No: 00026

Under	the Weathertight Homes Resolution Services Act 2002
In the matter of	An adjudication claim
Between	**Christopher David Aaron Putman** and **Cathryn Joan Putman**
	Claimant
And	**Jenmark Homes Limited**
	First respondent
And	**Approved Building Certifiers Limited**
	Second respondent
And	**B W Lee Housecheck Ltd**
	Third respondent
And	**Brent Lee**
	Fourth respondent
And	**Tony Heron**
	Fifth respondent

Determination of Adjudicators
10th February 2004

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1. Summary

1.1. The claim by the claimants is a claim in respect of their home which is a leaky building as defined by the Weathertight Homes Resolution Services Act 2002.

1.2. The dwellinghouse is a leaky building because of the failure to comply with the manufacturer's Technical Information for the Harditex cladding used in construction.

1.3. The building does not comply, and has never complied, with the Building Code.

1.4. The reasonable cost of remedial work to the dwelling to remedy these defects is $87,000.00.

1.5. Mr & Mrs Putman have suffered disruption to their lives, stress and inconvenience from these events and will continue to do so until remedial work is finished such as to entitle them to damages in the sum of $15,000.00 to Mrs Putman and $5,000.00 to Mr Putman.

1.6. The builder of the dwelling was negligent in its failure to construct the dwelling in accordance with the building consent or the Technical Information for Harditex or the Building Code and is liable to Mr & Mrs Putman in their damages totalling $107,000.00.

1.7. The building certifier, Approved Building Certifiers Limited, was negligent in its inspections and/or approvals and/or the issue of a Code Compliance Certificate which has caused Mr & Mrs Putman those losses and the building certifier is liable to them in those sums totalling $107,000.00.

1.8. Jenmark Homes Limited and Approved Building Certifiers Limited are joint tort feasors and are liable severally to Mr & Mrs Putman for those sums but can recover against each other, in the case of Jenmark Homes Limited a liability of 80% and in the case of Approved Building Certifiers Limited a liability of 20%.

1.9. The personal author of the Code Compliance Certificate, Tony Heron, is not liable as there has been no proven negligence on his part in the system that was followed by the building certifier, Approved Building Certifiers Limited, for inspection and approval of work and the completion of the Code Compliance Certificate.

1.10. B W Lee Housecheck Limited, the company which inspected the dwelling at the time Mr & Mrs Putman purchased it, was negligent in its advices to Mr & Mrs Putman in failing to draw their attention to matters which might be of concern and require further enquiry and this has caused Mr & Mrs Putman the losses mentioned which they are entitled to recover against it, $107,000.00.

1.11. B W Lee Housecheck Limited is entitled to recover all monies it pays to Mr & Mrs Putman from Jenmark Homes Limited and Approved Building Certifiers Limited but those parties are in turn respectively entitled to contributions to that recovery in the same proportions, that is 80% liability from Jenmark Homes Limited and 20% liability from Approved Building Certifiers Limited.

1.12. The sole director of B W Lee Housecheck Limited, Mr Brent Lee, has no personal liability to Mr & Mrs Putman because in all his

dealings with them he held himself out as acting by and on behalf of his company.

1.13. No party is entitled to any order for costs against any other party.

2. Adjudication Process

2.1. On 16 December 2002 the claimants made application to the Weathertight Homes Resolution Service (**the WHR Service**) under the Weathertight Homes Resolution Services Act 2002 (**the WHRS Act**) in respect of their property at 13A Studfall Street, Pakuranga.

2.2. The claim has been accepted pursuant to s7 of the WHRS Act and an assessor's report dated 18 February 2003 provided by Lawrence J Cook pursuant to s10 of that Act.

2.3. The claimants made application pursuant to s26 of the WHRS Act for this matter to be referred to adjudication. Mr David Gatley and I were appointed as adjudicators.

2.4. There was a Preliminary Conference held on 19 June 2003 attended by some of the parties. We have made certain directions since then pursuant to s36 of the WHRS Act and orders adding parties pursuant to s33 of that Act. In our Directions No 5 dated 16 September 2003 we directed the preparation and lodgement and service of written briefs of evidence and gave guidance notes for the parties and counsel as to how the hearing would be conducted including the provision of written evidence, absolute transparency with no surprises, and the provision of evidence of fact or opinion prior to the commencement of the hearing.

2.5. The respondents joined to the adjudication by us were B W Lee Housecheck Limited, Brent Lee and Tony Heron.

2.6. During the course of the process we were requested to, and did, issue witness summonses pursuant to clauses 8 and 9 of the Schedule to the WHRS Act to Stan Bloxham (at the request of the claimants) and Philip O'Sullivan (at the request of the first respondent, Jenmark Homes (**Jenmark**) which was supported by Approved Building Certifiers Limited (**ABC**)).

2.7. The hearing before Mr Gatley and me, which was estimated to last 2 – 3 days, commenced on 10 December 2003 and proceeding into 11, 12 December and 17 December 2003. All parties, except Jenmark, were present and/or represented from the outset of the hearing namely:

- Mr & Mrs Putman with counsel, Rachael Scott and Michael McInnes
- Approved Building Certifiers Limited (**ABC**) by Mr Neil Boler
- B W Lee Housecheck Limited (**Lee Housecheck**) and Mr Brent Lee (**Lee**) by Mr Jordaan
- Mr Tony Heron (**Heron**) by Mr John Swan

2.8. Jenmark was not represented at all from the outset of the hearing although Mr Mark Dent, a former director, did attend the hearing to advise that Jenmark had been properly served but that it had ceased trading some time ago. He was not sure of its legal status. He advised that he himself was an undischarged bankrupt but said, at that time, that he had no authority to represent the company. He remained at the hearing and sought from time to time to participate but, because other parties resisted that and because Mr Dent had no standing in the matter, we declined to allow him to do so.

2.9. At the commencement of the second day's hearing on 11 December 2003 we were advised by counsel for the claimants that Jenmark was not shown on official records as being either struck off or in liquidation. Mr Dent attended the hearing and advised that there were 10,000 shares of the company of which he held 5,000 with his wife, Jennifer Dent, holding the remaining 5,000 and that while he, Mr Dent, could not act as a director being bankrupt, his wife was still a director and had orally authorised him to attend on the company's behalf and represent it at the hearing. We decided to allow Mr Dent to do so pursuant to s50 of the WHRS Act.

2.10. At the commencement of the third day of hearing on 12 December 2003 the claimants through counsel first gave notice under s30 of the WHRS Act withdrawing their claim against Jenmark and secondly in the alternative applied under s34 of that Act to have Jenmark struck out as a party. There was not agreement to that course from other respondents. We took the view that s30 was addressed to total withdrawal of the claim rather than withdrawal against one party only. We also took the view, because there was opposition from other respondents to Jenmark being struck out as a party under s34, including that there may be cross-claims from other respondents against Jenmark, that it was fair and appropriate in all the circumstances that Jenmark remained as a party. Mr Dent continued to participate fully in the adjudication on its behalf.

2.11. We were requested by all parties to inspect the property and that was eminently sensible which we did (pursuant to s36(1)(g) of the WHRS Act) at the conclusion of the first day of hearing on 10 December 2003. All parties were present at that site inspection with the consent of the Putmans as owners except that Mr Putman indicated that at that stage he did not consent to Mr Dent being on the premises and he was asked to leave, he at that stage having no standing in the adjudication.

3. The Property and Claim

3.1. The property is at 13A Studfall Street, Pakuranga, and is owned by the claimants (**the Putmans**). The residence there had been constructed in 1999 and was purchased by the Putmans from the previous owners by agreement dated 8 June 2002 taking possession about 19 July 2002.

3.2. The dwelling had been constructed by Jenmark with the Building Certificate "A" no 284 being dated 18 November 1998, the application for building consent being dated 29 January 1999, and the Code Compliance Certificate dated 19 April 1999. The Building Certificate "A" and the Code Compliance Certificate were both signed by Tony Heron (refer below) – there were questions about his capacity in so doing. We were given no evidence about the course of construction.

3.3. Before the Putmans completed their purchase they sought advice concerning cracks seen on the exterior walls and silicone around the shower. They sought a pre-purchase inspection check and their agreement included a condition on their "being satisfied with a building report by B W Lee Housecheck Limited to be completed ...".

3.4. Mr Lee did complete a report and it is referred to below. On the basis of that the agreement was declared unconditional and the purchase proceeded.

3.5. After the Putmans took possession they found there was no ceiling insulation and on enquiry from the Manukau City Council found the Code Compliance Certificate issued by ABC and signed by Mr Heron. They made contact with Mr Heron and in turn Chris Green, "the builder", and insulation was duly installed.

3.6. After two further weeks they found an indent in the stairwell wall and the only thing to stop Mr Putman's hand going through the wall was wallpaper with the Gibraltar board lining behind the wallpaper being spongy to the touch. They made contact with Mr Dent and Mr Lee about this; a hole was cut out in the stairwell wall and it was found that the insulation was soaking wet and infested with ants. They made further investigation and became concerned about the weathertightness of the dwelling. When that issue was receiving significant publicity an arrangement was made for Philip O'Sullivan, a registered engineer with Prendos Limited, to inspect the house which he did and in respect of which he wrote to the Putmans by letter dated 4 December 2002. We refer to his opinion below.

3.7. His report was significantly distressing to the Putmans and Mr Putman said he "felt like the rug had been pulled out from under [his] feet". He spoke of the "mental, physical and emotional toll [as having been] ongoing and enormous" and of his constant worry about family health and how his wife was coping. Mrs Putman supported that with evidence of her frustration and near despondency and the adverse effect of the condition of their home on the whole family's physical and mental wellbeing. She referred to respiratory problems for herself and her husband and concern about the asthma for her son, Troy, and respiratory problems for her newborn son, Nicholas. She described herself as being at her "wit's end" and as being "angry that we are forced to raise our children in this situation". The Putmans have brought this adjudication claim in the manner described above.

4. Statutory Requirements

4.1. The following regulatory provisions apply to this claim:

4.1.1. At the time of construction of the dwelling by Jenmark in 1999, Jenmark was required to ensure that the building

complied with the Building Code whether or not a building consent was required (s7(1) Building Act 1991 (**the Building Act**)).

4.1.2. In this case a building consent was required (s32 of the Building Act), and indeed an application for building consent was made under s33.

4.1.3. That application for building consent was by way of application to ABC for a Building Certificate and on 18 November 1998 a Building Certificate "A" no 284 addressed to the Manukau City Council was signed by Mr Heron "... by or for and on behalf of the building certifier [ABC]" in which he certified that ABC had been "engaged to inspect the building work in relation to the listed provisions of the Building Code ... [and was] satisfied on reasonable grounds that the proposed building work would comply with the listed provisions of the Building Code if properly completed in accordance with the listed plans and specifications" (**exhibit E**).

4.1.4. Certificates of this nature are authorised to be issued by "a building certifier" by s56 of the Building Act.

4.1.5. It was treated at the hearing as common ground that ABC was an approved "building certifier" under s51 of the Building Act (and we refer to this below).

4.1.6. The National Building Code required by Part VI of the Building Act was created by the Building Regulations 1992 (**the Building Regulations**) pursuant to s48 of the Building Act.

4.1.7. The relevant portions of the Building Code are in clause E2 "External Moisture", extracts of which are:

> "E2.1 The objective of this provision is to safeguard people from illness or injury which could result from external moisture entering the building.
>
> E2.2 The building shall be constructed to provide adequate resistance to penetration by, and the accumulation of, moisture from the outside"
>
> but with the limitation:
>
> > "Requirement E2.2 shall not apply to buildings in which moisture from outside would result in effects which are no more harmful than those likely to arise indoors during normal use."
>
> "E2.3.1Roofs shall shed precipitated moisture ..."
>
> "E2.3.2Roofs and exterior walls shall prevent the penetration of water that could cause undue dampness or damage to building elements."

4.1.8. An owner is required by s43 of the Building Act to advise the territorial authority as soon as practicable that the building work has been completed to the extent required by the Building Consent issued.

4.1.9. In fact in this case the advice of completion of the building work pursuant to s43(1) of the Building Act was signed by Mr J W Stanton described on the Advice form as "inspector" and as signing "by/for and on behalf of the owner" and is dated 19 April 1999 (**exhibit H**) [and we refer to Mr Stanton's role below].

4.1.10. A Code Compliance Certificate (defined by s2 of the Building Act to mean:

> "... a certificate to that effect ...")

may be issued by a "building certifier" under s56(3) of the Building Act:

> "... if the building certifier is satisfied **on reasonable grounds** that the building work complied with the provisions of the Building Code on the date of certification" (emphasis added)

with the further provision in s56(3A) that:

> "subject to subsections (2) and (3) a building certifier may, at the building certifier's discretion, accept a producer statement establishing compliance with all or any of the provisions of the Building Code."

although there is no suggestion in this case that that discretion was exercised.

4.1.11. A Code Compliance Certificate was issued by ABC dated 19 April 1999 and signed "by or for and on behalf of [ABC]" by Mr Heron (**exhibit I**).

4.1.12. A territorial authority is obliged under s50 to accept the Code Compliance Certificate issued by a building certifier as establishing compliance with the provisions of the Building Code.

4.1.13. A building certifier is obliged under s50(2) of the Building Act to accept, amongst other things:

> "A current and relevant accreditation certificate to that effect issued by [the Building Authority] under section 59 [of the Building Act]"

as establishing compliance with the provisions of the Building Code. As we state below, the evidence of Mr Bloxham was that the Harditex system was not an acceptable solution but was rather an alternative solution.

4.2. We heard significant evidence about the Harditex system involved in this construction and an Appraisal Certificate issued by Building Technology Limited (**BTL**).

4.3. It is important to emphasise that s58 of the Building Act permits an application to be made to the Building Standards Authority (**BSA**) for:

> "... the accreditation of any proprietary item, being a material, method of construction, design, or component relating to building work"

That application is to be made by the proprietor or the proprietor's agent and is to be accompanied by an appraisal which complies with subsections (3) and (4) (subsection (2)).

That appraisal is required to be:

> "... a detailed and reasoned technical opinion issued by an appropriately qualified organisation having no proprietary interest in the appraised item" (subsection (3))

and is to include identification of the appraised item and its purpose being a purpose within the scope of the Building Code and identification of the manufacturer and is further to include:

> "An opinion that the product is suitable for its purpose **provided it is manufactured and installed under the specified conditions**" (emphasis added)

and:

> "A specification of the product and, if necessary, of the manner of its installation"

and:

> "The specific conditions on which the opinion is subject"

and:

> "The basis of appraisal"

and:

> "A list of other documents (if any) that need to be referred to in order to check that an individual application of the appraised item conforms to the conditions."

4.4. The provisions of s59 of the Building Act include that the Building Industry Authority is required to accredit the item if it is satisfied that the item, if used under the conditions specified, will comply with specified provisions of the Building Code and may obtain further advice necessary to assist. Any such accreditation is to be made after considering any report and recommendations. The Authority is required to issue a certificate of accreditation once an item is accredited with reference to required conditions.

4.5. The evidence of Mr Bloxham from James Hardie was that the status of Harditex was that it was an alternative solution not an acceptable solution.

4.6. There is the further provision of s49 of the Building Act allowing the Building Industry Authority to approve documents for use in establishing compliance with the provisions of the Building Code. Mr Cook, the assessor, gave evidence that Harditex had not been approved under this section.

5. Condition of Dwellinghouse and Causation

5.1. There is no doubt in our mind that this dwellinghouse is damaged. There are photographs taken by the assessor and annexed to his report. The damage to the dwellinghouse was quite apparent from our site inspection. The assessor's report and his evidence at the

hearing and the evidence from Mr & Mrs Putman all confirm that damage. Indeed, apart perhaps from a question of the **extent** of damage, it did not seem to be contested by other parties that there was damage.

5.2. It is also our view that this damage, or at least part of it, has been caused by the ingress of water. Again there did not seem to be any real contest on that from the respondents.

5.3. The assessor described his view at para 2.1 of his report that rainwater had penetrated past the Harditex cladding at the heads of windows and/or at the lower end of the garage South roof apron flashing and also through cracks in the Harditex cladding. He reported, and this was confirmed by Mr Bloxham to whom we shall refer, that the Harditex cladding had not been installed in accordance with manufacturers' recommendations.

5.4. In particular he listed 10 different aspects in which the Harditex Technical Information sheets were not complied with.

5.5. In general terms, although there was significant debate in cross-examination about aspects of the construction, there was no real evidence put forward by any respondent that that Harditex Technical Information had in fact been complied with.

5.6. There were questions about which version of the information applied. We were shown in evidence versions dated 1996 and 1998. Our view is that, this construction having occurred in 1999, it is the 1998 version of that Technical Information that applied. In any event, however, there did not seem to be material differences between the two versions which would have affected the assessor's comments on non-compliance even if the 1996 version had applied.

5.7. Horizontal Control Joints

5.7.1. The first aspect of non-compliance identified by the assessor was installation of Harditex without a horizontal control joint at floor joist level to allow for shrinkage of the floor joists. This is because of the fact that this dwelling is two-storied and therefore there is a floor approximately midway up the construction for the second storey and normally the Harditex installation requires a control joint at that floor joist level. In particular fig 13 p10 note 2 reads:

> "In multi-storey applications the horizontal control joints must coincide with floor joists (refer figs 25, 26 and 27)"

5.7.2. Those three diagrams (figs 25, 26 and 27, p16) show alternative methods of horizontal flashing for control joints. The most applicable is fig 25 where the two sheets of Harditex abut each other without a reveal and without overlap. That fig 25 clearly requires a gap of 9mm between the upper Harditex sheet and the lower Harditex sheet.

5.7.3. The reason for this was described to us that that gap would allow movement in the floor and upper storey without a resultant crack in the plaster allowing water entry.

5.7.4. In respect of the eastern wall where the garage adjoins, there was not the same requirement for the horizontal control joint because of the existence of the stairway inside which, of course, removed the flooring from that area and therefore the floor joist which would otherwise have supported it. Although that stairway did not occupy the whole of the area that would otherwise have required a control joint and there was then a floor joist beyond the stairway, this was substantially, if not completely, where the garage adjoined and therefore it was accepted that there

was not the same need for a horizontal control joint on that wall.

5.7.5. That is significant because that eastern wall was the wall that had the most damage and apparently the most water ingress but that wall did not require under the Harditex Technical Information a horizontal control joint for the reason mentioned namely that there is substantially no floor joist because of the internal stairway.

5.7.6. Mr Bloxham in his evidence said that cracking was likely to have been caused by a lack of control joints at floor level on the south wall at the mid level, the north wall between the windows (in three places) and on the western wall between the windows (in two places).

5.7.7. It is our view that, although the Technical Information may not have required a horizontal control joint in this particular position, that does not excuse the absence of a control joint if the same would have prevented cracking and stopped or at least reduced water ingress into that wall. It is not enough, as we say below, for the construction to comply with the letter of the Harditex Technical Information sheets, it must also comply with the Building Code itself. Or to put it another way, the construction must comply with the Building Code primarily and part of the way to achieve that may be to comply with a supplier's technical information but the requirement of the Building Code may go beyond that.

5.7.8. We mention below the view expressed by Mr O'Sullivan about entry of water from the roof apron flashing to the garage and that may indeed have been a factor in the eastern wall leakage and damage to that wall but in our view it is only a factor and the cracking in the horizontal joint

between the Harditex, for whatever cause, has led to other leakage into that wall.

5.7.9. There are cracks in all of the other three walls but, apart from one demonstrated crack in the southern wall near the front door (which is near to the stairwell and therefore would not require a horizontal control joint) there were no other horizontal cracks identified (refer **exhibit B**).

5.8. PVC Corner Mouldings

5.8.1. The assessor's report identified that PVC corner mouldings must be installed to allow for shrinkage movement at the floor joist level and he identified two sections on the north-western corner of the dwelling where destructive testing and the photographs showed that the PVC corner mould was continuous across the horizontal joints of the Harditex. He said that this resulted in the Harditex textured finish cracking or breaking off adjacent to the corner PVC moulding.

5.8.2. There seemed to be no substantial disagreement with his facts or assessment and the crack map (**exhibit B**) showed a crack having developed at that corner and that location.

5.8.3. In his "brief of evidence" sent 3 November 2003 Mr Boler of ABC said:

> "In photo 9 the clouts in the corner mould appear to be above the join in the substrate. Photo 9 shows a join in the corner mould relative to the horizontal join in the substrate."

We simply do not accept that that is what the photograph shows. The assessor is correct in showing that that corner mould is continuous across the horizontal joint.

5.9. Tape Reinforcing for Recessed Edge Joints

5.9.1. The assessor's report referred to tape reinforcing for recessed edge joints not having been installed for the full length of the joint and/or the recess in the sheet not having been formed to some joints as recommended practise by Harditex.

5.9.2. That issue was not canvassed at the hearing but there seemed to be no disagreement with the assessor's comments.

5.10. Offset Sheet Joints

5.10.1. The Harditex Technical Information (fig 13, p10) requires that where sheets are installed more than one full sheet in height, the sheets for the upper portion or storey are to be offset from those in the lower portion or storey.

5.10.2. The assessor identifies that this has not been done in the present construction.

5.10.3. In our view this subject property is one where that requirement is vital. Particularly is this so on the eastern wall where there is a substantial area of plain wall. As stated above, there has been no horizontal control joint (although possibly in strict terms no requirement for one) which made the requirement for offsetting of sheets of even more importance. The prevention of cracking to the Harditex was an important issue from the outset and compliance with the Technical Information was important and may well have avoided any cracking or leakage. Certainly, in our view, the absence of offsetting was another

factor which has contributed to the cracking and the leakage.

5.11. Coincidence of Vertical Sheet Joints with Edges of Openings

5.11.1. Fig 12 p10 of the Technical Information graphically shows that where there is an opening in a wall clad with Harditex there should not be a vertical sheet coinciding with the edge of that opening but there should be at least 200mm offset.

5.11.2. The assessor's report confirms that that has not occurred in this property.

5.11.3. There are cracks in the Harditex which appear to be, and the evidence was, that they were or could have been, caused by that coincidence of sheet edge with opening edge particularly cracks in the northern, eastern and southern walls (**exhibit B**).

5.11.4. Mr Bloxham in his evidence confirmed that if there was an offset less than 200mm there was likely to be cracking. He identified as cracks likely to have been caused from this as being two cracks below the left hand upper window on the northern wall and one crack below each of two windows in the upper storey on the western wall. He said that these cracks suggested that there was less than 200mm between the edge of the respective vertical sheets and the edge of the openings (that is windows).

5.11.5. In its response ABC claimed that photographs 12 and 13 clearly showed that the join in the substrate was at least 100mm from the door jamb. In our view that only serves to underline, and indeed photographs 12 and 13 graphically portray, that the joints between those particular sheets was

less than the minimum referred to in the Harditex Technical Information.

5.12. **Gap Between Sheet and Head Flashing**

5.12.1. Fig 14 p10 of the Technical Information contains a requirement for a head flashing to a window or door including a minimum 5mm gap between the bottom of the Harditex sheet and the head flashing.

5.12.2. In his report the assessor said that this had not been done at the subject site but, as we understood his evidence, it was specifically only on the northern elevation where the ranch slider had been installed and where there had been some investigative testing that he was able to confirm this. We draw the inference, in the absence of other evidence, that this is likely to have occurred elsewhere. Certainly we had no assurance that it has not occurred elsewhere.

5.12.3. Mr Bloxham said in evidence that it was vital to flash the tops and sides of windows and that if this was not done it was likely that water which ran down the Harditex surface would enter the dwelling. He said that a silicone fillet would be unreliable.

5.13. **Back-Sealing and In-Seal Strip**

5.13.1. The Harditex Technical Information provides that, as an alternative to the 5mm gap referred to in paragraph 5.12 hereof:

> "When the sheet is brought hard down on to the flashing for appearance reasons, the bottom edge of the sheet must be back sealed. A continuous 6mm x

> 10mm In-seal 3109 strip must also be used to seal the back of the sheet."

5.13.2. The assessor's evidence was that both back-sealing and in-seal strip had been omitted at the subject site.

5.13.3. Again, although the only area where there had been investigative testing carried out was the ranch slider on the northern wall, we draw the inference that there was no such back-sealing or in-seal strip on other places where required as the alternative; or conversely, we are not prepared to draw the inference that that has been done in those other places in the absence of evidence.

5.14. **Silicone Sealant at Ends of Head Flashings**

5.14.1. The Harditex Technical Information (fig 14 p10) contains the note:

> "Notch Harditex to fit flashing, make neat, tight-fitting cut then seal with silicone paintable sealant"

5.14.2. The assessor's report and his evidence was that this had not been done at the subject site.

5.15. **Side Window Flanges In-Seal Strip**

5.15.1. The notation at fig 16 p11 of the Harditex Technical Information reads:

> "Inseal 3109 6mm x 10mm or flexible sealant between window and Harditex to give a positive seal"

with the further note on p11:

> "Silicone applied as a fillet to the window edge and onto the cladding is not an effective weathering method and must not be used"

5.15.2. The assessor's report and evidence was that there was no in-seal strip or sealant under the window side flanges at the subject site.

5.16. **Sill or Side Flashings**

5.16.1. Fig 18 (p12) of the Harditex Technical Information depicts sill flashings and side flashings recommended to give "good long-term protection" and the assessor's report was that there were no such.

5.16.2. The only response from ABC on this issue was that even if in-seal strips had been applied they would not be able to have been seen at the time of inspections.

5.17. It was argued that the BTL (BRANZ) Appraisal Certificate no 243 (1995) had precedence over any Harditex Technical Information. That Appraisal Certificate clearly requires compliance with manufacturers' instructions and indeed there are express Conditions of Certification from BTL, the appraiser under the certificate and of which the opinion is expressed, specifically requiring installation and use in accordance with the manufacturers' instructions.

5.18. There was also argument that the system for the cladding to this dwellinghouse was so different from the Harditex system that it could not be regarded as a Harditex system. Furthermore, the assessor was challenged about his proposed remedial work which included a cavity on the grounds that, if he was prepared to recommend departure from the Harditex system, he should also be prepared to allow that in the course of original construction and cladding for this dwellinghouse departures were permissible. Our view on that is that the Harditex system for use of this material for this process must be

followed or it must be demonstrated by clear evidence that any departure from the system improved the system and did not detract from it. No such evidence was given to us. The fact is that the system used (whether strictly a Harditex system or not) allowed water to enter.

5.19. There was no other substantial evidence from any party that the entry of water was from any other cause. Indeed Mr Dent did not call evidence on behalf of Jenmark and the other parties had no direct involvement in the construction and could not give evidence on it. Their respective positions concentrated on their respective roles and we refer to those later. The only exception to this was that at the request of ABC we issued a witness summons at the request of ABC to Philip Vernon O'Sullivan of Auckland, Building Surveyor, who gave evidence and in particular spoke to a letter of 4 December 2002 to the Putmans where he said:

> "In both cases the causes of the initial leaks appear to be quite minor; probably the end of the roof apron flashing in the case of the stairs and leakage from the lower mitred joints of the first floor bedroom window frames for the rear wall. The presence of the vinyl wallpaper and paint over the Harditex tend to trap moisture. Subsequent swelling of timber framing has resulted in cracking and further moisture ingress."

5.20. He emphasised in his evidence that he had not carried out any investigation of significance and that letter including the extract were his preliminary responses only. He said that a system would fail when the component parts fail and that as elements of the components were reduced so the risk increased. Untreated timber would be more at risk, he said, if the components of the system had failed. He said that Harditex was not an acceptable solution under NZS3604:1990 but the whole system was an alternate solution. He repeated that the Building Industry Authority does not recognise NZS3604 as an acceptable solution for Clause E2 of the Building Code. He said that the New Zealand standard had no authority as it had never been recognised by the Building Industry Authority as an

acceptable solution and he said that a proven certifier should have taken more care with a Harditex system than with say a stucco plaster system which was recognised as an acceptable solution (although Mr Bloxham had described it as an alternative solution). He said that with vinyl wallpaper inside and paint outside, a residence (and in this case the residence) was a very good "storer of water". He said that it would make no difference if the sheets layout had been offset but again he emphasised that he was expressing a preliminary opinion and did not extensively test this site. He agreed with Mr Dent that leakage in this case was the result of a system failure and with counsel for Mr Lee that the system used was flawed. He gave general evidence about his views on weather protection and maintenance. He emphasised that there was never a full inspection on his part and it was very hard to determine the cause of water entry in this case. He expressed also the preliminary view, as he had said in his letter, that the absence of the roof apron flashing to the garage would have caused leakage into the eastern wall.

5.21. Our view of Mr O'Sullivan's evidence was that the general discussions were of interest but unhelpful in the specific case. His inspection was for the purpose of a television programme only and he emphasised that he had not made a thorough inspection. His views on this particular case were therefore significantly limited. His reference to the system being "flawed" was unhelpful because the ten aspects in which the Harditex Technical Information requirements had not been followed were not put to him and we were left in significant doubt as to whether he was being critical of the Harditex system as a whole (which was not one of the issues which had been put to us in this claim) or the system as it had been applied with all the faults in this particular case (where he had not carried out extensive or effective testing).

5.22. The absence of a roof apron flashing may explain **some** water ingress in the eastern wall but the evidence was clear that there was

much more damage and much more water ingress than could have been caused by the end of the roof apron flashing. Any leakage from the lower mitred joints on the first floor bedroom window frames for the rear (northern) wall may have caused some water ingress and damage there but there was clearly water ingress in many other parts of that wall causing further damage.

5.23. We accept the evidence from the assessor that there has not been compliance with the Harditex Technical Information sheets for the Harditex system to such a degree that that has allowed water ingress and caused damage.

5.24. **Jenmark Response**

5.24.1. Jenmark Homes Limited did not file any response pursuant to s28 of the WHRS Act nor give any indication of the basis of any defence until well into the hearing. Indeed as we have said, it was not represented at the hearing until Mr Dent appeared on its behalf and with the authority of the remaining director on the second day of hearing, 11 December 2003.

5.24.2. Mr Dent did not give evidence nor call any himself. Indeed it was hard for us to discern precisely what position Jenmark took in the case. His cross-examination of various witnesses was wide reaching but did not have a context in which we could consider the responses given. For example, he alleged during cross-examination of the assessor that there had been sealant placed between the Harditex sheets and the head-flashings before final inspection – a fact which if properly established would have impacted on the ability of the inspector from ABC to determine whether there was Code compliance but this was not pursued in any constructive way.

5.25. ABC Response

5.25.1. Approved Building Certifiers Limited, represented by Mr Boler, lodged several documents before the hearing including a reply to the assessor's report and a brief of evidence. Some matters concerning ABC are mentioned below. In the context of damage and causation first he acknowledged that the "decay to the framing has been caused by moisture ingress" but qualifies this by saying that "this could be from either rain water or by condensation from within the building". Secondly he acknowledged that the letter from Mr O'Sullivan correctly identified decay but referred to condensation in the context that: "The Harditex cannot be **entirely** blamed for the ingress of moisture" (emphasis added), referring to the BRANZ Bulletin 425 dated April 2002. He referred to maintenance and the requirement in the NZ Building Code (**NZBC**) clause B2 Durability, Performance, B2.3.1; the Harditex Technical Information requiring checking and wash down 12 monthly and repainting every 7 – 12 years and the general requirement for regular maintenance mentioned there; and the reference in the Building Industry Authority (**BIA**) Acceptable Solution B2/AS1 to easy detection of failure to comply with the NZBC during normal maintenance.

5.25.2. The ABC response also referred to the BRANZ Appraisal Certificate no 243 (1995) but, as we have said above, that Appraisal Certificate specifically requires compliance with the manufacturers' instructions and that appears to have not occurred in this case to such an extent that the assessor described it as no longer a Harditex system.

5.25.3. The ABC response refers to what would have been the case had treated timber been used namely that "there would be no fungal decay or rot" but, as that response acknowledges, "the use of untreated timber framing is an acceptable solution ..." (or at least was at the time).

5.25.4. In his brief of evidence dated 3 November 2003 Mr Boler refers again to maintenance. He also challenges the assessor's report in the manner we have mentioned above.

5.25.5. The only evidence ABC called was Mr O'Sullivan's (referred to above) and Mr Boler who simply affirmed the written material he had already presented and to which we have referred.

5.25.6. Our view is that there was no real evidence of want of regular maintenance of the kind described such as would have led to the water ingress and deterioration that was experienced. There were only three years that elapsed between construction and purchase by the Putmans and the discovery of extensive damage and it is our view that there is no evidence that want of maintenance during that period contributed significantly to that damage.

5.25.7. With reference to the view of the assessor that rainwater has penetrated past the Harditex cladding at the heads of windows, ABC argued that this only related to the rear (north) wall and particularly the area surrounding the ranch slider shown in photographs 10 – 13. Its remarks are addressed more to the certifier's responsibility and situation than to causation and indeed its response implies that, while this may not have been evident on a reasonable inspection, the construction in that area would or could have been such as to allow water entry.

5.26. **Response Other Parties**

5.26.1. Neither Mr Heron nor Mr Lee responded further to the issue of the causation of leaks, limiting their case presentation to their respective roles.

6. **Builder's Liability**

6.1. Jenmark is said by the claimants to be liable to them in negligence. Clearly there is no contract between them. Any claim must therefore argue, and it must be found, that there was a duty of care owed by the builder to the claimants as subsequent purchasers and the builder has been negligent in the discharge of that duty of care.

6.2. The existence of a duty of care is clearly established in decided Court cases such as *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394, *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234.

6.3. Our view on the evidence is that Jenmark was negligent in its construction of the dwellinghouse or in its supervision of its contractors to do so. The Harditex system plainly required compliance and plainly was not adhered to causing the water ingress and resultant damage. The Building Code had its requirements mentioned which were not met.

7. **Liability ABC**

7.1. It has clearly been established by the authorities that a territorial authority owes a duty of care to the owner of a property where construction is occurring and in respect of which the territorial authority has a role (*Invercargill City Council v Hamlin* [1996] 1

NZLR 513); and to any subsequent purchaser of that property (*Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234).

7.2. It is our view that a building certifier owes like duties of care including, as in this case, to subsequent purchasers of the property. As noted in *Construction Law in New Zealand:* T Kennedy-Grant (1999) at para 4.6:

> "The intention of [the Building Act] in providing for the approval of building certifiers is to encourage a shift of responsibility for inspection and certification of building work from territorial authorities to competent persons. The requirements for the issue of building certificates and code compliance certificates by building certifiers are the same, so far as the requisite standard of work is concerned, as those applying to the issue of such certificates by territorial authorities."

7.3. We have already referred to the relevant statutory provisions in the Building Act concerning building certifiers. Any applicant for approval as a building certifier is required by s51(3) to have appropriate qualifications, adequate relevant experience and sufficient knowledge of the Building Code. It is also required to have a scheme of insurance applicable:

> "... in respect of any insurable civil liability of the applicant that might arise out of the issuing by the applicant of a Code Compliance Certificate ... or a Building Certificate ..."

which implies that the Legislature anticipated there would be civil liability arising.

Relevant also are sections 90 and 91 of the Building Act. Section 90 provides:

> "Civil proceedings against a building certifier in respect of the exercise by the building certifier of the building certifier's statutory function in issuing a Building Certificate or a Code Compliance Certificate are to be brought in tort and not in contract."

And section 91(3) in referring to limitation defences also refers to:

> "Civil proceedings ... brought against ... a building certifier" in respect of "... the date of issue of the consent or certificate or determination".

7.4. The requirement in s56(3) of the Building Act that before a building certifier decides to issue a Code Compliance Certificate that certifier must be "satisfied on reasonable grounds that the building work complied with the provisions of the Building Code on the date of certificate" emphasises the onuses on the certifier. Like onus is imposed by s56(2) in respect of the issue of a Building Certificate.

The fact that a territorial authority is required to accept a Building Certificate or Code Compliance Certificate issued by a building certifier under s50 emphasises the reliance that the local authority is entitled under the Act to have on a building certifier discharging responsibilities properly.

7.5. Indeed we did not understand Mr Boler on behalf of ABC to argue that there was no duty of care; rather his arguments addressed the extent of that duty.

7.6. We reject any suggestion that ABC did not have liability because of the involvement of Mr Heron. There was evidence about Mr Heron's contractual relationship with ABC. We deal with Mr Heron's personal position below but we do not consider that whatever may have been his contractual relationship with ABC that relieves ABC of any liability. Whether Mr Heron was an employee or an independent contractor, in either case he signed the Building Certificate A No 284 dated 18 November 1998 and the Code Compliance Certificate dated 19 April 1999 "by or for and on behalf of the building certifier" and ABC must accept any liability as his principal.

7.7. The supervisory role of ABC in respect of the construction and compliance with the Building Act and Code was significant.

7.8. The Building Certificate "A" referred to the certifier's satisfaction on reasonable ground that the proposed building work would comply with the list of requirements of the Building Code if properly completed in accordance with the list of plans and specifications. It must be taken from that that persons on behalf of the building certifier, ABC, had perused the list of plans and specifications and had satisfied themselves on reasonable grounds that the proposed building work would comply. Part of that proposed building work was the use of the Harditex system in its entirety and with any limitations on the acceptability of that product and system to meet the requirements of the Building Code of the kind already mentioned.

7.9. The apparent sequence to establish Code compliance was in three stages:

7.9.1. A job card was kept by ABC which recorded certain inspections by its employees (**exhibit G**). That job card reveals that one J Stanton and one R George were involved in apparent inspections and approvals between 28 January 1999 and 16 April 1999. There were four notations all dated 16 April 1999 and all apparently approved by Mr George (who did not give evidence), namely:

> "External linings
> Final – (A) building
> Final – (B) plumbing
> Final – (C) drainage 'As Built' "

Significant comment was made about the proximity of those notations to the further documents mentioned below, both dated 19 April 1999, but it was said that although the approvals carried that date the inspections which may have preceded those approvals occurred or could have occurred

earlier. We accept that that is so and we accept that it was in order for ABC to have agents (and again we do not know if either J Stanton or R George were employees or independent contractors, but that does not alter the position) to carry out inspections and approvals and complete a job card accordingly. We have no evidence on how that process was concluded or whether those approvals were given properly or negligently.

7.9.2. An advice of completion of building work under s43 of the Building Act was completed and dated 19 April 1999 and signed by Mr Stanton (who we assume was the same person who was noted on the job card **exhibit G** as approving certain early stages in the construction) and he is described as "inspector" and "by/for and on behalf of the owner" (**exhibit H**). It seems inappropriate to us that the agent of a building certifier should be signing this form. The whole tenor of s43 of the Act is that it is for the **owner** to advise of completion to the extent required by the Building Consent in respect of the building work (subsection (1)) and for the **owner** to include any Building Certificates or a Code Compliance Certificate issued by a building certifier (subsection (2)). It is then that the territorial authority issues the Code Compliance Certificate if satisfied on reasonable ground that the building work complies with the Code or with previously approved waivers or modifications unless there is already a Code Compliance Certificate issued by a building certifier (subsection (3)). As stated earlier, a building certifier **may** only issue a Code Compliance Certificate if satisfied on reasonable grounds that the building work complied with the provisions of the Building Code on the date of certification (s56(3)). It seems to us wrong that the same party should be advising completion and certifying compliance. However we do not think that anything hinges

on the fact that that advice of completion was given by the building certifier in this case.

7.9.3. A Code Compliance Certificate pursuant to ss43 and 56 of the Building Act was issued dated 19 April 1999 and signed by Mr Heron "by or for and on behalf of the building certifier" in which he certified that the new building at 13A Studfall Street, Pakuranga, complied with the Building Code in respect of all of the building work under the Building Consent.

7.10. Mr Putman did say in evidence that he did not see (and therefore did not in any way take account of) the Code Compliance Certificate until after he and Mrs Putman had committed themselves to purchase and had indeed settled their purchase. No-one argued that ABC was relieved of any liability to Mr & Mrs Putman because they had not relied on that consent before making those commitments but we would have rejected that argument anyway. A Code Compliance Certificate whether issued by a territorial authority or a building certifier is public knowledge and carries duty of care responsibilities from the moment of its issue.

7.11. It is our view that the construction did not comply with the Building Code in at least two major respects:

7.11.1. It had not been constructed in accordance with the Building Consent insofar as the Harditex system which required to be constructed completely in accordance with the manufacturer's specifications had not been so constructed.

7.11.2. It had been constructed in a way that at the time, or at least ultimately, it was not going to fulfil the requirements of clause E2.1, E2.2 and/or E2.3.2 of the Building Code referred to above.

7.12. It could be argued that there was no evidence that as at 19 April 1999 that there was in fact penetration of water at all and certainly to an extent "that could cause undue dampness or damage to building elements" (clause E2.3.2). That is not in our view a sufficient answer because:

7.12.1. It is not the actual penetration of water to which the Code is addressed but rather the **construction** to provide adequate resistance to the penetration by, and the accumulation of, moisture from the outside (clause E2.2) and the **construction** of exterior walls to prevent penetration of water that could cause undue dampness or damage to building elements (clause E2.3.2).

7.12.2. The fact that the Harditex system had not been constructed in accordance with the manufacturer's specifications would have, or should on reasonable inspection and enquiry have, alerted the building certifier or anyone else at the time to an increased prospect of water entry.

7.13. In his evidence Mr Boler said:

> "All inspections were scheduled inspections. If at the time of each inspection ABC was reasonably satisfied that the work inspected complied with the approved plans then that inspection was recorded as approved on the inspector's worksheet, which is loaded into the computer at the end of each day's work, and also on the site copy of the inspection check list. If any of the work was rejected and was of a major nature then this was also recorded and a reinspection scheduled, otherwise if of a minor nature the builder was verbally instructed to remedy the fault and ABC would call back later that day to check and then record the inspection as approved. The next scheduled inspection would not proceed unless the previous inspection was approved. ABC at all times did adequately inspect the building during the course of construction. ABC are not clerk of works and are not present when the work is done, only when that particular work is completed. If defects are hidden or covered up then it is most unlikely that a certifier would pick these defects up, however in

> saying that these defects would probably only be of a minor nature."

7.14. That evidence is, of course, hearsay because Mr Boler was not apparently significantly involved in the day to day work of ABC. In a letter dated 5 October 2003 to Cairns Slane he said:

> "You may or may not be aware that I have only taken over the management of ABC as of April this year [2003] ..."

Furthermore the record of inspections on the job card **exhibit G** indicates that all inspections were by J Stanton and/or R George and not by Mr Boler. We have assumed that he has been relying on what he understood to be the **process** that was normally followed.

7.15. The criticism was made that, if there were only three days between the external linings inspection and the three final inspections on the one hand and the issue of the Code Compliance Certificate on the other, then it would have been impossible to know whether the external linings, particularly the installation of the Harditex system, did or did not comply with the Harditex Technical Information and that ABC was negligent in the issue of a Code Compliance Certificate when those belated inspections had been done. As to the proximity of the recorded approval dates, especially the final approvals of 16 April 1999 and the Code Compliance Certificate issued on 19 April 1999, the evidence was that the inspection or inspections may have occurred earlier than the noted approval date. We think that it is a matter of one thing or the other. Either the inspection was made in a timely fashion well before the approval was given and at a time when the system could be inspected in which case the failures in it to comply with Hardies Technical Information, such as the absence of horizontal control joints and the failure to offset sheets in the upper storey from the lower storey, would have been apparent; or if the inspections were so late that it was too late to pick up those matters then ABC as certifier should

have refused to certify those matters until it was properly satisfied that the system had been properly installed. If the builder had been late in calling for an inspection then that did not oblige ABC to make assumptions and it was under no obligation to certify a building that it had no sure knowledge of. Either way ABC had not made proper enquiry to ensure that the Hardies Technical Information was fully and properly complied with so as to avoid the disastrous consequences that have in fact occurred.

7.16. In his initial response to the claim on behalf of ABC Mr Boler had said that the failures to comply with the Hardies Technical Information sheets for Harditex referred to in the assessor's report and given in detail above would all have been undetectable at the time of final inspection. In our view that is not a sufficient answer. The integrity of the Harditex system and the requirement of clauses E2.1, E2.2 and E2.3.2 of the Building Code meant that an inspection should have been made at an appropriate time to ensure that the Harditex Technical Information was being properly and thoroughly complied with. It should not have been left until "final inspection" if that meant critical requirements of that system were not able to be detected.

7.17. So far as the absence of silicone sealant at the ends of the head flashings and/or the in-seal strip or sealant under the side flanges of the window jambs is concerned, again the response of Mr Boler was that that would have been impossible to detect once the joinery was installed. The assessor's evidence was that it could be done by the use of a knife but again our view is that one way or the other the certifier should not have approved this aspect of the work without either having inspected at an appropriate prior time or making appropriate and sufficient enquiry of the builder to ascertain that the work had been done properly; which clearly in this case it had not.

7.18. It was also argued for the claimant that ABC is liable for the negligence of its agent or employee, Tony Heron. We deal with Mr Heron's position below but in summary our view is that it would have been in order for ABC to have had different employees performing different roles provided there were sufficient checks to ensure that all aspects of the building inspection, certification and approval work required of the building certifier was attended to. We do not consider that the individual who signs a Code Compliance Certificate must have personally perused plans and specifications and inspected the site provided that the person who does so is able to rely on proper and thorough investigative work done by others. We are satisfied that Mr Heron did not personally deal with the whole matter and all its detail throughout the process but that fact on its own does not in our view constitute negligence.

7.19. In his evidence Mr Boler also referred to the building certifier's obligations in respect of the building consent but we do not need to go further into that because it was the inspection and issue of the Code Compliance Certificate and the non-compliance with the Building Consent documents and the Building Code during construction and after that are of relevance and not what may have occurred before, or during, the building consent process.

7.20. Mr Boler's evidence also referred to maintenance but as we have said above there is no evidence that has satisfied us that there has been a want of maintenance or at least that any want of maintenance has significantly contributed to the cause of water penetration to this dwelling.

7.21. In his response to this claim and documents filed dated 2 October 2003 Mr Boler did include various documents including "duplicate of Code Compliance Certificate", "duplicate of job sheet" and "duplicate of Certificate A". Despite being referred to as duplicates these are not in fact copies of the documents which were in the Council

records and which were referred to in evidence extensively as exhibits E, G and I. The "duplicate" of both the Code Compliance Certificate and Building Certificate both show the signatory as "Neil Boler" and there are other changes to those forms from the originals that we were referring to in evidence. No explanation was given to us about this and Mr Boler was not questioned about that and we have disregarded those differences in our decision.

7.22. We have considered carefully the position of the building certifier, Approved Building Certifiers Limited, in this matter and have formed the view that it has been negligent in the carrying out of (or failure to carry out) required inspections and in the issue of the Code Compliance Certificate and we find it liable to the claimants in this claim.

7.23. Before leaving the subject of Approved Building Certifiers Limited we record that it was for a period represented by a firm of solicitors who wrote to the WHR Service a letter dated 18 September which included:

> "Approved Building Certifiers Limited's insurance policy does not respond to this claim."

Apart from having difficulty understanding exactly what that means, we note that it was a requirement of approval of the building certifier by the Building Industry Authority pursuant to s51 that the application should include evidence that a scheme of insurance approved by the authority would apply in respect of any insurable civil liability that might arise out of the issue of a Code Compliance or Building Certificate. This requirement for insurance came to our attention at the first preliminary conference we had when Mr Boler made some reference to the possible lack of liquidity on the part of Approved Building Certifiers Limited (refer Direction no 3 dated 15 July 2003 at paragraph 5). Nothing was addressed to us on the reason why any scheme of insurance that ABC may have had to

satisfy the requirement of s51(3) was not sufficient to cover it in respect of any liability it may have in this matter. That is outside the scope of our enquiry but it seems to us that the policy behind the Act is avoided if the very liability that we have found against the building certifier is not covered by appropriate insurance despite the requirement of s51 for that to be the case.

8. **Liability : Tony Heron**

8.1. Mr Heron was joined by us as a respondent pursuant to s33 of the WHRS Act on the application of the claimants. That application referred to a letter dated 5 October 2003 from ABC referring to Mr Heron as a "management contractor" and the Code Compliance Certificate signed by him.

8.2. Mr Heron applied to be removed as a party pursuant to s34 of the WHRS Act on two occasions during the hearing which we declined at the time for the reasons stated then.

8.3. The evidence we had was that Mr Heron was employed under an individual employment contract with ABC dated 14 March 1997. There was on file a "Position Description – Building Control Officer" for him dated 20 October 1997 and a company car agreement dated 13 March 1997 amended on 26 March 1997. Between February 1997 and November 1998 he was paid an annual salary; there followed a period of leave; and from January 1999 to September 2001 he was paid on an hourly rate and provided with the use of a company car. We were given detail of his contractual arrangements with ABC from October 2001 but that is not relevant to our enquiry which concerned events in April 1999. He said that he worked for no other employer during the relevant period and his work for ABC consisted of determinations and assessments.

8.4. It was argued that Mr Heron had a joint tort feasor liability whether an independent contractor or employee; and further that if he was an independent contractor he had his own tort liability.

8.5. We do not find it necessary to determine those issues because primarily we are of the view that Tony Heron personally was not negligent in respect of the Code Compliance Certificate that he signed dated 19 April 1999 **exhibit I**. He signed that "by or for and on behalf of the building certifier" and he did so in reliance on inspections and approvals by J Stanton and R George recorded in the ABC job card **exhibit G**. He did not in fact personally inspect or approve and he relied on the advices given to him by other employees or agents of ABC.

8.6. For the sake of completeness we find that at the relevant time the nature of Mr Heron's employment by ABC was more that of an employee than an independent contractor. He worked full time for ABC (and his evidence was that he was asked on one occasion by the Building Industry Authority to do a job in Auckland rather than its flying in an expert – which we do not think significantly alters the position) and the fact that he was paid on an hourly rate does not of itself in our view materially alter his status. We were referred to the cases *Challenge Realty Ltd v CIR* [1990] 3 NZLR 42 and *Telecom South Limited v Post Office Union (Inc)* [1992] 1 NZLR 275 which, although they dealt with other circumstances of employment, that is real estate agency on the one hand and management consultancy on the other, we found helpful to confirm our view on that.

8.7. The claimants sought to rely on *Lister v Romford Ice and Cold Storage Limited* [1957] AC 555. Although there is reference in the House of Lords judgments to contribution from a joint tort feasor who was employed by the party found primarily liable, that was principally a decision on the question of implied terms in the contract of service. The judgment of Viscount Simonds includes a brief discussion on

insurance ramifications (a factor relevant here in the context of the requirement for a scheme of insurance under s51(3)(b) of the Building Act).

8.8. We were also referred to the general statement in *Bowstead and Reynolds on Agency* (17th edition 2001) page 420 para 8-177:

> "Where principal and agent are both liable for a wrongful act committed by the agent they are joint tort feasors."

We refer to contributions below but need take this matter no further given our decision that there was no evidence that Mr Heron himself was personally negligent in the matter.

8.9. It was also claimed that Mr Heron had a liability under the Fair Trading Act 1986 in that the Code Compliance Certificate he signed was misleading or deceptive or likely to mislead or deceive and that he had no basis for being satisfied that the building complied with the Building Code. It was submitted that this was done "in trade" despite the finding in *Chisholm v Auckland City* [2002] NZKMA 362 that a Council exercising its regulatory functions was not "in trade" for the purpose of s9 of the Fair Trading Act 1986. Our view is that a building certifier carrying out these same regulatory functions is likewise not "in trade" for the purposes of that Act. "Trade" is defined in s2 of that Act to mean:

> "... any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land."

Although Mr Heron (and ABC) were in the business of supplying services, we make the same distinction in relation to regulatory functions as was made in *Chisholm*. Furthermore the circumstances of Mr Heron's involvement can be distinguished from cases such as *Kinsman v Cornfields Limited* (2001) 10 TCLR 342, a case where

the appellant had personal liability as being the *alter ego* of the company and the only person who could effectively act on its behalf.

8.10. Perhaps more importantly any misleading or deceptive information in the Code Compliance Certificate was not of Mr Heron's making but rather came from information he was supplied with by J Stanton or R George. As Richardson J said in *Goldsbro v Walker* [1993] 1 NZLR 394 at 401:

> "Section 9 requires that the conduct that is misleading be that of the person charged ... It is not sufficient to attract liability that the communication simply purports to pass on information ostensibly provided by a third party. In such as case any misleading conduct is that of the third party not of the intermediary ...
>
> The test under s9 is objective and on which side of the line a particular case falls turns on an assessment of what was conveyed. Was it a representation by the person charged or was it the passing on of information for what it was worth to the receiver without any inference that the person charged was vouching for it?"

Certainly the Code Compliance Certificate was a formal document but it was signed by Mr Heron for and on behalf of the building certifier, ABC, and the facts were that it was signed by him on the basis of information (which now proves to be misleading) supplied by others to him.

8.11. For the sake of completeness we find that there was not a limitation defence under the Fair Trading Act because the loss or damage, or the likelihood of loss or damage, was not discovered by the claimants until after June 2002 and there was no evidence that that was discovered or ought reasonably to have been discovered by the previous owners from whom Mr & Mrs Putman purchased the residence.

9. Liability: B W Housecheck Limited and Brent Lee: General

9.1. We did consider whether we have jurisdiction to determine the claims made against B W Lee Housecheck Limited and Mr Lee and have formed the view that we do. This matter was not raised substantively at the hearing but we have addressed it.

9.2. "Claim" is defined to mean:

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

9.3. Criteria for eligibility of claims for adjudication services is set out in s7 of the WHRS Act and includes that it must be a claim by the owner of a dwellinghouse that is a leaky building and that damage to the dwellinghouse has resulted from the same being a leaky building.

9.4. As we have found, this is a legitimate claim.

9.5. The power to join parties under s33 includes:

> "(a) the person ought to be bound by ... an order of the adjudicator; or
> ...
> (c) for another reason it is desirable the person be joined as a respondent."

It was pursuant to that section that the order was made by us joining B W Lee Housecheck Limited and Mr Brent Lee as respondents.

9.6. Under s42(1) of the WHRS Act an adjudicator may make any order that a Court of competent jurisdiction could make in relation to **a claim** in accordance with the principles of law. That means a claim as defined in s5 which has been found to be eligible under s7 (and in

this case is eligible). We are of the view that that gives us the jurisdiction to deal with this matter.

10. **Liability: B W Lee Housecheck Limited: Negligence**

10.1. This company (**Lee Housecheck**) was joined by us as a respondent pursuant to s33 of the WHRS Act for the reasons we gave at the time.

10.2. In their agreement to purchase the property dated 8 June 2002 Mr & Mrs Putman had inserted a clause:

> "This agreement is conditional upon the purchasers being satisfied with a building report by B W Lee Housecheck Limited to be completed with 5 working days from the date of this agreement."

10.3. This clause was written into the agreement by the salesperson, Ann May, who recommended Lee Housecheck because she knew Mr Brent Lee personally. Ms May advised that a report would cost around $150.00 and that Mr Lee was suitably qualified and it was she who arranged for the inspection of the property by Mr Lee. It was to her that Mr Lee explained his two-tiered cost and inspection structure, namely either "a superficial inspection of approximately half an hour that would cost $150.00 plus GST, that is $168.75 with a brief report provided or carry out an in-depth inspection where [he] would present [her] (presumably Ann May) with a 14 page report". It was the agent who elected the superficial inspection option. Mr Lee said in evidence that the in-depth inspection report would cost some $280.00 - $300.00 plus GST.

10.4. In an open letter dated 23 October 2003 (**exhibit H**) Ms May refers to her relationship with Mr Lee as being on a professional and never

a personal basis and that she has "no memory of what the report contained" for Mr & Mrs Putman's property.

10.5. Mr Putman said that he wanted more details so gave Mr Lee a call and asked specifically about the cladding, shower and laundry ranch slider sill. He said that Mr Lee told him that the cracks did not concern him and that they appeared to have been repaired; and that he did not think they would become a problem but if Mr & Mrs Putman "wanted to be fussy" they could see all the cracks again and have them resealed in a year's time or have them ground down to the joints and replastered. Mr Putman said that Mr Lee told him the shower did not appear to be leaking but "if we wanted someone to fix it, he knew someone who could do the job". He said that Mr Lee said that the wood on the ranch slider in the laundry was dry. He said that Mr Lee said that the join between the cladding that may once have been letting the moisture in appeared to have resealed and he said that Mr Lee told him he did not think there would be leaks around the laundry ranch slider any more.

10.6. In his evidence Mr Lee said that he pointed out various cracks at the rear (northern) wall to the property and on the wall by the garage door (eastern) and that he wanted to make it clear (in his evidence) that at the time of his report that he found cracks only on the northern and eastern walls. He said that there were more cracks apparently found by the assessor when he carried out his inspection seven months later. He said that the cracks he found were not out of the ordinary and could have been caused by many reasons and that there was no way that he could have ascertained only by a visual inspection that the joints of the sheets were not properly done or that the Harditex system had not been properly applied and because of this gave rise to leaks. In evidence Mr Putman confirmed that there were more cracks in the dwelling at the time of the hearing than there had been at the time of Mr Lee's inspection.

10.7. The sequence then seems to us to be this:

10.7.1. At the time of purchase of the property Mr & Mrs Putman saw cracks on the exterior walls and what appeared to be excessive silicone around the shower and a small area of rot to the left of the inside sill of the ranch slider which they discussed with the agent, Ann May, who persuaded them to include the condition for pre-purchase inspection check.

10.7.2. The agent, Ann May, contacted Mr Lee direct for an inspection and advised him what was required.

10.7.3. Mr Lee gave the option for alternative tiered inspection and report and Ms May opted for the cheaper option.

10.7.4. Mr Lee then inspected the property based on what he had been told and asked by Ann May.

10.7.5. Mr Lee prepared a written report.

10.7.6. Mr Lee conveyed the results direct to Ann May.

10.7.7. Ann May contacted Mrs Putman to tell her that Mr Lee had inspected and there was nothing to be concerned about.

10.7.8. Mr Putman telephoned Mr Lee to discuss his ongoing concerns and was given certain assurances.

10.7.9. Mr Putman requested the written report which Mr Lee faxed to him and which apparently had been prepared before the telephone discussion wherein Mr Putman sought more details.

10.8. There were in fact two versions of the written report, the first containing two errors in referring to "A/11 Studfall, Pakuranga" and having on page 2 the words "... but as long as all joists and sheets ..." when it should have read "... but as long as all joints and sheets ...". The second version of the report corrected those two errors but Mr Putman's evidence was that this version was left in the letterbox and also contained a disclaimer. By then Mr & Mrs Putman had found the significant defects in the dwelling, particularly the eastern wall, and were making further enquiry about that.

10.9. Mr Putman's evidence was that it was on the basis of the first version which had been faxed to him that they decided to go ahead with the purchase and made the agreement unconditional.

10.10. Mr Lee's evidence was that his limitation document is always part of his report and always accompanies the same and he denied that it did not form part of his original report and he denied that it was attached later. Our view on this issue is that we are somewhat sceptical about the limitation document. The faxed version as produced by Mr Putman contained the errors mentioned and there is handwritten on page 2 the word "joints" alongside the apparently erroneous "joists". The version produced by Mr Lee, however, does not have that handwritten notation on page 2. We were not given any evidence about limitations on a report which is in the second tier of Lee Housecheck's inspection régime and we remain unconvinced that the limitations document did accompany the first version of the report.

10.11. In the result, however, little hinges on that limitation document. When Mr & Mrs Putman were negotiating to buy the home they saw cracks in the exterior walls, excessive silicone around the shower and a small area of rot inside the ranch slider and it was those issues that they asked the agent to obtain the pre-inspection check and report concerning. When Mr Putman spoke to Mr Lee he

specifically addressed the question of cladding, shower and laundry sill. Mr Lee found cracks on the northern and eastern walls and he reassured Mr & Mrs Putman about those. The report (whether with or without the limitation document) specifically refers to cracks on the northern and eastern walls and his uncertainty whether "Uniseal" rubber had been used on vertical and horizontal relief and control joints. The report spoke about grinding back, resurfacing, renailing and replastering and the requirement for better sealing on the side of the reveal to the kitchen window. It also referred to the necessity for flashing. Even if the "Limitations of this Report" document had been annexed, it serves to emphasise that there was only a "visual inspection" and that no warranty could be given as to defects not apparent to visual inspection. As we have said, there were matters which were apparent on visual inspections and which should have alerted Mr Lee to the necessity for further enquiry or further comment in the substantive report.

10.12. In submissions on behalf of Lee Housecheck and Mr Lee it was said:

> "In our submission whether this page [the limitation document] was attached to the original fax to Mr Putman is not important. It is however important that Mr Putman did know or should have known that the report would have been made on that basis."

While we accept the first statement that the attachment is not important, there was no evidence that Mr Putman knew the report would have been made on such a basis and there is nothing to suggest he should have.

10.13. It is our clear view that the very matters which have subsequently caused concern were inspected by Mr Lee and he gave reassurances to Mr & Mrs Putman sufficient for them to declare the agreement unconditional and proceed with the purchase.

10.14. It matters not to us whether the cost of this report was cheap or not. (Indeed some would question whether there is any significant difference in cost between $150.00 and $280.00-$300.00, and no explanation was given as to how there could be that price structural difference compared with what were apparently different tiers of report). If a job is undertaken then it must be done properly and in accordance with appropriate standards whether the price is cheap or not.

10.15. The question for us is whether in carrying out that inspection and reporting to Mr & Mrs Putman both orally and in writing Lee Housecheck has been negligent or has breached some implied term of the contract between them for adequate and sufficiently comprehensive reporting.

10.16. One factor which can be taken into account is that Mr Lee was aware that Mr Putman had some involvement in the building industry and he could reasonably anticipate that Mr Putman would understand concerns expressed and take appropriate further advice or action. Mr Putman's response to that was that his expertise was not in that area and it was for that very reason that he sought the independent comment and advice. Our view is that in giving a report of this kind the language used can be appropriately adjusted for the recipient and what may not be understood by a layman may need further clarification but what can be understood by a person in the trade need not have such comprehensive detail.

10.17. Mr Lee in his evidence stressed the limits of the inspection he was requested to carry out and emphasised that: "... if I had been asked to provide them with a proper and full inspection, I am certain that I would have picked up the moisture problem". That certainty emphasises to us the need for him to have made further enquiry once he found what he did on visual inspection. It is what passed between him and Mr Putman rather than between him and Ms May

that is of importance. Mr Putman orally challenged him on the matters of concern but was reassured by him.

10.18. In submissions on behalf of Lee Housecheck and Mr Lee it was argued that they were only requested to do a superficial inspection with regards to the cladding. It was argued that they could not damage the property on an inspection and that a knife pushed through the sealant at the sides of a window could cause leaking. The submission suggested that Mr Lee was not "requested to examine the insides of the property or to do any further investigations". As we have said his initial instructions had come from Ms May who did not give evidence but it was the exchanges he had with Mr Putman that were of more significance. Indeed the submissions on his behalf attempt to take two conflicting positions; on the one hand it is argued that his involvement was minimal and that the visual inspection that he agreed to undertake would not have found the faults; but on the other hand it is argued that his written report, in its reference to sealing and fixing of joints and sheets, negated negligence on his part. If the visual inspection revealed the necessity for sealing and fixing of joints and sheets then it must have been quite apparent to him that that was a problem. That may go to causation and damages questions which we mention below but it only serves to emphasise to us that there was negligence in the assurances that were given by Mr Lee to Mr Putman. Furthermore, sealing and fixing the joints and sheets would not have necessarily resolved the matter and indeed the evidence we have is that there will need to be much more done than this. Had Mr Lee properly assessed the position at the time he should have alerted Mr & Mrs Putman to the prospect that there could be further damage from water leakage and more extensive work required.

10.19. It was argued for Lee Housecheck and Mr Lee that those parties are not liable merely because of the general findings made that the cladding has been installed improperly. It was argued that there

must be established a causal link between any negligence established and any damage or loss. Reference was made to evidence from both the assessor and from Mr O'Sullivan about the cause of leaks and the argument was that a reasonable person in Mr Lee's position would not have picked up the problem. As we have said we are attaching little, if any, weight to Mr O'Sullivan's letter and evidence because of the basis of his inspection of the property. We have also said that we accept the assessor's evidence as to the causes of leaking and these included the incorrect installation of Harditex cladding.

10.20. Our view is also that the matters in question should have alerted Mr Lee and Lee Housecheck to the concerns which have later proven to be of major importance and that the reports (both oral and written) do not sufficiently articulate these so as to encourage further enquiry. Mr & Mrs Putman were reassured by the reports where reassurance should not have been given.

10.21. Accordingly we find that Lee Housecheck has a liability to Mr & Mrs Putman and we deal with the extent of that liability later.

11. **Liability: B W Lee Housecheck Limited: Fair Trading Act**

11.1. It was further submitted that Lee Housecheck had a liability under s9 of the Fair Trading Act 1986 which provides:

> "No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

11.2. We have already referred at paragraph 8.9 to the expression "trade". Our view is that Lee Housecheck was "in trade" carrying on a business or occupation of supply of services, namely the checking of houses and reporting on condition thereof.

11.3. The submission for the claimant is that the telephone discussion and the report "suggested that there were no major problems, or risk of major problems, with the cladding at Studfall Street [which was] incorrect".

11.4. It has long been established that silence is not misleading conduct (refer *Mills v United Building Society* [1988] 2 NZLR 392).

11.5. It is our considered view that it is what Mr Lee in his oral advices and report left unsaid that was at issue. On its face his written report is not misleading or deceptive. It is his failure to warn Mr & Mrs Putman sufficiently appropriately that there should be further enquiry or testing that led them into the sense of false security that we have mentioned. As we have said we considered this to be negligent and we have found Lee Housecheck liable accordingly.

11.6. It does not automatically follow that that company (or indeed Mr Lee personally) has a liability under the Fair Trading Act 1986 solely because of any liability for negligence and we have formed the view that there was not sufficient misleading or deceptive conduct on behalf of Lee Housecheck or Mr Lee to qualify Mr & Mrs Putman for relief under that Act.

12. **Liability: Brent Lee: Negligence**

12.1. The claim is also made that Mr Brent Lee is personally liable to the claimants either for negligence or under the Fair Trading Act.

12.2. We need add nothing further to the factual recount of events.

12.3. At all times documents were from B W Lee Housecheck Limited including the report and the invoice (**exhibit 10**). We do not consider that the fact that the report (which in fact is unsigned) bears Mr Lee's name as signatory is of any significance. It is then and was

at all times quite apparent that he was acting on behalf of his company.

12.4. It may be said that it was not until the report was received that Mr & Mrs Putman were aware of the existence of B W Lee Housecheck Limited and that it was Mr Putman's oral discussion with Mr Lee that led him to his false sense of reassurance and the commitment to purchase the property. However that was followed by a faxed copy of both invoice and report and that made clear reference to the limited liability company.

12.5. The leading authority on the liability of a director or employee for torts committed by a company is *Trevor Ivory Limited v Anderson* [1992] 2 NZLR 516 where a one-person company negligently provided weed control advice under a contract to an orchardist. The company acted at all times through its controlling director and was found to have breached an implied term in the contract to use reasonable care. While the claim succeeded against the company it did not against the controlling director as he had not undertaken a personal duty of care and made it clear that it was the company, rather than he personally, who had contracted and provided the advice. The Court emphasised that special facts amounting to an assumption of responsibility are required to establish a personal duty of care to a third party.

12.6. For the claimants it was argued first that on the facts Mr Lee had personally assumed responsibility to the claimants and secondly that *Trevor Ivory* can be distinguished as not applying to claims by home owners arising from building defects.

12.7. We do not accept either of those submissions. There is no evidence of any special facts amounting to an assumption of responsibility by him personally. We do not see any distinction can be drawn from *Trevor Ivory* on the basis argued, namely that this is a claim by a

home owner. The Weathertight Homes Resolution Services Act 2002 makes it quite clear that it is not a legislative change to the substantive law but rather enactment of a procedure for resolution of claims relating to "leaky buildings". Indeed the substance of an adjudicator's determination is under s42(1):

> "... any order that a Court of competent jurisdiction could make in relation to a claim **in accordance with principles of law**" (emphasis added)

13. **Brent Lee Personal Liability: Fair Trading Act**

13.1. As we have said above, we do not consider that there was deceptive or misleading conduct on the part of Mr Lee or Lee Housecheck to qualify Mr & Mrs Putman for a claim under the Fair Trading Act 1986.

14. **Damages**

14.1. The claim originally made in the application under the WHRS Act was for $75,000.00 based on the estimate provided by Mr O'Sullivan (although, as we have said, his assessment was not significantly comprehensive).

14.2. In the assessor's report dated 18 February 2003 he estimated, based on an estimate schedule from Hughes Hill & Co, that the likely cost of remedial work was $80,000.00 inclusive of GST which allowed for temporary accommodation, contract administration and building consent fees but added that it would be possible to obtain quotations for the majority of the work on a "charge up" basis due to the unknown extent of decay.

14.3. At the hearing it was argued that the claimants were entitled to sums totalling $170,000.00 being:

Repair costs at the date of the adjudication, $80,000.00 as estimated plus $7,000.00 increase	$ 87,000.00
Diminution in value following repair	43,000.00
General damages of $20,000.00 to each of Mr & Mrs Putman	40,000.00
Total	$170,000.00

Repair Costs

14.4. There was no direct evidence given at the hearing about repair costs other than by reference to the assessment by Hughes Hill & Co and by Mr Cook, the assessor. Mr Cook confirmed on oath that the Hughes Hill estimate was reasonable and that in his view there should be a ventilated cavity. As to contingency he said that this could be up to 50% if the schedule of pricing was inadequate and further that he believed there needed to be building supervision. We asked him to make enquiry of cost increases from Hughes Hill since their estimates annexed to his report and he later advised that on the basis of the information he was able to get he expected a cost increase of about $7,000.00.

14.5. We are prepared to accept on the evidence that is available that the likely cost of repairs to the claimants' dwellinghouse to remedy the defects which have caused it to leak is $87,000.00. That is a significantly speculative assessment because it will only be once work is started that the extent of that is known and it could be greater or less. The evidence however was clear that there would need to be work of the nature anticipated by the Hughes Hill & Co estimate and that that was, with increases adjustments, a likely figure. In particular there will need to be removal of the cladding, insulation and rotten framing, there will need to be H3 wall framing reinstated and there will need to be the new Harditex surface properly applied, stopped, painted etc. There was some discussion about the requirement for treated timber given that there was not any at present and that this could be said to be betterment but our

view is that in all the circumstances of the evidence we have heard it would be foolhardy not to use treated timber in the replacement work. We were not given detail of what price difference there would be if untreated timber were used but it would, in our view, be unacceptably risky to use untreated timber and if there is any betterment that is likely to be offset by the prospect of other extra costs not allowed for.

14.6. It was argued for Lee Housecheck that on the evidence of Mr Farrelly once the remedial work was carried out the property would be worth $314,000.00 and the increase in that from the price paid by Mr & Mrs Putman, $253,000.00, namely $61,000.00, should be taken into account. We reject that submission. If there has been any increase in value that should be to the benefit of Mr & Mrs Putman. The cost of repair to the defective building is certainly the measure of their losses and any increase in value that may have occurred because of the market or other factors is not to be taken into account. As counsel said in written submissions, damages in tort should be calculated on the basis of the position had the wrong not been suffered.

Diminution in Value

14.7. It was argued on the basis of evidence from a report from Matthew Taylor, registered valuer, that even once the work was done there would be a loss of value because of a "stigma" element and the difference between the market value once the work was done, that is "assuming no building defects", $288,000.00, and the market value once the defects had been remedied, $245,000.00, namely $43,000.00, is a loss suffered by the claimants for which they are entitled to recompense.

14.8. We were referred to *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 where such a claim was allowed. Hardie Boys J considered the

conflicting valuation evidence at length and came to a conclusion that there was a diminution in value for each of two flats of $5,000.00 he saying (p577 l15) that that was a case where the damages could not be assessed with any certainty at all and the appropriate figure was fixed as "a matter of impression, if not mere guesswork".

14.9. There was evidence in the present case to the contrary from Anthony Farrelly who produced two reports, the second (**exhibit 3**) being in response to the "stigma" valuation evidence of Mr Taylor. He said that provided the property was "properly re-clad in accordance with the Building Code and local government requirements together with the assumption that a cavity between the new cladding and the framework is created [as recommended by Mr Cook and the Hughes Hill estimate] we believe that no discount factor would be justified".

14.10. We have considered all the evidence carefully and are of the view that there is no sufficient evidence of "stigma" value loss. As Mr Farrelly indicates, the repair work which we have considered appropriate does include a cavity, treated timber, and full compliance with the Building Code and Harditex Technical Information. That will be known and that information can be available to any purchaser. If there is any "stigma" then we suspect this will rather be because of the significant adverse publicity that dwellings of this nature have attracted and nothing that the claimants can do by way of repair will alter that. Indeed we consider it a significant prospect that if remedial work is done thoroughly and comprehensively as proposed that may well reassure purchasers even to the extent of possibly enhancing the value as compared with the property, had it been properly constructed in the first place, and the worries and misgivings that prospective purchasers may have had not knowing whether the building was suspect or not.

14.11. Accordingly we reject that category of damage.

General Damages

14.12. The availability of general damages for pain and suffering, humiliation, distress and loss of enjoyment has been part of our law for some time. In the context of house construction there was $15,000.00 awarded to the plaintiffs in *Chase v de Groot* [1994] 1 NZLR 613. That was a case of defective foundations requiring complete demolition of the house following a fire. The recorded judgment does not include Tipping J's detailed consideration of issues of damages but in *Attorney-General v Niania* [1994] 3 NZLR 98 at page 113 l22 he refers to his earlier judgment in *Chase* and the fact that the award in that case (and another in 1987, *Dynes v Warren* (High Court, Christchurch, A242/84, 18 December 1987)) had been made after a detailed examination of a number of comparative authorities. On the basis of what he said there the authors of Todd, *Law of Torts in New Zealand* 3rd edition page 1184 said that his remarks indicated "these amounts [in *Chase* and *Dynes*] were considered to be modest". We do not read those words into His Honour's judgment in *Niania*. We were also referred to *Stevenson Precast Systems Limited v Kelland* (High Court, Auckland, CP 303-SD/01: Tompkins J: 9/8/01) and *Smythe v Bayleys Real Estate Limited* (1993) 5 TCLR 454.

14.13. The claim is made for $20,000.00 for each of Mr & Mrs Putman on the basis of the accepted authorities. It is for us to assess first whether they have suffered in a way which entitles them to damages of this kind and secondly the amount of such damage. We are of the view that there has been suffering by them of this kind. They have had their home physically damaged by the testing that was done to determine the cause of, and extent of, damage. Fortunately that has not apparently become significantly worse in the meantime. They referred to, and there was evidence about, the *Stachybotrys*

atra fungus found by Biodet Services Ltd in a Gibraltar board sample from the wall in the stairwell at their property and the photographs and our visual inspection confirm that. There was evidence about the poor health, especially respiratory problems, of Mr & Mrs Putman's two children but we were not given evidence that that was in any way attributable to the fungus or other dampness in the dwelling from the leaking. Mr & Mrs Putman have had the unsightliness of the destructive testing to their home for a long period. They have had the uncertainty of their entitlements against other parties and indeed how they will effect repairs. Even the outcome of this determination may not necessarily bring that to an end. In addition they will have the significant disruption of the reconstruction work that is inevitably required. The position was especially bad for Mrs Putman who has been in the home daily with the young children and the unsightliness and concerns we have mentioned.

14.14. On the authorities we have and having regard to the evidence we have heard it is our view that they should be compensated in this category which we fix at $15,000.00 for Mrs Putman and $5,000.00 for Mr Putman.

15. Extent of Liability and Apportionment

Jenmark Homes Limited

15.1. We have found that Jenmark is liable for its negligence in the construction of the dwelling either in the work that it carried out directly or in the work that was carried out by its contractors or others under its direction. That included the defects in construction, the failure to comply with the Harditex Technical Information which had formed part of the Building Consent and the failure to comply with the Building Code as to waterproof matters in clause E.

15.2. The claimants are entitled to recover from Jenmark Homes Limited the sums of $87,000.00 being repair costs and $20,000.00 for general damages, a total of $107,000.00.

15.3. That is a direct liability of Jenmark Homes Limited as tort feasor.

15.4. For the purpose of contributions between tort feasors under s. 17(1)(c) of the Law Reform Act1936 we fix the liability of Jenmark Homes Limited at 80%. The builder had the prime responsibility to comply with the Building Code and the Hardies Technical Information. As to recovery from Jenmark Homes Limited by Approved Building Certifiers Limited, the other tortfeasor, the question is whether the builder owes the certifier any duty of care. We take the view that it does and order that Approved Building Certifiers Limited can recover 80% of its liability from Jenmark Homes Limited.

Approved Building Certifiers Limited

15.5. We have found Approved Building Certifiers Limited negligent and it is liable to Mr & Mrs Putman in sums totalling $107,000.00.

15.6. For the purpose of apportionment we fix its liability at 20%. As to whether there can be recovery by Approved Building Certifiers Limited from Jenmark Homes Limited, we are mindful that in *Morton v Douglas Homes* Limited, [1984] 2 NZLR 548, the Court declined to order any such contribution by the Council from the builder (see p.614) on the grounds that the Council had its own responsibilities independently of the builder and to entitle a Council to recover from a builder would be contrary to public policy. We take a different view in this case. Jenmark had the duty to call for inspections in a timely manner. It is because the builder has not involved the certifier in the process to an adequate degree that the inspection did not produce the answers that it should. Accordingly we order that if

Jenmark Homes Limited has paid the full amount due to Mr & Mrs Putman then it can recover from Approved Building Certifiers Limited 20% of that sum, $21,400.00. As we have said above if Approved Building Certifiers Limited has made full payment of the amount awarded to Mr & Mrs Putman, $107,000.00, it can recover 80% of that sum, $85,600.00, from Jenmark Homes Limited.

B W Lee Housecheck Limited

15.7. We have apportioned the tort liability between Jenmark Homes Limited and Approved Building Certifiers Limited in respect of the construction of the dwelling and the general damages for Mr & Mrs Putman.

15.8. It is a different situation concerning the damages recoverable from B W Lee Housecheck Limited.

15.9. Its liability is in tort for negligence and it is the loss that flows from its negligent acts that forms the damages for which it is liable.

15.10. It did not have any hand whatever in the construction of the property or the fact that the construction failed to comply with the Building Code and other matters we have mentioned. The question is what damage flows from the failure to report adequately the defects apparent from the visual inspection.

15.11. The evidence from Mr Putman was that, had he not had the assurances concerning the residence from Lee Housecheck he would not have proceeded with the purchase. No evidence was given to us about the value of the property at the time Mr & Mrs Putman purchased it in the condition that it then was, that is as a "leaky building". Likewise, there was no direct evidence from Mr or Mrs Putman about the price they may have paid had they been fully and properly informed about the condition of the dwelling as to those

matters they referred to Lee Housecheck (which would have been significantly speculative). It could be argued that the answers to those questions would have been that the property had a lesser value by at least the repair costs if not more. That means that the loss to Mr & Mrs Putman at the time they purchased was that they purchased the property for at least $80,000.00 more than they would otherwise have paid for it. We have had to make a careful assessment of what we think are the losses to Mr and Mrs Putman from the negligent involvement of Lee Housecheck and we have come to the conclusion that that loss should be quantified at $107,000.00 made up as set out above.

15.12. The reason why that loss was suffered, however, is because of the negligence of Jenmark Homes Limited and Approved Building Certifiers Limited that we have mentioned. Accordingly it is our view that, while Lee Housecheck is liable to Mr & Mrs Putman for the sums totalling $107,000.00, it is also entitled to full recovery of that sum from both Jenmark Homes Limited and Approved Building Certifiers Limited.

15.13. If either or both of those parties have paid all of the damages to Mr & Mrs Putman then the liability of Lee Housecheck is reduced accordingly. If those damages are paid in whole or in part up to $107,000.00 by Lee Housecheck to Mr & Mrs Putman it is entitled to recover that sum in the stated proportions from Jenmark Homes Limited and Approved Building Certifiers Limited.

16. Costs

16.1. The circumstances for any award of costs is limited by s43 of the Weathertight Homes Resolution Services Act which reads:

"(1) An adjudicator may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if the adjudicator considers that the party has caused those costs and expenses to be incurred unnecessarily by –
(a) bad faith on the part of that party; or
(b) allegations or objections by that party that are without substantial merit.

(2) If the adjudicator does not make a determination under subsection (1), the parties to the adjudication must meet their own costs and expenses."

16.2. There are only two categories of costs that we need consider:

16.2.1. The rights of claim for costs by Mr & Mrs Putman against any of the other parties.

16.2.2. A claim made by Mr Heron or Mr Brent Lee for costs against Mr & Mrs Putman.

16.3. We do not consider that there is any entitlement for costs to Mr & Mrs Putman. There has been no bad faith on the part of any of the other parties and the allegations and objections that they raised had merit which needed careful consideration at the hearing and in this determination.

16.4. Conversely we do not think there is any entitlement for Mr Heron or Mr Brent Lee to recover costs from Mr & Mrs Putman. Again there is no bad faith on their part. We considered twice during the hearing an application by Mr Heron to be removed from the proceedings under s34 and declined that on both occasions. That in itself emphasises the view we had then that the allegations against Mr Heron may have had substantial merit. Although in the result we have not found any liability on his part, and although this was on the grounds that were advanced for his removal at the time during the hearing, we are still of the view that the allegations against him had substantial merit. He was the personal signatory to critical

documents including the Code Compliance Certificate and there were unresolved questions until conclusion of the hearing as to whether he had been negligent in so doing or had some liability over and above the principal on whose behalf he was acting. The claim against Mr Lee was made in the context of the claim against Lee Housecheck and that company had to address the claim against it.

17. **Result**

17.1. In the result pursuant to the provisions of the Weathertight Homes Resolution Services Act 2002 we make the following orders.

17.2. Jenmark Homes Limited is ordered to pay to Mr & Mrs Putman the sum of $87,000.00 and further to Mr Putman the sum of $5,000.00 and Mrs Putman the sum of $15,000.00.

17.3. Approved Building Certifiers Limited is ordered to pay to Mr & Mrs Putman the sum of $87,000.00 and further to Mr Putman the sum of $5,000.00 and Mrs Putman the sum of $15,000.00.

17.4. B W Lee Housecheck Limited is ordered to pay to Mr & Mrs Putman the sum of $87,000.00 and further to Mr Putman the sum of $5,000.00 and Mrs Putman the sum of $15,000.00.

17.5. Jenmark Homes Limited is entitled to a contribution from Approved Building Certifiers Limited, if it has paid to Mr & Mrs Putman the sum of $107,000.00, in the sum of $21,400.00 and Approved Building Certifiers Limited is ordered to pay that sum, if that payment has been made, to Jenmark Homes Limited.

17.6. Approved Building Certifiers Limited is entitled to a contribution from Jenmark Homes Limited, if it has paid to Mr & Mrs Putman the sum of $107,000.00, in the sum of $85,600.00 and Jenmark Holdings

Limited is ordered to pay that sum, if that payment has been made, to Approved Building Certifiers Limited.

17.7. B W Lee Housecheck Limited is entitled to a contribution from Jenmark Homes Limited and/or Approved Building Certifiers Limited, if it has paid to Mr & Mrs Putman the sum of $107,000.00, full reimbursement from each of those parties for that sum and Jenmark Homes Limited and Approved Building Certifiers Limited are ordered, if it has made such a payment, to pay to B W Lee Housecheck Limited that sum (or if both parties are making payment, that sum in the proportions of 80% from Jenmark Homes Limited and 20% from Approved Building Certifiers Limited, that is B W Lee Housecheck Limited should not receive more than the sum that it has paid but each of Jenmark Homes Limited and Approved Building Certifiers Limited is entitled, under the orders made above, to a reimbursement from the other in the stated proportions for any sum that it pays to B W Housecheck Limited).

17.8. No other orders are made and no orders for costs are made.

17.9. Pursuant to s41(1)(b)(iii) of the Weathertight Homes Resolution Services Act 2002 the statement is made that if an application to enforce this determination by entry as a judgment is made and any party takes no steps in relation thereto, the consequences are that it is likely that judgment will be entered for the amounts for which payment has been ordered and steps taken to enforce that judgment in accordance with the law.

DATED the 10th day of February 2004

David M Carden
For Adjudicators