mr Balemi's involvement in the building process. Mr Balemi contends that he was not a supervisor, as he did not possess the requisite skills to oversee the contractors. Although at times he was on site during the construction process, Mr Balemi contends that he did not engage in any building work on the parts of the house that are the subject of this claim. The Adjudicator, as well as the Hartleys and the Council, characterised Mr Balemi as both a director and employee with a direct and specific role relating to many of the relevant defects. Being the only representative of BBL engaged in the construction of the property, Mr Balemi plainly had a critical role as manager of the project. The factual scope of his role, particularly in respect of his involvement in and control of the construction process, is an important aspect of the appeal.

[11] Between March 1998 and March 1999, the Council was involved during the construction of the house in carrying out a number of inspections, culminating in the issuing of the Code Compliance Certificate. This certificate essentially certifies that the building work meets all the requirements of the building code.

Sale of the house

[12] Just before the Code Compliance Certificate was issued, Mrs Mak entered into an Agreement for Sale and Purchase of the house from W J and E A Balemi, the directors of BEL. This purchase was settled on 15 March 1999, and the property was transferred to Mrs Mak's family trust shortly thereafter on 20 March 1999.

[13] About January 2003, the Hartleys made their first visit to the house. An open home was being held by the real estate agency Harcourts, and the Hartleys spent approximately an hour looking it over. They visited the house again three days after the open home, spending between 30 and 40 minutes at the property. They next visited the house on 8 February 2003, when an auction was held for its sale. The evidence suggests that the Hartleys spent 20 minutes looking around before the auction began. The house did not sell at auction. Three weeks later, the Hartleys visited the house again to discuss a possible agreement with Mrs Mak. They spent 40 minutes at the property during this fourth visit.

[14] On 1 March 2003, Mrs Mak entered an Agreement for Sale and Purchase of the house with Mr Maxwell Clinick, Mrs Hartley's father. The Hartleys spent 20 to 30 minutes taking a fifth look at the house as a pre-settlement inspection, approximately one week before settlement of Mr Clinick's agreement. On 11 April 2003, the settlement date for Mr Clinick's purchase, an Agreement for Sale and Purchase of the house was signed between Mr Clinick and the Hartleys. Both agreements were settled on the same day, and the Hartleys took possession of the house.

[15] The facts surrounding the Hartleys' pre-purchase inspection of the house remain somewhat uncertain. The Hartleys were adamant that Mrs Mak had shown them a report prior to their purchase prepared by a Mr Brent Lee. They maintained that the report gave them reassurance that the house was properly constructed. The Adjudicator found that this report was not necessarily a pre-purchase inspection report, but rather a valuation report.

The damage is noticed

[16] Not long after settlement, in May 2003, the Hartleys first noticed leaks. Mr Hartley is a builder who completed an apprenticeship and who has worked in the building industry for 16 years. Mrs Hartley, in the lead up to the purchase of the house, had been a real estate agent for some eight years. They say that after a rain storm they became aware of leaks and, as a consequence, investigated the property and found some signs of previous leaking such as carpet damage and repainting.

[17] On 8 August 2003, the Hartleys contacted Mr Balemi about the leaks and damage to the house. One month later, on 10 September 2003, they filed a claim with the WHRS. The WHRS assessor, Mr Paul Probett, first visited the house on 11 August 2004. He subsequently completed his report on 29 September 2004. His conclusion was that the claimant met the relevant criteria under the WHRS Act making it an eligible claim which qualified for reference to mediation or to the adjudication process.

[18] Subsequent to Mr Probett's report, further inspection and testing of the house was undertaken. This culminated in a supplementary report issued in September 2005, which established that the criteria for mediation and adjudication still applied.

The adjudication

[19] The Adjudicator held a preliminary conference on 19 May 2005. The adjudication was scheduled to begin on 15 November 2005, but was delayed until 5 December 2005 due to a combination of the late delivery of a response and the need for a further exchange of evidence. The hearing eventually took place from 5 to 7 December 2004. Final written submissions were to be filed by 16 December 2005. The Adjudicator's Determination was issued on 11 April 2006.

The appeal

[20] An appeal was filed in the High Court on 10 May 2006. The case was timetabled on the swift track leading to a two day hearing in early September at which all of the parties had the opportunity to make oral submissions regarding the issues the subject of the appeal and cross appeals. As a result of the legal and factual issues canvassed at the hearing, and to ensure that all of the parties had the opportunity to respond adequately to the various points raised during the argument, a sequential timetable for final submissions was agreed with counsel. Under that timetable, the submissions discussed in this judgment were received and have been carefully considered. All counsel are thanked for their thoughtful, careful, comprehensive and focussed submissions.

[21] There was one aspect of the appeal in respect of which further submissions and oral argument was necessary. It related to the issue of alleged contributory negligence by the Hartleys. In particular, the argument focussed on whether the Hartleys were at fault in not obtaining a pre-purchase inspection report from a professional building surveyor. A second related issue concerned whether, if fault on the part of the Hartleys were established, it was causative of the losses claimed.

The statutory context

[22] The WHRS Act was enacted as remedial legislation to meet a serious crisis for persons whose dwellinghouses were leaky buildings. By 2002, the country had become aware of this widespread problem. People caught up in this crisis, as was outlined in the explanatory note to the Bill (see SO 2002/34), needed independent advice on the nature of their problem and the options available for fixing it. They also needed affordable access to fast and effective dispute resolution procedures. Section 3 of the WHRS Act outlined the purpose of the legislation, namely: ... *to provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible, and cost-effective procedures for assessment and resolution of claims relating to those buildings.*

[23] There are helpful discussions of the statutory scheme in ***Kay v Dickson Lonergan Ltd & Ors*** HC AK CIV-2005-483-201 31 May 2006, Ellen France J and in ***Auckland City Council v Weathertight Homes Resolution Service & Anor*** HC AK CIV-2004-404-004407 28 September 2004, Harrison J.

[24] Incidentally, the WHRS Act was recently repealed and replaced by the Weathertight Homes Resolution Act 2006. This Act (except for ss 1 and 2 and subpart 7 of Part 2 dealing with transitional provisions) will be in force as from 1 April 2007, pursuant to cl 2 of the Weathertight Homes Resolution Services Act 2006 Commencement Order 2007 (SR 2007/21). Section 126 completely repeals the WHRS Act on 1 April 2007. Part 2 of the new Act provides a set of comprehensive transitional provisions for claims that are currently being processed under the WHRS Act.

[25] The reason for this replacement is that clarification was required with respect to the position regarding multi-unit complexes and lower value claims. The purpose of the legislation remains the same. The new Act establishes a tribunal to perform the adjudication functions with respect to leaky buildings. There are numerous similarities between that Act and the WHRS Act currently in issue, meaning that principles discernible from this judgment will remain relevant to any future cases under the new Act.

[26] The original WHRS Act was intended to be a statutory regime for dealing with claims relating to leaky buildings. As provided by the overview in s 4, the WHRS Act covers four separate aspects: assessment and evaluation of claims in relation to leaky buildings, mediation of claims, compulsory adjudication of claims and miscellaneous matters which underpin the substantive adjudication function. The WHRS Act provides various mechanisms for claimant home owners to go through the claim process. This process begins with an application under s 9 to have an assessor from the WHRS assess the building and report (under s 10) on whether or not it meets the criteria under s 7(2) for an "eligible claim". If so, the report provides the assessor's view on various issues including the cause of the leaks.

[27] Section 5 dealing with interpretation provides definitions of "claim", "eligible claim" and "leaky building" as follows:

claim means a claim by the owner of a dwellinghouse that the owner believes
(a) is a leaky building; and
(b) has suffered damage as a consequence of it being a leaky building.

eligible claim means a claim by the owner of a dwellinghouse that has been evaluated by an evaluation panel as meeting the criteria set out in section 7(2).

leaky building means a dwellinghouse into which water has penetrated as a result of any aspect of the design, construction, or alteration of the dwellinghouse, or materials used in its construction or alteration.

[28] The WHRS Act has a part dealing with assessment and evaluation of claims.

Section 7 provides:

7 Criteria for eligibility of claims for mediation and adjudication services
(1) A claim may be dealt with under this Act only if
(a) it is a claim by the owner of the dwellinghouse concerned; and
(b) it is an eligible claim in terms of subsection (2).

(2) To be an eligible claim, a claim must, in the opinion of an evaluation panel, formed on the basis of an assessor's report, meet the following criteria:
(a) the dwellinghouse to which the claim relates must
(i) have been built; or
(ii) have been subject to alterations that give rise to the claimwithin the period of 10 years immediately preceding the date that an application is made to the chief executive under section 9(1); and
(b) the dwellinghouse is a leaky building; and
(c) damage to the dwellinghouse has resulted from the dwellinghouse being a leaky building.

[29] The assessor's report under s 10 of the WHRS Act determines whether these criteria have been met:
10 Assessor's report
(1) An assessor's report is a report setting out

(a) whether or not, in the assessor's opinion, the claim to which the report relates meets the criteria set out in section 7(2); and
(b) if the report states that the claim meets those criteria, the assessor's view as to
(i) the cause of water entering the dwellinghouse; and
(ii) the nature and extent of any damage caused by the water entering the dwellinghouse; and
(iii) the work needed to make the dwellinghouse watertight and repair that damage; and
(iv) the estimated cost of that work; and
(v) the persons who should be parties to the claim.

[30] Every assessor's report must be considered by an evaluation panel under s 12, which is separately required to decide whether the claim meets the criteria in s 7(2). A negative determination gives rise to a right of review to the chief adjudicator.

[31] Once it is established that the criteria have been met, the claimant may choose to refer the claim to mediation under s 14, and/or adjudication under s 22. Mediation is governed by ss 13 to 21 of the WHRS Act, and is a process whereby the parties are empowered, with the assistance of an appointed mediator, to come to their own resolution regarding the claim.

[32] Adjudication is a more formal, structured process, governed by a large part of the WHRS Act. The adjudication process is performed by one of several adjudicators appointed under s 24 for their knowledge, skills and experience. The jurisdiction of an adjudicator is set out in s 29 of the WHRS Act:
29 Jurisdiction of adjudicators
(1) In relation to any claim that has been referred to adjudication, the adjudicator is to determine
(a) the liability (if any) of any of the parties to the claimant; and
(b) remedies in relation to any liability determined under paragraph (a).
(2) In relation to any liability determined under subsection (1)(a), the adjudicator may also determine
(a) the liability (if any) of any respondent to any other respondent; and
(b) remedies in relation to any liability determined under paragraph (a).

[33] An adjudicator also possesses other powers prescribed by the WHRS Act. These include the power to terminate proceedings (s 31), consolidate proceedings with the parties' written consent (s 32) and order the joinder or removal of parties (ss 33 and 34). An adjudicator has very broad powers in relation to the adjudication process conferred by s 36. These include:
36 Powers of adjudicator
(1) An adjudicator may
(a) conduct the adjudication in any manner that he or she thinks fit, including adopting an inquisitorial process; and
(b) request further written submissions from the parties to the adjudication, but must give the relevant parties an opportunity to comment on those submissions; and
(c) request the parties to the adjudication to provide copies of any documents that he or she may reasonably require; and
(d) set deadlines for further submissions and comments by the parties; and
(e) appoint an expert adviser to report on specific issues (as long as the parties are notified before the appointment is made); and
(f) call a conference of the parties; and
(g) carry out an inspection of the dwellinghouse to which the claim relates (as long as the consent of the owner or occupier is obtained before entry to any land or premises is made); and
(h) request the parties to do any other thing during the course of an adjudication that he or she considers may reasonably be required to enable the effective and complete determination of the questions that have arisen in the adjudication; and
(i) issue any other reasonable directions that relate to the conduct of the adjudication.

[34] In addition, an adjudicator possesses a number of duties. These are laid out in s 35 of the WHRS Act and include:
35 Duties of adjudicator
An adjudicator must
(a) act independently, impartially, and in a timely manner; and (b) avoid incurring unnecessary expense; and
(c) comply with the principles of natural justice; and
(d) disclose any conflict of interest to the parties to an adjudication; and
(e) if paragraph (d) applies, withdraw from the adjudication unless those parties agree otherwise.

[35] The adjudicator's determination must be made within 35 days unless the parties otherwise agree under s 40. In substance, this determination is much like a judgment issued by a Court. Section 42 relevantly provides:
42 Adjudicator's determination: substance
(1) An adjudicator may make any order that a court of competent jurisdiction could make in relation to a claim in accordance with principles of law.

[36] Rights of appeal are available to all of the parties, to either the District Court or the High Court depending on the amount at issue under the claim. Section 44(1) allows for an appeal to be made to the High Court on a question of law or fact. In its determination of the appeal, the Court may (under s 46(1)):
(1) ... do any 1 or more of the following things:

(a) confirm, modify, or reverse the determination or any part of it:
(b) exercise any of the powers that could have been exercised by the adjudicator in relation to the claim to which the appeal relates.

[37] On appeal, a determination under s 46(1) has effect as if it were a determination made by an adjudicator for the WHRS Act. Moreover, such determination is a final determination of the claim.

[38] Lastly, s 55 provides that for the purposes of the Limitation Act 1950, proceedings are deemed to be filed when an application is made under s 9(1) of the WHRS Act for an assessor's report.

The legal test to be applied by the High Court on appeal

[39] The WHRS Act, while allowing for an appeal on a question of law or fact under s 44(1) that arises from an adjudicator's determination, does not specifically state what test is to be applied by the Court in the determination of that appeal. Section 63 allows rules to be made regulating the practice and procedure of the District Courts to proceedings under the WHRS Act in the District Court. At this time, no rules have been made pursuant to s 63. There is no such provision governing proceedings under the Act heard in the High Court.

[40] However, r 701 of the High Court Rules states:

701 Application of this Part
(1) This Part applies to appeals to the Court under any enactment other than
(a) appeals under the Summary Proceedings Act 1957:
(b) appeals under the Arbitration Act 1996:
(c) appeals under the Bail Act 2000:
(d) appeals or references to the Court by way of case stated to which Part 11 applies.
(3) This Part applies subject to any express provision in the enactment under which the appeal is brought or sought to be brought.

[41] Rule 701 is contained in Part 10 of the High Court Rules, which governs appeals. Thus, subject to any modification contained in the WHRS Act, the appeals provisions of the High Court Rules govern the test on appeal. In particular, r 718 provides:

718 Appeal to be a rehearing
All appeals must be by way of rehearing.

[42] The test on appeal from the WHRS Act is therefore quite broad, involving a question of whether an adjudicator was right in fact and in law in making his or her determination, as determined by way of rehearing. However, there are limits on this process which tell against general factual retrials. The meaning of the expression "appeals must be by way of rehearing" has been discussed in McGechan on Procedure at HR718.01:

The expression "appeal by way of rehearing" has a technical meaning. It does not mean that the court starts with a clean slate. It does, however, have to come to its own conclusion, based on the material presented before the decision-maker, and any further evidence which has been admitted. This rule will apply if the statute conferring the appeal right does not clearly specify another approach: *Kelly v LSA* (2004) 17 PRNZ 449.

In ***Pratt v Wanganui Education Board*** [1977] 1 NZLR 476 it was held that there is not a complete rehearing, as for example in the case of a new trial, but the appeal is to be determined by the Court considering for itself the issues which had to be determined at the original hearing and the effect of the evidence then heard as it appears on the record of the proceedings but applying the law as it is when the appeal is heard and not as it was at the time of the original hearing.

The question was discussed in some detail by the Court of Appeal in R***ae v International Insurance Brokers (Nelson Marlborough) Ltd*** [1998] 3 NZLR 190 (CA), where Tipping J (for the majority) said (at p 198): *"Any tendency or wish to engage in a general factual retrial must be firmly* resisted. This Court will not reverse a factual finding unless compelling grounds are shown for doing so."

[43] The decision of ***Rae v International Insurance Brokers (Nelson Marlborough) Ltd*** [1998] 3 NZLR 190 (CA) has been subsequently approved on a number of occasions: see for example **Stemson v AMP General Insurance (NZ) Ltd** [2007] 1 NZLR 289 (PC) and ***Urbani v Gillions & Sons Ltd*** (2004) 17 PRNZ 112 (SC). Rae involved an appeal against a finding of the High Court regarding whether a particular conversation had taken place. Tipping J concluded at 198 (as summarised in McGechan above) that, while appellants often wish to treat appeals as retrials of fact, the Court will not reverse a factual finding unless compelling grounds to do so are shown.

[44] In ***Rae,*** Thomas J further clarified the situation regarding retrials of fact in the course of a separate and more detailed, though concurring, judgment. At 199, he outlined that the trial Judge (here the Adjudicator) possesses numerous advantages in determining matters of fact: seeing witnesses firsthand to get an impression of reliability or credibility; an ability to gain an impression of the evidence based on more than the "*cold typeface of the transcript";* the completeness of the picture presented at the hearing; and the first hand impression of the probabilities inherent in the circumstances traversed in evidence. In short, Thomas J concluded that there has been "too great a willingness to explore a trial Judge's findings of fact and too little regard to the advantages which that Judge enjoyed in the area of fact finding".

[45] This approach is consistent with the view of Fisher J ***in Wilson v Neva Holdings Limited*** [1994] 1 NZLR 481 which considered the scope of the appellate process in relation to an appeal from a Masters' Chambers decision. But

there are more general observations which emphasise that the context of an appeal is important in determining the level of readiness to intervene. Fisher J stated at 484-485:

An appellate Court refrains from substituting its own discretion for that of the original Judge in the absence of positive grounds for intervention. The criteria for intervention have been variously described but in the long run require error of principle or a result which is plainly wrong: ***Pay v Pay*** *[1968] NZLR 140, 147;* ***Havelock-Green v Westhaven Cabaret Ltd*** *[1976] 1 NZLR 728, 730. This is often helpfully broken down into the four requirements that "an appellant must show that the Judge acted on a wrong principle; or that he failed to take into account some relevant matter or that he took account of some irrelevant matter or that he was plainly wrong" per McMullin J in* May v May *(1982) 1 NZLR 165, 170. To that one can add the introduction of significant new evidence or argument on appeal. The authorities are legion and need not be repeated.*

*... it is important to note that ... there are degrees of readiness to intervene which vary according to the circumstances. The circumstances include the extent of the argument presented in the Court below, the existence and thoroughness of reasons for decision, and whether significant fresh evidence or argument has been presented for the first time on appeal. Those criteria are applied constantly, for example, in the context of appeals against District Court sentences. The extreme case is one in which no reasons for decision have been given at all. The absence of reasons does not of itself mean that the original decision is to be ignored (****Mullett v Gabriel*** *(1989) 52 SASR 330, 333;* ***House v The King*** *(1936) 55 CLR 499, 505) but of course it will then be relatively easy to persuade the appellate Court to intervene (see further* ***R v Awatere*** *[1982] 1 NZLR 644, 649 lines 8-15).*

[46] Counsel for the Hartleys relied in reply on Urbani as authority for the fact that the appellant merely needs to satisfy the appellate court that the factual findings are wrong. That case involved an appeal on the basis that incorrect factual findings were made about an employee's involvement in funeral home embalming procedures. The Court made reference to Rae at 113, noting that it was a case concerning findings of primary fact based on conflicting oral evidence. There is no suggestion that the test outlined in Rae governing such cases is incorrect.

[47] The Hartleys' counsel also helpfully referred to the decision of Kirby J in ***State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)*** (1999) 160 ALR 588 (HCA). There, Kirby J canvassed the law regarding the correct appellate approach to factual findings, particularly in the context of witness credibility. He rightly eschewed a complete ban on appellate interference with these findings, but tempered this by stating at 622:

Full reasons must be given by the appellate court to demonstrate that, notwithstanding the credibility finding, the result of the trial is "palpably", "glaringly" or "compellingly" erroneous when viewed in the light of all of the evidence. If this court considers that the circumstances are insufficiently exceptional, the reasons unpersuasive and the interference unwarranted, it may say so. It will then restore the trial judge's findings as, from time to time, it has done.

[48] Essentially, this is the same test as contained in Rae - there must be a demonstrable error or compelling grounds for an appellate court to overturn a factual finding.

[49] In the context of appeals from adjudicators in weathertight homes cases, there is an additional relevant factor to those mentioned in Rae, namely, the fact that the WHRS is an expert body in which the adjudicators are appointed under s 24. The Minister must recommend for appointment only persons who, in the Minister's opinion, are suitable to be appointed as adjudicators, having regard to their "*knowledge, skills and experience*": see s 24 discussed at [32]. Under the statutory scheme of the WHRS Act, summarised above, each adjudicator will therefore have special expertise in determining the issues which arise for adjudication in the context of a leaky building claim.

[50] Moreover, each adjudicator will have had the opportunity to hear and consider all of the evidence on a firsthand basis. In this context, it is noted that adjudicators have the power to conduct an adjudication "in any manner that he or she thinks fit, including adopting an inquisitorial process": see s 36(1)(a). The information to be considered by the adjudicator will also include the assessor's report under s 10 and in this case included a supplementary report compiled in September 2005, shortly before the adjudication hearing. For present purposes, a key point is that the assessors themselves are appointed by the chief executive of the Department of Building and Housing under s 8 on the basis that they are suitable for appointment as assessors and "having regard to their knowledge, skills and experience".

[51] The qualifications and skills of those who are currently adjudicators and assessors for the WHRS allows the Court to treat them as the equivalent of a specialist tribunal, whose opinions on matters of fact an appellate court would normally be loath to second guess, unless compelling grounds exist for so doing, or unless they can be shown to have fallen into demonstrable error.

[52] Further, WHRS determinations are specifically intended to have the same scope as the Court but also to be speedy and more informal: see for example the general policy statement in SOP 2002/34 which contains the explanatory note which states that: *The intent is that the adjudication process will have the same scope as a court would but will be a quicker, less formal, and more accessible forum for determining liability.*

[53] Thus, while the Court is able in appropriate cases to overturn any findings of fact made by a WHRS adjudicator, it will be naturally cautious about doing so in the absence of compelling grounds that the adjudication was wrongly decided; in other words, where clear grounds are made out to do so.

Key issues on appeal

[54] Arising from the submissions on the appeal by the Hartleys and the cross appeals by Mr Balemi and the Architect, there are a number of issues for determination:

a) Damage to the house:
   i) Did the Adjudicator err in his factual findings on the specific causes of the leaking? Specifically, the challenges on causation were:
      - The Hartleys argued that the retaining walls were leaking separately, rather than as a result of the parapet leaks;
      - The Hartleys argued that the contribution of the saddle flashings was at least equal to that of the fastenings in terms of the solid balustrades leak, increasing the total amount of damage overall;
      - Mr Balemi argued that the sill flashings on the external windows and doors were standard practice and therefore could not be causative of the damage;
   ii) Did the Adjudicator err in his findings regarding quantum for damage caused to the building?

b) Did the Adjudicator err in his findings regarding the personal liability of Mr Balemi, specifically:
   i) Did Mr Balemi owe a duty of care to the appellants?
   ii) If so, what was the scope of Mr Balemi's duty?
   iii) If so, did Mr Balemi breach that duty?

c) Did the Adjudicator err in his findings regarding contributory negligence?
   i) The relative contribution of the respondents, specifically:
      - Was the Architect also liable for the problems with the eyebrows?
      - Did Mr Balemi contribute to the problems with the parapets, eyebrows, pergolas and solid balustrades?
   ii) The contribution of the Hartleys, specifically:
      - Was there any failure to mitigate their loss?
      - Was there any fault on their part causative of the damage?
      - Was the 66.6% contribution and consequent reduction in their damages correct?

d) General damages:
   i) Did the Adjudicator err in finding that general damages can be claimed in a claim brought under the WHRS Act?
   ii) Did the Adjudicator err in finding that the appellants were not eligible for general damages?

e) Did the Adjudicator err in his findings of liability against the Architect in respect of the sill design?

Findings of the Adjudicator on those issues

Damage to the property

[55] The Adjudicator found that there was damage to certain parts of the house caused by leaking. He outlined those parts as follows:

a) External windows and doors. The Adjudicator found that:
   - The windows and external doors leaked as a result of the construction of the sill flashings (the way in which the plaster was finished over the flashings);
   - Those leaks caused 32% of the overall wall area damage;
   - The cost of repairing that damage was $104,580; and
   - BBL, Mr Balemi, the Architect, the Plasterer and the Council were liable for that damage.

b) Parapets at roof level. The Adjudicator found that:
   - The parapets were causing leaks. The major cause of the leaks were cracks in the plaster. Once the water got in, the waterproof membrane was directing the water behind the building paper and into the framing and Hardibacker (a substrate used as external or composite cladding);
   - Leaks visible on the inside of the south-western retaining wall were caused by leaks coming from the parapets;
   - Those leaks caused 36% of the overall wall area damage;
   - The cost of repairing that damage was $92,718; and
   - BBL and Mr Balemi were liable for that damage.

c) Eyebrows above windows. The Adjudicator found that:
   - The failure to waterproof the top surface of the eyebrows and a failure to install a flashing along the top at the junction with the building wall had caused leaks;
   - Those leaks caused 7% of the overall wall area damage;
   - The cost of repairing that damage was $20,588; and
   - BBL, Mr Balemi, the Plasterer and the Council were liable for that damage.

d) Beam to column junctions (pergola). The Adjudicator found that:
   - There was no waterproofing membrane over the top of the columns supporting the pergola framing, thereby causing leaks;
   - Those leaks caused 11% of the overall wall area damage;
   - The cost of repairing that damage was $29,251; and
   - He found BBL, Mr Balemi, the Plasterer and the Council liable for that damage.

e) Solid balustrades around the decks. The Adjudicator found that:
   - Leaks were resulting from the fixing of the handrail support posts. The lack of saddle flashings at the top of the balustrades was not a factor contributing to these leaks;
   - Those leaks caused 14% of the overall wall area damage;
   - The cost of repairing that damage was $37,548; and
   - BBL and Mr Balemi were liable for 10% of that damage.

[56] The Adjudicator dismissed the claims that the retaining walls were leaking and contributing to the overall damage. He concluded that the evidence suggested that the leaks in the parapets or the plastered walls above were the real source of the water apparent in the southwestern retaining wall. Claims had also been made in relation to the penetration though the external walls, as well as the external solid plaster generally. The Adjudicator found that those cracks and leaks were the result of the swelling of the timber framing as a result of the other leaks in the building. As a result, the cost of this remedial work was attributed (as outlined above) to the original causes of the leaks.

[57] The Adjudicator's overall assessment of the cost of the repairs totaled $284,685. His summary of the figures was based on what he considered most accurately reflected the extent of the remedial work that he had found to be necessary (see 6.5 of the Determination). In making that assessment, he looked at five different estimates. At 6.2 of the Determination, the Adjudicator discussed the caution with which he treated those estimates, noting that:

Repair work is notoriously difficult to price, as there is so much that is unknown until the work is actually done. If a builder is prepared to give a firm price for this type of work, then he will either price on the basis of a "worst case" scenario, or he will be taking a very great risk that the work will cost more than the quotation.

The first respondent's personal liability

[58] The Adjudicator established the legal position relative to Mr Balemi at 8.4.13 of the Determination:

i) Where a company gives negligent advice and acts solely through its director in doing so and it is made clear that it is only the company that is giving the advice and there is no representation of personal involvement of the director, it is only the company that can be held liable at a substantive hearing (***Trevor Ivory v Anderson*** [1992] 2 NZLR 517]).

ii) However, the facts may show that there has been an assumption of responsibility by an individual acting on behalf of the company (Trevor Ivory).

iii) In construction cases directors of a company may owe a duty of care independently of the company and may be liable in negligence if they had some involvement in matters of construction giving rise to the plaintiff s claims (***Morton v Douglas Homes Ltd*** [1984] 2 NZLR 595]; ***Callaghan v Robert Ronayne Ltd*** (1979) 1 NZCPR 98).

iv) The fact that the company may be vicariously liable for the negligence of its employees/agents does not relieve those employees/agents from personal liability if the appropriate level of duty of care is established and that person is shown to have acted negligently (***Callaghan***).

v) The assumption of responsibility for a statement or task, in which a defendant is found to have failed to exercise reasonable care, and it is foreseeable that the plaintiff will rely on that statement or task, creates an assumption of legal responsibility and, subject to any countervailing policy factors, a duty of care will arise; or where it is *"fair, just and reasonable"* to do so, the law will deem a defendant to have assumed responsibility; but this depends on a combination of factors including assumption of responsibility, vulnerability of the plaintiff, special skill of the defendant, the need for deterrence and promotion of professional standards and lack of alternative means of protection (***Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd*** [2005] 1 NZLR 324).

[59] The Adjudicator was satisfied that the evidence showed that Mr Balemi was closely involved in all aspects of the building work: he made the application for building consent, selected the subcontractors and suppliers, negotiated the scope of their work and authorised changes to the plans. Although he did not carry out much of the physical work on the site, he was in control of the building work. Hence, the Adjudicator concluded that Mr Balemi was *"personally in control of this building project, to the extent that he owed a duty of care to subsequent purchasers to use reasonable care to ensure that the building was properly built"* (at 8.4.17).

[60] Mr Balemi was found to have breached that duty of care in relation to the external windows and doors by his involvement in the decision to complete the sill flashing. He was also found to have negligently approved the way the roofing membrane went behind the building paper in the parapets, changing the detail on the architects' plans. He was negligent in failing to ensure that the tops of the eyebrows above the windows were waterproofed. Similarly, Mr Balemi was negligent in failing to ensure that the tops of the columns and the junctions with the pergola beams were waterproofed. With respect to the solid balustrades, Mr Balemi's only negligence was in relation to the absence of the saddle flashings, but that was only a small portion of the damage to the solid balustrades.

Contributory negligence

[61] As outlined above, the Adjudicator found responsibility on the part of the various respondents for the damage to the house. He apportioned the damage according to his assessment of their relative contributions to each particular part of the damage.

[62] The Adjudicator found that the Hartleys themselves had contributed to the damage in two ways. First, they failed to take steps that reasonably prudent prospective purchasers would take. The Adjudicator reasoned that the Hartleys were aware of the risks associated with monolithic-clad houses, and knowing that, they chose not to engage a professional building surveyor. They believed that they were capable of carrying out the inspection for themselves. But the Adjudicator found their inspection was inadequate. Had it been properly carried out, they would have noticed areas that were damp or showing signs of dampness, as the Adjudicator found that the property had been leaking for some time.

[63] A more detailed analysis of the Adjudicator's reasoning on this aspect of the case, and the related factual findings will be undertaken later in this judgment. This is necessary in the light of the legal principles applicable to apportionment of liability where contributory negligence is alleged and, importantly, where causation is in issue.

Failure to mitigate

[64] This defence related to the failure by the Hartleys to undertake repair work in a timely fashion. This aspect of the defence by the respondents is discussed at 12.22 and following in the Determination.

[65] The reasoning of the Adjudicator in upholding the defence, and rejecting the evidence of the Hartleys is set out in 12.25 and 12.26 as follows:

I am not satisfied that the Owners were prevented from carrying out some remedial work due to a lack of finance. Whilst I accept that they may not have been in a position to find $153,000, they were in a position to take some steps to prevent the ongoing leaks. Up until Mrs Hartley stopped working to give birth to their first child, in January 2005, they had two incomes. And yet, although it must have been clear that the leaks were getting worse, and they knew that their house was deteriorating, they took no steps to try and stop the leaks. Mr Hartley is a builder, who would be expected to have some ideas on how to stop the leaks. If he did not know, then more reason for them to seek outside professional assistance. A consultant, such as Mr Smith, could have quickly advised them on what steps they should take to minimise the damage caused by the ongoing leaks.

This is a case in which the Owners have not taken reasonable steps to mitigate their losses. I am not suggesting that they should have arranged for the leaks to be fixed immediately, without carefully considering the causes of the leaks, and their options. The evidence is that they virtually watched their house slowly deteriorating around them, without taking reasonable steps to protect their investment.

[66] The Adjudicator then concluded that the failure by the Hartleys to take steps to prevent ongoing damage had probably increased the cost of remedial work by "between 25% and 50%".

[67] As a result of these two aspects of failure to mitigate and contributory negligence on the part of the Hartleys, the Adjudicator set their contribution at two thirds of the total damage suffered. This figure was based on his assessment of the contribution of the appellants on both grounds: the alleged contributory negligence and the failure to mitigate the damage.

General damages

[68] The Adjudicator dismissed the Hartleys' claim for $30,000 as general damages. He found that as a matter of law the WHRS may award general damages, relying on the decision of Judge F W M McElrea in ***Waitakere District Council v Smith*** [2005] DCR 300. However, on the evidence presented to him, he concluded (at 7.10):

Whilst I have no doubt that the condition of [the Hartleys'] house has caused them considerable anxiety, I am not convinced that it was to a level that would justify compensation. Modern life, as we know it in the 21" century, includes daily doses of worry, disappointment, stress and hardship. In this particular case, the Owners convinced me that they are reasonably experienced in the building and property world, and are used to the tensions and stresses that are a part of that business. I will not allow their claim for general damages.

Relevant legal principles

[69] As discussed at [43] above, in order for this Court to substitute its findings for the findings of fact made by the Adjudicator, the parties must demonstrate that there are compelling grounds to show that the decision was wrongly made. Before considering the respective contentions of the parties on the factual aspects of the appeal, it is necessary to determine certain points of law raised by the appeal.

Damage to property

Damage to the property -principles

[70] In order to be liable for particular damage to the house, the respondents must have breached a duty of care owed to the Hartleys as subsequent purchasers of the house. It is clear law in New Zealand that the builder of a dwellinghouse owes a duty of care to a subsequent purchaser of that dwellinghouse not to create any latent defects: ***Bowen v Paramount Builders (Hamilton) Ltd*** [1977] 1 NZLR 394 (CA). A local authority also owes a duty of care to ensure that houses are built in accordance with the local bylaws: ***Invercargill City Council v Hamlin*** [1994] 3 NZLR 513 (CA); [1996] 1 NZLR 513 (PC). As Todd says in The Law of Torts in New Zealand (4ed 2005) at 6.4.02(1):

Thus in a succession of cases in New Zealand over the last 20 years it had been decided that community standards and expectations demanded the imposition of a duty of care on local authorities and builders alike to ensure compliance with local bylaws...

Hamlin accordingly recognises that builders and local authority inspectors owe a duty of care to subsequent owners in building or inspecting dwellinghouses. The duty similarly can be owed by other persons whose negligence contributes to a building defect, such as architects, engineers and developers.

[71] It is an objective standard of care owed by those involved in building a house. Therefore, the Court must examine what the reasonable builder, council inspector, architect or plasterer would have done. This is to be judged at the time when the work was done, i.e. in the particular circumstances of the case. In the overall assessment, as was said in ***Fardon v Harcourt-Rivington*** (1932) 146 LT 391; [1932] All ER Rep 81 (HL) at 83, what amounts to negligence is a question of fact in each case.

[72] In order to breach that duty of care, the house must be shown to contain defects caused by the respondent(s). These must be proved to the usual civil standard, the balance of probabilities. Relative to a claim under the WHRS Act, it must be established by the claimant owner that the building is one into which water has penetrated as a result of any aspect of the design, construction or alteration of the building, or the materials used in its construction or alteration. This qualifies the building as a "leaky building" under the definition in s 5. The claimant owner must also establish that the leaky building has suffered damage as a consequence of it being a leaky building. Proof of such damage then provides the adjudicator with jurisdiction to determine issues of liability (if any) of other parties to the claim and remedies in relation to any such liability: see s 29(1).

Damage to the property - discussion

[73] The Adjudicator's findings regarding the separate forms of damage to the house were essentially findings of fact: there was damage as a result of a breach of the duty of care owed by the respondent parties in relation to certain aspects of the building process. As discussed earlier, this Court may only overturn those findings of fact if there is compelling evidence that the decision was wrongly made. I am conscious that the Adjudicator has particular expertise akin to that of a specialist tribunal. This is particularly so when the Adjudicator had assistance from two reports by an assessor, being a person appointed for his knowledge, skills and experience under s 8 of the WHRS Act.

[74] The Adjudicator's findings of fact were specific, detailed and clearly articulated. The Adjudicator looked at the house himself. He examined the damage in depth, and the findings made regarding the damage were the result of expert evidence, as well as his own personal expertise. The Adjudicator considered the assessor's report as well as the assessor's supplementary report, and heard evidence from the assessor himself. Some 17 witnesses gave evidence at the hearing and as noted at 1.7 of the Determination, *"all the parties who attended the hearing were given the opportunity to present their submissions and evidence and to ask questions of all the witnesses"*.

[75] The Adjudicator considered the evidence and the submissions and carefully articulated the reasons for his factual findings.

[76] The first aspect of the challenge to the factual findings concerned three elements: the analysis of the defects; the conclusions as to whether such defects resulted from negligence on the part of one or more of the respondents; and the findings against the individual respondents. The specific concerns about these factual findings were carefully articulated by Mr Hurd both in his written submissions and orally at the hearing.

[77] However, in my judgment, the Hartleys, Mr Balemi and the Architect who appealed the various decisions as to the causes of the leaks have not shown the existence of any grounds, let alone compelling ones, to enable me to find that the Adjudicator wrongly decided the nature and causes of each type of damage claimed. The same is true in relation to the respective contributions of the various respondents as found by the Adjudicator. This is particularly so in light of the fact that the Adjudicator had the benefit of the materials and information already referred to, saw and heard the witnesses and was able to assess the sources and consequences of the leaking to the Hartleys' dwellinghouse with the benefit of firsthand knowledge, experience and skills, as well as the other advantages possessed by a decider of facts at first instance.

[78] The second aspect of the challenge to the Adjudicator's factual findings was related to quantum of the repair costs. Mr Hurd noted the Adjudicator's observation at 6.2 that "*Repair work is notoriously difficult to price*". But the Hartleys were critical of the approach which was taken to the damages assessment and in particular suggested that firm quotations should have central significance. The Hartleys submitted that more weight should have been given by the Adjudicator to the quotation given by Mr Bennett who gave evidence for the Hartleys. Mr Hurd challenged the "rejection" of Mr Bennett's evidence.

[79] I have carefully considered these criticisms and the other matters raised on behalf of the Hartleys in the submissions on appeal. I conclude, however, that the matters raised were purely factual and the decisions made by the Adjudicator were clearly open to him to make on the basis of all the evidence before him on the issue of quantum. The fact that the Adjudicator rejected the evidence of one particular witness, as occurred in the case of Mr Bennett's evidence, does not provide a basis for me to conclude that the decision was plainly wrong. Indeed, on this part of the case, the appellants have not advanced any basis, let alone compelling grounds, for disturbing the factual findings of the Adjudicator.

Personal liability of the first respondent

Personal liability of the first respondent - principles

[80] The relevant legal principles regarding the personal liability of those involved with the builder were challenged and discussed by many of the parties during the course of the hearing and in written submissions. Counsel

presented helpful submissions on whether Mr Balemi should be found to owe a duty of care in the circumstances of this case. The issue is whether a director of a builder or a project manager may be found to owe a duty of care to a subsequent purchaser. Generally, when examining whether a duty of care exists, the Court goes through a two step process. The first is to see whether there is a relationship of proximity between the parties, and the second is to examine whether there are any policy factors that either support or militate against the creation of a duty of care - see for example ***RollsRoyce New Zealand Ltd v Carter Holt Harvey Ltd*** [2005] 1 NZLR 324 (CA) at 340-341.

[81] The leading case on the personal liability of directors is Trevor Ivory Ltd v Anderson [1992] 2 NZLR 517 (CA). In that case, the plaintiff had paid the company for advice regarding spraying a raspberry crop. The company, through its director, negligently advised the plaintiff to use the herbicide Roundup, which subsequently killed the raspberry crop. The Court of Appeal held that it required special circumstances for a director to be liable for the acts of the company, due to the principle of limited liability: see for example the judgment of Cooke P at 524. The requirement of special circumstances to displace limited liability was emphasised recently by Rodney Hansen J in Body ***Corporate No 187947 & Ors v E P Maddren & Sons Ltd & Ors*** HC AK CIV 2004-404-001149 13 May 2005 at [6].

[82] A critical issue is what the evidence must show. Generally, an assumption of responsibility is required in order to create personal liability, as Hardie Boys J said in ***Trevor Ivory*** at 527:

*Essentially I think the test is, or at least includes, whether there has been an assumption of responsibility, actual or imputed. That is an appropriate test for the personal liability of both a director and an employee. It was the basis upon which the director was held liable in **Fairline Shipping Corporation v Adamson** [1975] QB 180, (see p 189), where the assumption of responsibility was virtually express. It may lie behind the finding of liability in **Centrepac Partnership v Foreign Currency Consultants Ltd** (1989) 4 NZCLC 64,940. Assumption of responsibility may well arise or be imputed where the director or employee exercises particular control or control over a particular operation or activity, as in **Adler v Dickson** [1955] 1 QB 158 (although there the issue did not arise, as it was a pretrial decision on a different point of law). **Yuille v B & B Fisheries (Leigh) Ltd** [1958] 2 Lloyd's Rep 596 is another illustration. This is perhaps more likely to arise within a large company where there are clear allocations of responsibility, than in a small one. It arose however in the case of a small company in **Morton v Douglas Homes Ltd** [1984] 2 NZLR 548, 593ff, but not in a case to which I made some reference in my judgment in Morton, namely **Callaghan v Robert Ronayne Ltd** (Auckland, A 1112/76, 17 September 1979), a judgment of Speight J. It may be that in the present case there would have been a sufficient assumption of responsibility had Mr Ivory undertaken to do the spraying himself, but it is not necessary to consider that possibility.*

[83] Therefore part of the proximity enquiry in establishing a personal duty of care relates to the assumption of responsibility by a party. Trevor Ivory involved negligent misstatement, which is not the case here. While they can be treated similarly, Ms Grant submitted that there are two distinct rationales for liability, which should be kept in mind in applying the test. Negligent misstatement looks to the special relationship between parties where one is seeking to rely on the advice of another, whereas negligent services or actions focus rather on the adequacy of the services provided. Ms Grant further submitted that the test of assumption of responsibility is an objective test, drawing support for this from Rolls-Royce at [98][99]:

The assumption of responsibility and reliance concepts have also been used where the allegation is that services were negligently performed. This is understandable as negligent misstatements and services may tend to merge.

*Assumption of responsibility for a statement or a task does not usually entail a voluntary assumption of legal responsibility to a plaintiff, except in cases where the defendant is found to have undertaken to exercise reasonable care in circumstances which are analogous to, but short of, contract, and it is foreseeable that the plaintiff will rely on that undertaking. If that is the case then, subject to any countervailing policy factors, a duty of care will arise. In other cases, the law will deem the defendant to have assumed responsibility where it is fair, just and reasonable to do so: **Attorney-General v Carter & Anor** [2003] 2 NZLR 160], at pp 168 - 169 (paras [23] - [27]). Whether it is fair, just and reasonable to deem an assumption of responsibility and then a duty of care will depend on a combination of factors, including the assumption of responsibility for the task, any vulnerability of the plaintiff, any special skill of the defendant, the need for deterrence and promotion of professional standards, lack of alternative means of protection and so on - that is, essentially the matters discussed above at paras [58] - [65]. Wider policy factors will also need to be taken into account.*

[84] An important case on the liability of parties involved with the builder of a defective dwellinghouse is ***Morton v Douglas Homes Ltd*** [1984] 2 NZLR 548. In that case, flats were built on land that had previously been used as a shingle pit, and had subsequently been filled with sawdust and a top layer of spoil from nearby sandhills. Hardie Boys J held that the directors of the building company could be held personally liable for the subsidence of the terraces on the property, having failed to ensure that the piles were driven in properly as advised by experts. While ***Morton*** was decided prior to ***Trevor Ivory***, Hardie Boys J himself referred to it in Trevor Ivory as an example of where a director was found to have assumed personal responsibility. Central to the ability to find the directors liable was (at 595):

The relevance of the degree of control which a director has over the operations of the company is that it provides a test of whether or not his personal carelessness may be likely to cause damage to a third party, so that he becomes subject to a duty of care. It is not the fact that he is a director that creates the control, but rather that the fact of

control, however derived, may create the duty. There is therefore no essential difference in this respect between a director and a general manager or indeed a more humble employee of the company. Each is under a duty of care, both to those with whom he deals on the company's behalf and to those with whom the company deals in so far as that dealing is subject to control.

[85] However, Trevor Ivory did introduce a note of caution as to whether Morton established a general rule for the directors of building companies, as Cooke P said at 523:

So far as there were findings in [Morton] of personal liability on the part of directors, I am content to accept that on the particular facts there was an assumption of responsibility. Clearly the judgment was not intended to lay down a general rule in building negligence cases; and it would be unsafe to try to argue from one particular set of facts to another.

[86] However, Trevor Ivory also emphasised the importance of incorporation and the need for clear evidence in establishing the assumption of responsibility on the part of the director. Hardie Boys J said at 527 that:

To make a director liable for his personal negligence does not in my opinion run counter to the purposes and effect of incorporation. Those purposes relevantly include protection of shareholders from the company's liabilities, but that affords no reason to protect directors from the consequences of their own acts and omissions. What does run counter to the purposes and effect of incorporation is a failure to recognise the two capacities in which directors may act; that in appropriate circumstances they are to be identified with the company itself, so that their acts are in truth the company's acts. Indeed, I consider that the nature of corporate personality requires that this identification normally be the basic premise and that clear evidence be needed to displace it with a finding that a director is acting not as the company but as the company's agent or servant in a way that renders him personally liable. [Emphasis added]

[87] The effect that Trevor Ivory has had on the test laid out in Morton is still somewhat unclear. A recent article characterised the control test as a subset of the assumption of responsibility test: see Seagar and Eric "Affirmation and Clarification of Trevor Ivory" [2006] NZLJ 268. Further, in his article "Trevor Ivory v Anderson - Reasoning from the Wrong Planet" NZ Lawyer 15 December 2006, Professor Peter Watts doubts that the interpretation of Trevor Ivory offered by Seagar and Eric sets out the correct approach to the tortious liability of directors. He argues that their interpretation of Trevor Ivory is predicated on the thesis that there is a distinction between directors and their employees, allowing only directors immunity from tortious liability. His argument is that, if an employee should be liable for the actus reus of a tort (rather than just the company on a vicarious basis), then if a director commits the same actus reus he should similarly be liable.

[88] Putting doctrinal issues to one side, the question was recently posed whether the test in the context of the liability of directors is the assumption of responsibility outlined in Trevor Ivory or the actual control test outlined in Morton: see Carpenter "Directors' Liability and Leaky Buildings" [2006] NZLJ 117. The author noted that clarity concerning the test was required. He added perceptively:

This issue is critical, as building owners are often dealing with building or certification companies that now no longer exist or have folded in the face of litigation. Many of these companies were small-scale operators, or in the case of larger entities, were shell companies set up for a particular development and then wound up afterwards.

[89] Hence, the opportunity for a claimant to sheet home personal liability to a director may well be critical to the prospects of recovery. In this context, the observations of the Court of Appeal in ***Rolls Royce*** (see [83]) are important. Commentary such as that contained in the articles referred to above must be viewed in the light of those observations of the Court of Appeal. In the context of leaky building adjudications and disputes, it therefore seems entirely appropriate for decisions makers to apply, where appropriate, the degree of control test articulated by Hardie Boys J in ***Morton.***

[90] This test is consistent with that laid down earlier by Speight J in the Callaghan case referred to by Hardie Boys J in ***Trevor Ivory***. So, whether or not the actual control test is characterised as a subset of the concept of assumption of responsibility, it is certainly not to be treated as a legislative rule. Rather, it is a basis upon which the existence of a duty of care of a builder (who may also be a director of a building company) may be determined in a particular case, but bearing in mind the additional factors identified by the Court of Appeal at [99] of ***Rolls Royce.***

[91] The degree of control test in Morton has been applied in recent cases. For example, in ***Drillien v Tubberty*** (2005) 6 NZCPR 470, Associate Judge Faire found on the facts no duty on the part of the director of the building company, as his position was factually different from the directors in **Morton.** There was no direct involvement on the director's part in ***Drillien*** in the building process, other than to organise what was necessary for the specific subcontractors. He left the subcontractors to get on with the business of the actual building work by themselves. This was in comparison with the directors in Morton who took a hand in specific areas. Direct personal involvement was crucial.

[92] However, personal involvement does not necessarily have to mean that physical work needs to have been undertaken by the director - that is just one potential manifestation of actual control over the building process. Personal involvement and the degree of control may also include, as in Morton itself, administering the construction of the building. Therefore, the test to be applied in examining whether the director of an incorporated builder owes a duty of care to a subsequent purchaser must, in part, examine the question of whether, and if so how, the

director has taken actual control over the process or any particular part thereof. Direct personal involvement may lead to the existence of a duty of care and hence liability, should that duty of care be breached.

[93] Ms Grant submitted that Trevor Ivory approach was not particularly relevant in building disputes. First, she noted that the Court went out of its way to explain that building disputes are different. Secondly, she submitted that the comments by Cooke P at 523 (as reproduced at [85] above) confirmed that Morton is still good law. It is also relevant to note that Cooke P drew attention to the judgment of Hardie Boys J who also distinguished the facts in Morton from those in Trevor Ivory. I refer to the test articulated by Hardie Boys J himself as outlined earlier.

[94] The principles upon which Mr Balemi's personal liability should be determined relate to his personal involvement and the degree of control he exercised over the building process. This is not to say that the principal of a one person company will always be liable for his or her actions, as his or her liability in tort will be determined by the degree of control he or she personally assumes in the building process.

Personal liability of the first respondent - discussion

[95] Much of the argument presented over the course of the three day hearing before the Adjudicator related to Mr Balemi's role as director of BBL, and whether he should be personally liable to the appellants for the negligence of BBL. The Adjudicator found that he personally assumed liability, because he was closely involved in all aspects of the building process: applying for building consent, selecting the subcontractors and suppliers, negotiating the scope of the subcontractors work as well as their prices, authorising changes from the architect's plans, organising and managing the building work on site most days. Relevantly, Mr Balemi was personally involved in decisions that led directly to the leaking damage the house suffered, such as the decision to install the sill flashings in a way that subsequently caused significant damage through leaks.

[96] On the cross appeal by Mr Balemi, his counsel Mr Cogswell submitted that these findings were merely a recitation of what any person in a managerial position in relation to a builder would do. It was submitted that his role came nowhere near that of an "on-site overseer", as he placed reliance on a team of experienced and capable contractors. Further, it was argued that the fact of applying for building consent, selecting the subcontractors and suppliers himself, negotiating their contracts and authorising changes to the plans was not enough: there needs to be an assumption of an additional role or making of an independent decision for personal liability to be imposed.

[97] However, I consider that the question of whether or not Mr Balemi assumed personal responsibility was essentially a factual question for the Adjudicator. Such factual determination was to be based on the test he enunciated drawing upon the principles in ***Morton*** and ***Trevor Ivory.*** In my judgment, the challenges made to the Adjudicator's findings by counsel for Mr Balemi were essentially challenges to the legal principles upon which he based his findings, rather more than the factual findings relating to Mr Balemi's role.

[98] The Adjudicator's assessment of the test in ***Morton*** and ***Trevor Ivory*** (as outlined at [58] summarised the law clearly and succinctly, despite the fact that there was understandably no detailed discussion of the legal principles emerging from the Morton and Trevor Ivory cases. But the correct basic principles were identified. Therefore, any challenge to the law on which the finding of personal liability was based must fail.

[99] Similarly, counsel for Mr Balemi has not shown that any of the factual findings as regards Mr Balemi's role were wrong, let alone based on demonstrable error. Therefore, I consider that there are no grounds on which the Adjudicator's findings on this point should be disturbed. The cross appeal by Mr Balemi is dismissed.

Contributory negligence

Contributory negligence - legal principles

[100] ***Jones v Livox Quarries Ltd*** [1952] 2 QB 608 (CA) at 615 established that the essence of contributory negligence is a failure on the part of the plaintiff to take reasonable care to protect his or her own interests where they are, or ought to have been, known to the plaintiff and reasonably foreseeable. Section 3 of the Contributory Negligence Act 1947 provides:

> 3 *Apportionment of liability in case of contributory negligence*
>
> *(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:*
>
> *Provided that-*
>
> *(a) This subsection shall not operate to defeat any defence arising under a contract:*
>
> *(b) Where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.*
>
> *(2) Where damages are recoverable by any person by virtue of the last preceding subsection subject to such reduction as is therein mentioned, the Court shall find and record the total damages which would have been recoverable if the claimant had not been at fault.*
>
> *(3) Section 17 of the Law Reform Act 1936 (which relates to proceedings against, and contribution between, joint and several tortfeasors) shall apply in any case where 2 or more persons are liable or would, if they had all*

been sued, be liable by virtue of subsection (1) of this section in respect of the damage suffered by any person.

[101] Hence, s 3 allows for apportionment of responsibility for the damage where there is fault on both sides or fault on the part of the plaintiff and other parties.

"Fault' is defined by s 2 of the Contributory Negligence Act as meaning: "*...negligence, breach of statutory duty, or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.*"

[102] The current approach to contributory negligence is laid out in ***Dairy Containers Ltd v NZI Bank Ltd*** [1995] 2 NZLR 30, where Thomas J said at 112 that "fault' is a word to be broadly defined at the legislature's behest. Further, he said:

I appreciate, of course, that this interpretation would mean that contributory negligence would apply to all torts. But that is, I suspect, exactly what the legislature intended when including in the definition of "fault" the words "any act or omission which gives rise to a liability in tort". Nor is it necessary to restrict the legislature's intention to permit a reduction in damages to those torts only where contributory negligence would have operated to defeat the plaintiff's claim at common law prior to 1947. Certainly, that was the motivation behind the enactment of the Contributory Negligence Act and the mischief which the Act sought to remedy. But there is no reason why the legislature should not then be attributed with the enlightened view that damages are to be apportioned in accordance with the party's share in the responsibility for the damage suffered by the plaintiff. This interpretation is supported by a number of policy considerations. Indeed, I believe that a Court seized with the issue today would adopt a broad policy-based approach.

[103] For present purposes, an important aspect of the definition of fault when considering the conduct of a claimant, here the appellant, is the requirement that the negligence alleged gives rise to liability in tort. But in the context of contributory negligence care must be taken as to how the definition of fault in s 2 of the Contributory Negligence is applied to alleged contributory negligence of a claimant.

[104] This issue is highlighted in the case helpfully cited by Ms Grant for the Council, **Badger v Ministry of Defence** [2006] 3 All ER 173. On the issue of the alleged contributory negligence a claimant, Stanley Bumton J stated at [7]-[8]:

... as in the case of negligence, the question of fault is to be determined objectively. The question is not whether the claimant's conduct fell below the standard reasonably to be expected of him, but whether it fell below the standard reasonably to be expected of a person in his position: did his conduct fall below the standard to be expected of a person of ordinary prudence? These propositions were stated more elegantly by Lord Denning MR (with whose judgment the other members of the Court of Appeal agreed) in ***Froom v Butcher*** *[1975] 3 All ER 520 at 523, [1976] QB 286 at 291:*

> *Negligence depends on a breach of duty, whereas contributory negligence does not. Negligence is a man's carelessness in breach of duty to others. Contributory negligence is a man's carelessness in looking after his own safety. He is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man, he might be hurt himself: see [****Jones v Livox Quarries Ltd*** *[1952] 2 QB 608].*

He added ([1975] 3 All ER 520 at 525-526, [1976] QB 286 at 294):

> *In determining responsibility, the law eliminates the personal equation. It takes no notice of the views of the particular individual; or of others like him. It requires everyone to exercise all such precautions as a man of ordinary prudence would observe: see [****Vaughan v Menlove*** *(1837) 3 Bing NC 468, 132 ER 490 and* ***Glasgow Corp v Muir*** *[1943] 2 All ER 44 at 48, [1943] AC 448 at 457] by Lord Macmillan. Nowadays, when we have no juries to help us, it is the duty of the judge to say what a man or ordinary prudence would do. He should make up his own mind, leaving it to the Court of Appeal to correct him if he is wrong.*

[105] It is clear therefore that reasonable foreseeability of the risk of harm by a claimant is a prerequisite to a finding of contributory negligence. This principle was articulated by Denning LJ (as he then was) in ***Jones v Livox Quarries Ltd*** at 615:

Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself, and in his reckonings he must take into account the possibility of others being careless.

[106] Incidentally, the approach of Lord Denning MR in ***Froom v Butcher*** was recently endorsed by the Court of Appeal in ***Swarbrick Excavating (Christchurch) Ltd v Transit New Zealand*** CA156/05 3 November 2006.

[107] Moreover, it is axiomatic that decision-makers, in determining questions of contribution where negligence by a plaintiff is alleged, must only look at negligence or fault which is causal and operative: see ***Griffin v Wimble & Co*** [1950] NZLR 774 approving ***Davies v Swan Motor Co Ltd*** [1949] 2 KB 291 (CA). As stated in Todd at 22.2.03 (854):

Negligence by the plaintiff can be disregarded if this was not a proximate cause of damage of which he or she complains. Ordinary principles of causation and remoteness must be applied before any question of apportionment can arise.

[108] Negligence is an effective cause of injury if, judged broadly and on common sense principles, the injury is a direct consequence of the defendant's negligence: see ***Yorkshire Dale Steamship Co Ltd v Minister of War Transport*** [1942] AC 691 at 706; [1942] 2 All ER 6 at 15 and Laws NZ "Negligence" at para 3. Cooke P stated in ***McElroy Milne v Commercial Electronics Ltd*** [1993] 1 NZLR 39 (CA) at 41 that:

...the ultimate question as to compensatory damages is whether the particular damage claimed is sufficiently linked to the breach of the particular duty to merit recovery in all the circumstances.

[109] In **Sew Hoy & Sons Ltd v Coopers & Lybrand** [1996] 1 NZLR 392 (CA), McKay J at 399 held that causation means more than the mere creation of an opportunity to incur loss. It was also accepted in that case that causation requires more than meeting the "but for" test, that there must be legal causation as well. As Thomas J put it at 408-409:

The basic question remains whether there is a causal connection between the defendant's default and the plaintiff's loss .... The Judge needs to stand back from the case, examine the facts closely, and then decide whether there is a causal link between the default and the loss in issue which can be identified and supported by reasoned argument.

[110] As outlined in Todd at 21.3.01 in reliance on *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA) at [28], the fundamental problem in this field is to distinguish between causing a loss and providing an opportunity for its occurrence.

[111] In this case, the Adjudicator's reasoning on this aspect of contributory negligence and the arguments presented in this Court also raise an issue as to the standard of care expected of a plaintiff for his or her safety. This will normally correspond with the standard expected of the defendant in determining liability in negligence. Todd at 22.2.05 (858) elaborated on this point as follows:

In practice, however, the plaintiff's standard tends to be less exacting, and the reasonable plaintiff is allowed to have lapses whereas the reasonable defendant is not. One reason is that conduct putting oneself, as opposed to someone else, at risk of harm may not inspire an especially critical attitude on the part of the courts. Another is that the effect of a finding of contributory negligence is very different from a finding of negligence. Defendants tend to be insured with respect to activities which may cause harm to others, whereas contributory negligence leaves all or part of the loss to fall on the plaintiff personally. So the courts may adopt a more subjective approach in assessing whether a plaintiff has been at fault.

[112] But plainly it is necessary to be cautious about importing subjective elements, particularly where that aspect is advanced in an endeavour to elevate the standard of care for a claimant in relation to his own interests. To do so would be to detract from the requirement, emphasised by Lord Denning in Froom v Butcher, that one is required to "exercise" all such precautions as a man of ordinary prudence would observe.

[113] Subject then to proof of causation, the courts have abroad power to apportion liability where there has been contributory negligence. The test to establish such contributory negligence is a question of fact and is generally determined by whether the plaintiff acted reasonably in all the circumstances. This was confirmed by Casey J in ***Hooker v Stewart*** [1989] 3 NZLR 543 (CA) at 547:

It is common ground that in considering the question of mitigation and that of contributory negligence, the test is one of reasonableness and the position with regard to the former is succinctly stated in 12 Halsbury's Laws of England (4th ed) para 1194:

"1194. Standard of conduct required of the plaintiff. The plaintiff is only required to act reasonably, and whether he has done so is a question of fact in the circumstances of each particular case, and not a question of law. He must act not only in his own interests but also in the interests of the defendant and keep down the damages, so far as it is reasonable and proper, by acting reasonably in the matter. One test of reasonableness is whether a prudent man would have acted in the same way if the original wrongful act had arisen through his own default. In cases of breach of contract the plaintiff is under no obligation to do anything other than in the ordinary course of business, and where he has been placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the defendant whose breach of contract has occasioned the difficulty. Similar principles apply in tort."

Much of this also accords with the obligation imposed on a party against whom contributory negligence is alleged, to take reasonable care to safeguard his own interests. [Emphasis added]

[114] If contributory negligence is established, apportionment of the damages between the parties turns upon the relevant degrees of causation and the relative blameworthiness of the parties, as outlined in ***Davies v Swan Motor Co (Swansea) Ltd*** and ***Stapley v Gypsum Mines Ltd*** [1952] AC 663 at 682; [1953] 2 All ER 478 at 486. Usually, apportionment is a discretionary matter for the trial judge. In ***Gilrose Finance Ltd v Ellis Gould*** [2000] 2 NZLR 129, the Privy Council said that the apportionment must be plainly wrong in order to be overturned on appeal. Relevantly in the context of this appeal, the speech of Lord Clyde giving the judgment of their Lordships stated at 133-134:

It was claimed that the Court of Appeal had erred in law in the principle which they had applied in deciding whether or not as an appeal Court they could properly interfere with the Judge's assessment of the contribution. The argument was that the Court of Appeal had adopted too high a standard in requiring an error of principle to be identified before interfering with the assessment made by the Judge. But that argument involves a misreading of the judgment

of the Court of Appeal ... Here they said: "we must emphasise that this is an appeal and we are not entitled to revisit the Judge's findings unless we are satisfied that they were plainly wrong". That seems to Their Lordships to be a perfectly appropriate standard to adopt, bearing in mind that, as the appeal Court observed, the Judge having seen and heard the witnesses "had the flavour of the case". It was not for the Court of Appeal to make any fine adjustment to the apportionment of fault even if they felt that the proportions of the Judge were open to challenge. Their Lordships can see no ground for holding that the Judge was plainly wrong, or that the proportions should, as the appellant in the context of the apportionment suggested, be reversed, with the respondents bearing the greater share.

[115] Apportionment between the parties as joint tortfeasors is also a factual enquiry based on s 17(2) of the Law Reform Act 1936. This states:

In any proceedings for contribution under this section, the amount of the contribution recoverable from any person shall be such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the Court shall have the power to exempt any person from liability to make contribution or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

[116] Accordingly, where there is more than one party responsible for causing the relevant damage, the Court or decision-maker may apportion the cost between those parties in a just and equitable manner, based on the extent of responsibility held by each party.

Contributory negligence findings

[117] The evidential findings of the Adjudicator are the starting point for a consideration of the claimed contributory negligence by the Hartleys for (i) failing to obtain a pre-purchase inspection report from a professional building surveyor, and (ii) failing to carry out a proper inspection of the property prior to purchase: see the Determination at 12.2. As noted, the Adjudicator was satisfied that the Hartleys had *"made a contribution towards the situation in which they now find themselves"*: see the Determination at 12.21.

[118] In order to analyse the key findings, it is necessary to refer in some detail to an earlier part of the Determination dealing with the arguments by Mr Heaney for the Council based upon no duty, no causation and voluntary assumption of risk. In this context, Mr Heaney had argued that the Hartleys *"cannot recover for patent defects that existed at the date of the purchase of the property and that [they] knew about prior to deciding to make the purchase"*: see Determination at 11.5.1 and 11.5.7.

[119] The Adjudicator found as follows:

11.5.8 ... I have generally accepted the evidence of the Owners on this issue, and decided that the cracking was either predominantly concealed by the paint in March 2003, or was not anywhere near as serious in March 2003 as it was sixteen months later, in August 2004. Therefore the defects were not patent, to the extent that a normal observer would not notice them, or consider that they were abnormal. I am not convinced that the Owners knew that they were purchasing a building that was seriously cracked or leaked. They knew the house was nearly five years old, but still looked in excellent condition....

11.5.9 The defective construction work was not patent, and if the building was leaking in March 2003, the leaks were not noticed by the Owners or Ms Mak. However, Mr Heaney submits that if the owners had not noticed the cracks or leaks, then this was because they did not carry out a proper and full inspection of the house. He submits that there will seldom be cases as strong as this for negating causation. He says that the owners were an experienced real estate agent fully aware of the need for pre-purchase inspections, and an experienced builder who was familiar with the problems associated with leaky buildings.

11.5.10 I do not accept this submission for the following reasons. The evidence shows that the Owners undertook a reasonably careful inspection of this house before they committed to making an offer. They did not fail to conduct a pre-purchase inspection. The fact that Mr Hartley undertook the inspection himself is quite reasonable. He is a builder. I find that the defects were not patent, so he would have needed to undertake some destructive testing if he was to have unearthed the defects. It is not normal for a prospective purchaser to start cutting holes in the external plaster, or into the internal linings, just to see if there are some problems. This is raising the threshold too high, and would be unreasonable. I am not satisfied that the knowledge that the Owners had acquired at the time of purchase is sufficient to negate any duty of care that the Council may be found to owe to the Owners.

11.5.11 For similar reasons, I am not satisfied that the chain of causation has been broken under these circumstances. The cause of the Owners' losses is the defects in the work that caused the house to leak. The Owners, not being aware of the defects, have not caused their own losses ...

[120] When the Adjudicator considered the question of alleged contributory negligence by the Hartleys, he made the following findings:

12.8 ...All of the evidence given to me shows that there were no obvious signs of leaks into this house in 2003, such as to put an ordinary layperson on notice that further inspections or inquiries should be undertaken. It was not a new house, but it was only four years old. However, I do accept that the knowledge and public awareness about building defects in 1992 was not the same as it was in 2003.

[121] The Adjudicator then considered two District Court cases. But he then concluded that he was:

12.11 ... not persuaded that either of these cases is authority for the proposition that a purchaser of a four year old house in 2003 should have obtained a pre-purchase inspection report. They do support the argument that a purchaser should take reasonable steps to check what they are buying, but no more than that.

[122] Next, the Adjudicator stated:

12.12 It is common ground that the owners did not commission a building surveyor to undertake a pre-purchase inspection on their behalf. Mr Hartley undertook the inspection himself. The respondents say that the Owners should have been aware of the problems with plastered houses by the time that they purchased this house, and that the inspections that they undertook were inadequate under these circumstances.

12.13 I have already mentioned that Mr Hartley is a builder with 16 years experience, and that Mrs Hartley had been operating as a real estate agent for 8 years in the eastern suburbs of Auckland. I think that they both understated their personal knowledge and awareness of the problems about leaky homes in March 2003. If what they told me was accurate, and they did not really appreciate the extent of the problems, then I would conclude that they should have engaged a professional building surveyor to check the house over. That is what a reasonably prudent purchaser of a plastered house should have done in March 2003. However, as I have mentioned, I think that they have understated their knowledge and awareness, and they did realise that this house needed to be looked at very carefully. This is why they visited the house on at least three occasions before deciding to buy it, and again before settlement took place.

12.14 I have come to the conclusion that the Owners have become confused about their evidence about cavities. I do not accept that they mentioned the subject of cavities to anyone prior to them having purchased this house. I do not think that they discussed cavities between themselves until after these problems had arisen. I am satisfied that Mr Hartley did not know, in March 2003, whether houses should have had cavities, and did not know how to tell whether there was a cavity or not.

[123] Then, at 12.15, the Adjudicator stated that the question he had to ask was "whether a professional building surveyor, if he had inspected this house in March 2003, would have seen and found something more than the Owners and the vendor saw?"

[124] He answer that question as follows:

12.16 The evidence about the source of the leaks strongly indicates that this building had been quietly leaking for a considerable time.

Ms Mak did admit to having had some problems with leaks, but these were when water was seen inside the house. A normal house owner does not always detect minor leaks that only occur spasmodically, and under certain weather conditions. The damp patch on the wall maybe hidden from view behind some furniture, and the damp carpet may be assumed to have been the result of an accidentally left-open window. A professional building surveyor in 2003 would have usually used a moisture detection meter, which would be used to check in areas of high risk - such as at the bottom corners of windows, and I would expect a professional surveyor to have known what signs to look for.

12.17 Mr Hartley's own evidence raised some questions as to whether he carried out a thorough inspection, or whether he was looking for the right signs. ...

[125] The Adjudicator's conclusions were:

12.19 I think that it is probable that a surveyor, with the correct inspection equipment, would have detected damp areas within this house. This would have alerted the Owners to the possibility that there were leaking problems with the building. They may have then chosen to ask permission to carry out further tests, or to negotiate over the asking price, or to walk away.

12.20 This is, in my view, a case where the Owners have failed to take the steps which should have been taken by reasonably prudent prospective purchasers. They were aware of the risks associated with monolithic-clad houses. They chose not to engage a professional surveyor to inspect the house, believing that they were quite capable of doing this for themselves. They were mistaken. Mr Hartley did not carry out an adequate inspection. He failed to notice the areas that must have been damp, or would have displayed evidence of dampness, because they had been leaking for some time.

12.21 I am satisfied that this is a case where the Owners have made a contribution towards the situation in which they now find themselves. Although it is not certain that a building surveyor would have been able to alert them to the full extent of the weathertightness problems of this house, I think that it is likely that the building surveyor would have warned them about problems with moisture ingress.

Contributory negligence - the Hartleys' submissions

[126] The submissions for the Hartleys addressed two questions in relation to contributory negligence. Firstly, they asked whether in March 2003 it was negligent for the purchaser of this residential property not to obtain a pre-purchase inspection report. Secondly, the submissions addressed the question of whether the failure to obtain such a report could be said to be causative of the loss claimed by the Hartleys.

[127] In terms of the first question, the Hartleys' submissions are that in a general sense there was no evidence to displace the presumption contained in ***Invercargill City Council v Hamlin*** [1994] 3 NZLR 513 that there is no requirement to obtain a pre-purchase inspection report when purchasing a dwelling in New Zealand, as part of

the distinctive and longstanding feature of the New Zealand housing scene. Mr Hurd, for the Hartleys, further submitted that the factual findings made by the Adjudicator in the Determination did not support a finding that a pre-purchase inspection report was required.

[128] In Mr Hurd's submission, the findings themselves were contradictory and vague regarding the knowledge and position of the Hartleys - the Adjudicator found that there were no patent defects suggesting that inspection was prudent and suggested that the test for fault under s 3 of the Contributory Negligence Act 1947 was objective, but yet found that the Hartleys' inspection was inadequate because of their experience in the industry, a finding redolent of a subjective test.

[129] In addressing the second question of whether any such failure could be causative of the loss, Mr Hurd submitted that there was no analysis of causation in the Adjudicator's Determination. While the Adjudicator concluded that the report would likely have warned the Hartleys about the problems with moisture ingress, he made no findings as to the likely impact of that knowledge, which it is submitted means that there is no causative link.

[130] Further, counsel submitted that there is a problem in principle with any argument regarding causation. The Hartleys sued for the cost of repairing the physical damage to the building. Any loss in value related to the property (the arguable result of the failure to obtain a pre-purchase inspection report) is not at issue here. Neither did the purchase of the property, which might have been avoided had a pre-purchase inspection report been obtained, contribute to the actual physical damage to the property - in the Hartleys' submission, it purely determined who the victim of the loss was. In any case, there were no findings made by the Adjudicator that helped to determine the reduction in damages based on this alleged contributory negligence.

Contributory negligence - the Council's submissions

[131] Ms Grant, for the Council, made submissions in response, also representing the rest of the respondents. She emphasised firstly that the Adjudicator's findings with respect to contributory negligence were correct and should be upheld. The Council re-emphasised that the test for contributory negligence is set out in Badger v Ministry of Defence, establishing three issues for determination: whether there was fault on the Hartleys' part (determined objectively in the circumstances), whether the damage or loss resulted in whole or in part from that fault and what the extent of the Hartleys' responsibility for that fault was.

[132] The Council submitted that the Adjudicator clearly found that the Hartleys were at fault in failing to obtain a pre-purchase inspection report by a professional building surveyor or to carry out such an inspection themselves. This submission was based on the following factual findings and aspects of the evidence:

- That the owners were *"reasonably experienced in the building and property world..."* (see 7.10 of the Determination);
- Mrs Hartley's admission that she was aware of problems with leaky homes at the time, and knew that solid plaster houses should have cavities;
- Mrs Hartley's admission that they thought a pre-purchase inspection report was necessary to check whether the property had cavities;
- Mr Hartley's admission that in conducting his inspection, he was concerned about whether the house was weathertight and wanted to ensure that the house had a cavity;
- The finding that Mr Hartley did not know whether there should be a cavity and his inability to tell whether or not there was one;
- The finding that Mr Hartley's evidence *"raises some questions as to whether he carried out a thorough inspection, or whether he was looking for the right signs"* (see 12.17 of the Determination); and
- The finding that the Hartleys understated their personal knowledge and awareness with the problems about leaky homes in March 2003.

[133] In the Council's submission, fault had effectively been acknowledged by the Hartleys during the course of their evidence. The evidence supported the conclusion that in March 2003, they should have obtained a professional pre-purchase inspection report.

[134] The Council further submitted that causation was not an issue in the present case. "Damage" in terms of s 3 of the Contributory Negligence Act 1947 cannot, in the Council's submission, be defined closely to purely physical damage, but includes economic loss resulting from that damage. There were a number of ways in which the pre-purchase inspection report might have prevented the current loss to the Hartleys because, as the Adjudicator found at 12.21 of the Determination, the report of a building surveyor would have warned them about problems with moisture ingress.

[135] As a result, there was ample scope for the Adjudicator to assess in a broad, jury-like and common sense way the level of contribution by the Hartleys to their own loss. In the Council's submission, this was the correct approach to the assessment of contributory negligence as outlined in the relevant case law.

Contributory negligence - discussion

[136] The appeal in respect of the affirmative defence of contributory negligence, dealt with in section 12 of the Determination, is in a different category to the appeals in respect of the causes of the leaks and the quantum of the repair costs, the appeals regarding contribution by the respondents and the appeal against the findings that

the Hartleys did not take reasonable steps to mitigate their losses by their failure to repair in a timely manner. In these areas, I have concluded that it has not been shown that the Adjudicator was wrong in fact or law in the sense required to be shown on appeal according to the principles in Rae.

[137] It is otherwise with the findings made by the Adjudicator regarding the defects being latent (11.5.8), the fact that the house "*still looked in excellent condition*" (11.5.8), the reasonably careful inspection of the house (11.5.10), the fact Mr Hartley was reasonable in undertaking the pre-inspection report himself (11.5. 10) and the fact that the Hartleys were not aware of the defects did not cause their own losses (11.5. 11). All of these raise serious questions of accuracy and consistency in respect of the findings in paragraphs 12.13 to 12.21 (inclusive) in relation to contributory negligence. I also conclude that the Adjudicator did not apply the correct legal test for determining the question of alleged fault on the part of the Hartleys and the question of causation.

[138] As summarised at [104]-[106] earlier, the question of fault is to be determined objectively and requires the claimant (in relation to his or her own safety) to exercise such precautions as would someone of ordinary prudence. This requires the application of the test of reasonable foreseeability in relation to which the personal equation is eliminated. I conclude that the Adjudicator fell into error in this aspect of the law. In so doing, his factual findings, particularly the conclusion in 12.21 that the Hartleys *"have made a contribution towards the situation in which they now find themselves"*, were made on a flawed basis and one which provides a compelling ground for intervention on appeal.

[139] On this aspect of the case, I do not consider that the Council and other respondents have discharged the burden of proof of showing fault on the part of the Hartleys that would justify a finding of contributory negligence on their part. Indeed, the factual findings of the Adjudicator at 11.5.8 to 11.5.11 (summarised in detail above) would suggest that the Hartleys were not at fault when measured by the reasonably foreseeability test. Part of the error on the part of the Adjudicator seems to have been the application of a subjective test by relying on aspects personal to Mr and Mrs Hartley as suggested at 12.13. This has had the effect of placing a higher standard of care upon them, rather than applying the reasonableness standard required by law.

[140] It is true that the courts have on occasion applied a more subjective approach to assessing the question of fault on the part of a claimant. But this has usually been done to ensure that a less demanding standard of care is applied to a claimant (in the contributory negligence context) than is applied to a defendant in determining liability in negligence. This point is well made in Todd at 22.2.05 quoted at [111].

[141] In the present circumstances, I do not consider that the application of subjective elements (even if they had been established on the evidence) is either warranted in terms of policy or is in line with authority. Accordingly, I conclude that the Adjudicator was wrong in his finding of fault against the Hartleys.

[142] Should I be wrong on that aspect, there is another reason why I do not consider that the determination of liability on the part of the Hartleys for contributory negligence can be upheld. It relates to the issue of causation. In the context of contributory negligence, there is no discussion in the Determination of the issue of causation. The Adjudicator did not make any factual findings as to causation. In this context, the words of Cooke J in ***Rowe v Turner Hopkins*** [1982] 1 NZLR 178 at 181 are instructive. He emphasised that *"...with pleas of contributory negligence in cases where the application of the Act is doubtful, it will be helpful if [decision-makers] find the facts as to causation . ..".*

[143] The Adjudicator made reference in 12.19 to the fact that a report by a professional building surveyor might have alerted the Hartleys to the possibility that there were leaking problems with the building. He added that they "may have then chosen to ask permission to carry out further tests, or to negotiate over the asking price, or to walk away". But the Adjudicator did not go on to make any findings as to how the fault on the part of the Hartleys was causative of the losses which they suffered. In this context, it is important to recall that the claim being brought by the Hartleys under the WHRS Act was in respect of a leaky building. The damage the subject of any such claim is damage "*as a consequence of it being a leaky building*" and the focus of the assessor's report on any claim is on the repair work needed to make the dwellinghouse watertight and repair that damage and the estimated cause of that work: see s 10(1) of the WHRS Act. There is no factual link set out in the

Determination between such damage and the fault alleged by the respondents against the Hartleys.

[144] This was a claim for the repair costs arising from the physical damage to the dwellinghouse. It was not, and could not under the WHRS Act have been, a claim for loss of value caused by the fact that the dwellinghouse was not weathertight. This is to be compared with s 50(1)(c) of the Weathertight Homes Resolution Services Act 2006 which would permit such a claim. But I agree with Mr Hurd, counsel for the Hartleys, that in the context of this particular claim, there was a problem in principle with the argument concerning causation.

[145] Mr Hurd cited the case of Morton v Douglas Homes on this point. As mentioned earlier at [84], that case concerned defective foundations which ultimately resulted in extensive damage to flats owned by the plaintiffs. There, it was alleged that the plaintiffs were contributorily negligent in failing to obtain professional advice with respect to the quality of the ground and the foundations prior to their purchase. The allegation was rejected by Hardie Boys J who at 580 held:

I conclude that even if, contrary to my view, Mrs Morton and Mrs Friend were at fault in not obtaining professional advice, that did not in any way contribute to the damage they had suffered.

[146] I consider that a similar finding would have been justified by the Adjudicator in this case.

[147] Accordingly, on this aspect of the appeal, the appeal will be allowed. I must then consider the effect that this will have on the overall result.

[148] This requires a consideration of the basis upon which the Adjudicator dealt with the level of contribution which the Hartleys were required to make, in other words the amount by which their damages would be reduced. At 12.27, the Adjudicator stated:

After considering all of the evidence and circumstances, I find that the Owners should bear a substantial contribution of the damages. I would assess that the remedial work has probably increased by between 25% and 50%, due to the failure to take steps to prevent ongoing damage. The amount of contribution due to their failure to undertake a proper pre-purchase inspection is more difficult to assess, but I would think that it should be in the order of between 30% and 40%. Overall I will set the amount of the contribution as a total of two thirds of the damages, which is a finding that the defence of contributory negligence will succeed to the amount of 66'j3% of the damages suffered by the Owners.

[149] It seems that the Adjudicator in reaching the figure for contribution of 66.6% has treated the two aspects of failure to mitigate (by delaying the remedial work) and the contributory negligence (from the failure to undertake a proper pre-purchase inspection) broadly equally. This could have been achieved by taking the mid point between the figures of 25% and 50% (i.e. 37.5%) and the figure of 30% and 40% (i.e. 35%), adding the two (72.5%) and then carrying out a downward adjustment to fix 66.6%. However this was done, I consider that for the purposes of adjusting the Determination of the Adjudicator, it is appropriate and fair in all the circumstances of the appeal to fix an allowance for the contributory negligence aspect at 33.3%. This means that the award made by the Adjudicator (which was reduced by 66.6%) now must be increased, so that the deduction from the damages found by the Adjudicator is only 33.3%. This will have the effect of doubling the Hartleys' recovery.

[150] Drawing upon the summary of the Adjudicator in 13.16, this means that the amounts which the respective respondents must pay the appellants is as follows:

Balemi & Balemi Ltd	$56,122.00
Mr Brent Balemi	$56,122.00
Frans Kamermans Architects Ltd	$32,828.00
Mr Joe Kaukas	$10,646.00
Manukau City Council	$25,410.00
	$181,128.00

[151] The order in 15.7 is modified to reflect such changes.

[152] There will need to be consequential adjustments to the figures contained in the Orders in 15.1 to 15.6 (inclusive). By my calculations, each of the figures mentioned in the Order should be doubled. If there is any difficulty with this aspect, leave to apply is reserved.

Failure to mitigate

[153] The findings of fact by the Adjudicator on the failure to mitigate the damage to the house gave rise, in the appellant's submission, to another ground of challenge. However, this again is essentially a question of fact rather than of law. The question for the Adjudicator was whether the steps the Hartleys took, or failed to take, in mitigation were in fact reasonable. The evidence suggests that, apart from lodging a claim with the WHRS, the Hartleys took no steps to mitigate the damage that was occurring to the house. This shows a complete failure to mitigate in the light of the circumstances as found by the Adjudicator. Such finding was plainly open to the Adjudicator on the evidence, as was the finding that the damage increased in severity over the intervening period.

[154] I consider that, on appeal, the Hartleys have not established that the finding of the Adjudicator on this front was plainly wrong. They have shown no grounds to prove that the decision regarding contribution made by the Adjudicator was not one that was open to him, and as a result, this ground of appeal also fails.

General damages

General damages - legal principles

[155] Mr Manning, for the Plasterer, submitted that it is not within the scope of the Adjudicator's power to award general damages in a claim under the WHRS Act. He cited a helpful article by the Hon Robert Smellie CNZM QC, "Weathertight Homes: Limits on Adjudicators' Jurisdiction" NZ Lawyer (Issue 8, 21 January 2005). He also sought to distinguish the judgment of Judge McElrea in Waitakere City Council, in which the District Court Judge considered the article, but reached a different conclusion.

[156] In the article, the learned author advanced an argument based largely around an interpretation of s 42 in the light of the purpose of the WHRS Act (see s 42 at [35]).

[157] Because the WHRS Act was clearly enacted with a view to obtaining speedy, flexible and cost-effective procedures to deal with leaky homes, the author considered the scope of s 42 to be accordingly limited. The meaning of `claim' and `eligible claim' are contained within ss 5 and 7. Section 7 has been referred to earlier at [28]. It was also noted that the definition of "claim" that relates to a claim by an owner of a dwellinghouse who believes that it is a leaking building that has suffered damage as a result.

[158] Given that eligible claims (see s 7(2)) relate only to the physical damage to the house and matters covered within the initial assessor's report, the author concludes that the adjudicators' powers under s 42 cannot be extended to awarding general damages. Further, an award of general damages would not fit within the overall purpose of the WHRS Act to provide procedures that are speedy, flexible and cost-effective for affected homeowners. At 9, he states:

As the explanatory note... states, the immediate needs were seen to be independent advice on the options available for fixing leaks and consequent damage. The low-cost, fast track service operating outside the court system was to meet that need. Had Parliament intended to give adjudicators introduced as part of the WHRSA dual jurisdiction with the courts, and in particular dual jurisdiction to award general damages across the board as opposed to the cost of repairing leaks and damage caused by them, it would have said so. Instead it restricted claims to `eligible claims', and provided that homeowners who want to claim beyond that should pursue their contractual or constitutional rights to go to arbitration or apply to the courts. If a claimant elects either of those two options, then he or she is excluded from the state-funded, speedy, cost-effective remedy available pursuant to the WHRSA.

The idea that weathertight adjudicators, some of whom are not lawyers, should have the same open-ended jurisdictions as the courts is contrary to the whole thrust of the Act.

[159] Judge McElrea in Waitakere City Council approached the question by carefully examining the arguments put forward in the article. He first examined s 42, acknowledging that it supported giving WHRS adjudicators power to make substantive orders as well as procedural orders. He considered that s 29 was relevant to the interpretation of s 42, which establishes the adjudicators' jurisdiction.

[160] The learned Judge expressed the opinion, at 315, that these definitions do not rule out general damages, rather they "*merely establish the rules for eligibility - or, to put the matter differently, the criteria for entry to the tribunal." This was said to support an interpretation of s 42 providing the full range of remedies once eligibility is established: "they establish who may come through the door of the tribunal, not what happens inside it"*.

[161] In terms of the lack of legal qualifications of the adjudicators, Judge McElrea (at 316) gave a list of examples where people without legal qualifications may give awards:

- *Review Officers who are not required to have legal qualifications have, over time, been able to give lump sum awards up to $10,000;*
- *The Broadcasting Standards Authority can give awards of up to $5000 for breaches of privacy. Only the Chairperson of the Authority needs to have legal qualifications;*
- *The Employment Relations Authority may award compensation for hurt, humiliation, loss of dignity and injured feelings. None of the three members of the Authority need have legal qualifications; and*
- *The Human Rights Review Tribunal may award damages for humiliation, loss of dignity and injury to feelings under both the Privacy Act 1993 and the Health and Disability Commissioner Act 1994. The Chairperson is required to have legal qualifications, along with at least three members of the 20 strong pool of potential tribunal members.*

[162] He also compared the ability of juries to award general damages to the adjudicators' jurisdiction, concluding that in the light of the lack of restriction on the amount of damages that they may award, the legislature intended to give a wide jurisdiction to the WHRS adjudicators.

[163] In terms of the argument suggesting that claims are restricted by the contents of the assessors' report, the Judge examined s 10 (see [29]). He concluded that s 10 does not prevent the report from covering other types of loss, which might include special or general damage. Moreover, the wide inquisitorial powers of the adjudicators to obtain other relevant information did not restrict them to dealing with matters contained in the assessors' reports. In conclusion, the Judge said at 317-318:

Standing back and looking at the matter overall, I am clear that the purpose and intent of the Act is not inconsistent with a power to award general damages but is in fact enhanced by it. Both in s 29 dealing with jurisdiction and s 42 dealing with the substance of decisions, Parliament has used the widest language possible, and it would be inappropriate for the Courts to try and cut that down so as to impose restrictions the jurisdiction of the WHRS. The Act should be interpreted in a way that allows it to afford the fullest possible relief to deserving claimants.

[164] Mr Manning responded to the approach in Waitakere City Council in two ways. First, he submitted that the cost considerations in bringing a parallel claim for general damages in the courts were not a relevant consideration for the Judge. The fact that the District and High Courts have jurisdiction should alone be relevant.

[165] Secondly, in relation to the provisions of s 10 and the scope of the assessors' reports, he submitted that s 10 does not allow the assessors to report on other types of losses, such as those the subject of a claim for general damages. The assessor's report is statutorily circumscribed (by s 10 itself) as being a report setting out the matters contained within subsections (a) and (b). He submitted that this interpretation was also supported by the definition of "claim" within the WHRS Act. By definition, a claim relates to consequential damage to the house itself, rather than loss or damage suffered by the owner of the house. In this vein, Mr Manning submitted that the Judge's reference to s 29 and the adjudicators' jurisdiction as covering all aspects of liability and remedy was also flawed in the light of a correct interpretation of the terms "claim" and "eligible claim".

General damages - discussion

[166] The starting point is a consideration of ss 42 and 29. Examined together, they give the impression of a wide jurisdiction available to the adjudicators in order to effect the purpose of the WHRS Act, that is, a speedy, flexible and cost-effective solution to weathertightness problems of leaky buildings. However, the jurisdiction conferred relates specifically to a "claim" brought under the WHRS Act, and in my judgment the jurisdiction of adjudicators is of necessity limited by the scope of a claim.

[167] The definition of "claim" in s 5 at first blush lends some weight to a broad interpretation which might allow a specific claim for general damages. All that is necessary to create a claim is bringing an action based on the fact that the owner believes that the building is leaky, and has suffered damage as a result of that leaking. However, the criteria for an "eligible claim" in s 7 specifically limits the scope. Under section 7(2)(c) eligibility requires that "damage to the dwellinghouse has resulted from the dwellinghouse being a leaky building".

[168] This has the effect of limiting the scope of the adjudicators' powers to only that damage which has happened to the dwellinghouse itself. Sections 29 and 42, while initially appearing broad in application, are specifically defined in terms of the claims referred to adjudication. As is clear from s 7, in order to be eligible for adjudication, the claim must be an "eligible claim".

[169] This interpretation does no harm to the purpose of the WHRS Act: the claims process remains speedy, flexible and cost-effective. However, it could be argued that the logical consequence of this is that other damages are now excluded, including the loss of rental or the cost of alternative accommodation, as it is not damage that has happened to the dwellinghouse itself. This is not necessarily the case, as those damages can be distinguished from general damages for anxiety and stress that were claimed in the present case. Mental distress is a distinct head of damages, clearly different in nature from loss of rental or the cost of alternative accommodation. Allen, Hartshorne and Martin eds in Damages in Tort (2000) describe mental distress at 8-025 as:

... a term used to describe a wide range of feelings such as distress, frustration, anxiety, displeasure, vexation, tension or aggravation.

[170] That phrase is borrowed from the judgment of Lord Bingham LJ in ***Watts v Morrow*** [1991] 1 WLR 1421 at 1445F regarding damages for mental distress for which a surveyor was liable in contract.

[171] Damages for loss of rental or the cost of alternative accommodation are a form of economic loss, and they are directly consequent on the damage to the dwellinghouse in a way in which mental stress or anxiety is not. They are almost always associated with damage to the dwellinghouse, and are also more readily proved. They sit comfortably within the purpose of the WHRS Act, keeping the process speedy and efficient, and providing redress to those affected by the leaky homes crisis.

[172] The role of assessors is central to eligible claims. Therefore s 10 dealing with the content of the assessor's report is very important. That section in turn focusses first on the provisions of s 7(2) dealing with whether the dwellinghouse is a leaky building and the damage to the dwellinghouse and second on the assessor's views on cause, damage, repairs, cost and responsibility.

[173] The result is that nowhere in the statutory provisions that create jurisdiction are general damages mentioned. In my judgment, it is unlikely that such head of damage would be brought in as a sidewind without express reference being made to it in the statute. In this regard, s 29 dealing with the jurisdiction of arbitrators is not only silent on the ability to claim particular heads of damage but is also framed as relating to claims referred to adjudication. Similarly, s 42 which establishes the principles relative to the substance of the adjudicator's determination, is limited to orders that a "court of competent jurisdiction could make in relation to a claim ..." (emphasis added).

[174] If damages for mental anxiety or stress are not available to an adjudicator, then the problems inherent in deciding medical and other forensic issues are solved. Proving this type of damage might well involve further discovery, expert evidence, medical reports and so on. Adjudicators appointed under the WHRS Act are not appointed for this type of expertise.

[175] Finally, there is an argument that if an adjudicator did not have jurisdiction to award general damages then claimants would be required to abandon the right to claim or seek them separately in an action in court. I agree with Mr Manning's submission that the WHRS Act does not confer exclusive jurisdiction on the WHRS to hear and determine claims in respect of leaky buildings. Hence, the courts retain a parallel jurisdiction and have unrestricted powers to award general damages.

[176] In the end, I must stand back and interpret the WHRS Act on this point as best I can, bearing in mind the scheme of the legislation and its relevant objectives. In this context, s 3 sets out the purpose of the legislation and it is

directed at providing redress to the owners of leaky buildings through "*speedy, flexible and cost-effective procedures for assessment and resolution of claims relating to those buildings*". In my judgment, general damages claims for mental stress do not fit comfortably within the overall scheme of the legislation and its underlying policy considerations. Accordingly, I conclude that such a general damages claim was not available to the Hartleys through their WHRS Act claim.

[177] I have found that there is no basis under the WHRS Act to award general damages as compensation for any mental anxiety or stress in the context of a claim brought before the WHRS concerning a leaky building. In this regard, I conclude that the Adjudicator's decision to the contrary was wrong in law. Accordingly, although he decided that the Hartleys should not be awarded any part of the claimed $30,000, there was no legal basis on which he might made that award in any case. Even if I were wrong on the question of the inability of the Adjudicator to award general damages for mental anxiety or stress, I would not have been minded to interfere with the factual determination of the Adjudicator to make no award of damages.

Cross appeal by Council

[178] At the hearing of the appeal, Mr Heaney for the Council advised that the cross appeal by the Council was not being pursued because it was factually based. Mr Heaney submitted that, in view of the applicable test in relation to factual issues arising in an appeal, there was no basis for the Council to advance the cross appeal which was, in this case, purely a factual one.

Cross appeal by Architect

[179] The cross appeal by the Architect relates to the factual findings of liability in respect of the Architect's drawings in respect of external windows and doors. The Adjudicator noted that the architect provided a "Typical Sill" detail on sheet A4 01 of the drawings. Such detail was found to have been generally followed by the builder on site, except that the plaster had been taken further up the window flange. All of the experts agreed that such detail would not have been considered acceptable in 2005, but the critical issue was whether the Architect was negligent in respect of the sill design as at 1996. In this regard, there was plainly a conflict in the evidence, including from the experts, as to what was the acceptable design practice in 1996: see paragraphs 9.3.1 and 9.3.2 of the Determination.

[180] The Adjudicator resolved this conflict by referring to the BRANZ Good Stucco Practice booklet as providing a good and reliable summary of design details that were considered acceptable in 1996. Accordingly, the Adjudicator concluded that the Architect's design detail showing a buried sill flashing was at the time incorrect and had led to many of the leaking problems around the windows. As a consequence resultant damage (including lost rental) of approximately $125,000 was found: see paragraph 9.10.01 of the Determination.

[181] Having considered the submissions on behalf of the architect in support of the cross appeal, and the submissions of the appellant in opposition, I consider that the findings in this area of the determination were clearly factual matters based on the evidence before the Adjudicator. I do not accept the submission from counsel for the Architect that this was an error of law. On appeal, no basis has been established for showing that the factual findings by the Adjudicator were clearly wrong. Equally, there is no compelling basis upon which I consider I should intervene on this aspect of the case.

Other matters

[182] Counsel for the Plasterer, Mr Manning, referred in his written submission to an apparent minor arithmetical error on the part of the Adjudicator in respect of the contribution of the Plasterer. However, in the appeal this point was not pursued and there was no cross appeal by the Plasterer.

Outcome

[183] The outcome, as noted above at [1] and [2] is that the appeal by the Hartleys is allowed in part. However, the Hartleys have failed in respect of the appeal against the quantum of damage to the property, the appeal against the findings on their failure to mitigate and appeal against the failure to award them general damages.

[184] The cross appeals by Mr Balemi and the Architect also fail for the reasons set out above.

[185] The legal determination on the question of general damages for mental anxiety and stress is reversed for the reasons given.

[186] The effect of allowing the appeal in part and the consequential modifications to the orders are set out in [149]-[152] above.

Costs

[187] This is, I am told by counsel, the first such appeal to the High Court from a determination of an adjudicator under the WHRS Act. It was in many respects a test case. However, the Hartleys have had some degree of success and indeed the result is that they will now double the amount recovered in the claim. But they were also unsuccessful in respect of various aspects of the appeal as summarised above.

[188] My preliminary view is that the Hartleys should, taking into account all aspects of their success and failures, recover 70% of their costs. These should be met as to 50% by the Council, 25% by Balemi and Balemi Ltd and Mr Balemi. The balance of 25% should be shared equally by the Plasterer and the Architect.

[189] Counsel should be able to resolve all issues of costs in the light of this indication. If there is any issue as to implementation by the parties in relation to costs, I will receive memoranda (of not more than four pages) to be filed by 30 April 2007.

Appearances:
D Hurd for the appellants
P Cogswell for the first respondent
D Heaney and G Grant for the second respondent J Bierre and K Deobhakta for the third respondent W Manning for the fifth respondent

Solicitors/Counsel:
Kelly Flavell, PO Box 39056, Howick, Auckland
P Cogswell, PO Box 6343, Wellesley Street, Auckland Heaney & Co, PO Box 105391, Auckland
Zeljan Unkovich, PO Box 113010, Newmarket, Auckland Morgan Coakle, PO Box 114, Auckland
D Hurd, PO Box 4338, Shortland Street, Auckland
W Manning, PO Box 5844, Wellesley Street, Auckland