A Weathertight Adjudication Procedure? Adjudication under The Weathertight Homes Resolution Services Act 2002

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I: Introduction

Few New Zealanders will have been able to avoid hearing about the problems posed by leaky buildings. For more than two years there has been a barrage of media stories about the "leaky building crisis".[1] The leaky building phenomenon is not unique to New Zealand: similar problems have been experienced in Canada and the United States.[2]

The difficulties with leaky buildings in New Zealand were caused by changes in building methods during the 1980s and 1990s. Some homes built using the new methods are more susceptible to water damage caused by leaking than homes built using older techniques. The New Zealand Government initially downplayed the extent of the problem, but when the Building Industry Authority initiated the Hunn Report,[3] which found that the leaky homes problem was a substantial one, the Government was forced into action.[4]

The Government's answer to the problem is the Weathertight Homes Resolution Services Act 2002 ("the Act" or "WHRS Act"), which institutes the Weathertight Homes Resolution Service ("WHRS"). The WHRS is a dispute resolution mechanism with three stages: assessment, mediation, and adjudication.

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1 See eg Bingham, "Crisis Costs Councils Thousands", *New Zealand Herald*, Auckland, New Zealand, 20 April 2003, A3; Perrott "Building Industry Chief quits", *New Zealand Herald*, Auckland, New Zealand, 25 March 2003, A6; "Compensation fund may be needed", *Dominion Post*, Wellington, New Zealand, 25 September 2002, A3.

2 Hunn et al, "Report of the Building Industry Authority Overview Group on the Weathertightness of Buildings to the Building Industry Authority" (Building Industry Authority, Wellington, 31 August 2002) <http://www.bia.govt.nz/publicat/pdf/bia-report-17-9-02.pdf> (at 11 July 2004) ["Hunn Report"].

3 Ibid 10.

4 See generally Dobbie, *A Weathertight Dispute Resolution Proceedure for Leaky Homes? The Weathertight Homes Resolution Service Act 2002* (LLB (Hons) Dissertation, The University of Auckland, 2003) 10-13, 85-94 for background on the leaky building problem, and the development and operation of the WHRS.

The WHRS is designed to relieve pressure on the District Court, reduce costs and delays, and provide satisfactory compensation to the owners of leaky homes.

Part II of this article describes the statutory regime within which the problem developed. Part III is an overview of the Act and the WHRS. Part IV examines adjudication under the WHRS. The adjudication procedure, and an analysis of the first two adjudications to be decided under the WHRS, is the focus of this article. Adjudication is the focus for two reasons. First, early adjudication decisions have raised important issues about liability for leaky homes.[5] These issues are relevant to leaky home cases decided in the ordinary courts, as well as adjudication decisions under the WHRS. Secondly, the author wishes to suggest reform to the adjudication process, especially regarding the recoverability of costs.

II: The Building Act 1991 and the Building Code 1992

The Building Act 1991 was enacted to provide "controls relating to building work and the use of buildings, and for ensuring that buildings are safe and sanitary".[6] The Building Act is the statutory backdrop to leaky building liability in New Zealand; it sets out the sources of building regulation and defines the duties of territorial authorities, building certifiers, and other parties involved in construction. Section 7 of the Building Act provides that all building work shall comply with the Building Code 1992, a set of regulations made under the Building Act that sets out detailed requirements for buildings in New Zealand.

1. Procedure Under the Building Act 1991

Section 24(e) of the Building Act makes it a function of territorial authorities to enforce the Building Code. When any person wishes to build a structure that is covered by the Building Act he is required to apply to the territorial authority for a Building Consent. Under section 24 of the Building Act the territorial authority is required to consider and either approve or refuse the application. Either a building certifier or the territorial authority must then establish compliance with the Building Code before issuing a Code Compliance Certificate.[7]

2. The Building Industry Authority

The Building Industry Authority ("BIA") is instituted by section 10 of the Building Act. The BIAs functions are stated widely in section 12 and include: "Generally taking all such steps as may be necessary or desirable to achieve

5 Ibid 67-84 for discussion of liability for leaky homes.
6 Building Act 1991, s 6.
7 Ibid s 50.

the purposes of this Act".[8] The responsibilities of the BIA include processing applications for approval as building certifiers,[9] and making determinations in respect of the Building Code.[10]

The BIA was criticized by the media following the discovery of the problems posed by leaky buildings in New Zealand. It was alleged that the BIA knew about the problem for some years before it became widely known.[11] This led to the resignation of the Chief Executive of the BIA.[12]

3. The Building Code 1992

The Building Code is "performance based".[13] A council or building certifier who has to decide whether a building complies with the Building Code must be satisfied that the building will perform to the Code standard for its expected life.[14] Therefore where a building does leak, and the causes of leaking could have been discovered at the time the building was certified, it would be difficult to say that the certifier or council was reasonably satisfied that the building would perform to the standard at that time.

In the context of leaky homes, the most relevant provisions of the Building Code 1992 are:

B2. DURABILITY

FUNCTIONAL REQUIREMENT

Building materials, components and construction methods shall be sufficiently durable to ensure that the building, without reconstruction or major renovation, satisfies the other functional requirements of this code throughout the life of the building.

PERFORMANCE

From the time a code compliance certificate is issued, building elements shall with only normal maintenance continue to satisfy the performances of this code for ... the specified intended life of the building ...

E2. EXTERNAL MOISTURE ...

FUNCTIONAL REQUIREMENT

E2.2 Buildings shall be constructed to provide adequate resistance to penetration by, and the accumulation of moisture from the outside

8 Ibid s 12(1)(h).

9 Ibid s 12(e).

10 Ibid Part VII.

11 "Building Industry Authority under fire", *Dominion Post*, Wellington, New Zealand, 11 October 2002, A2; "Cullen points finger over leaky homes", *Dominion Post*, Wellington, New Zealand, 5 November 2002 A1; (19 November 2002) 604 NZPD 2183 (Bill English).

12 "Building industry chief quits", *New Zealand Herald*, supra note 1.

13 Howard Keyte QC and Jennifer Murphy, "Role and Liabilities of Building Certifiers and Territorial Authorities" (Paper presented at the *LexisNexis Butterworths Weathertight Homes Construction Conference 2003*, Auckland, 13-14 March 2003).

E3. INTERNAL MOISTURE ...
FUNCTIONAL REQUIREMENT

E3.2 Buildings shall be constructed to avoid the likelihood of:
(a) Fungal growth or the accumulation of contaminants on linings and other building elements ...
(c) Damage to building elements being caused by use of water ....

4. Limitations

Subsection 91(2) of the Building Act provides a ten-year limitation period for claims relating to building work.[15] The limitation period is important to building disputes, because defects may take significant time to be discovered or manifest themselves in damage to the rest of the building's structure. This ten-year limitation period has been incorporated in section 7(2) of the WHRS Act as one restriction on eligibility for the WHRS. Section 7(2) is in fact stricter than an ordinary limitation period because the Act requires that the building work in question must have been done within the ten years preceding the claim, whereas recent common law developments have held that limitation periods do not begin to run until damage is discovered or reasonably discoverable.[16]

III: The Weathertight Homes Resolution Services Act 2002

1. History and Purpose

The Act was originally Part Six of the Construction Contracts Bill 2002,[17] from which it was split at the Bill's third reading.[18] The Hon Robert Smellie QC said of the two Acts:[19]

> [They] involve fundamental departures from the conventional notions of jurisprudence. In particular, they introduce dispute resolution mechanisms in large part outside the established Court structures and invest the conclusions of non-judicial decision makers with significant degrees of permanency.

14 Ibid.
15 This ten-year period is known as the "long-stop" limitation period.
16 See *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA); *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).
17 House of Representatives, Supplementary Order Paper 31, Construction Contracts Bill, 19 November 2002. This paper created Part 6 of the Construction Contracts Bill.
18 House of Representatives, Supplementary Order Paper 32, Construction Contracts Bill, 19 November 2002. This paper split the Bill into two parts, creating the Weathertight Homes Resolution Services Bill.
19 Smellie, "Changing Times" [2003] NZLJ 9. Building disputes have long been the subject of dispute resolution outside of the courts. Perhaps the change observed is that until now the resolution of construction disputes outside of the courts has not been a statutory objective.

For this reason one might have expected the Bill to receive in-depth consideration by both Parliament as a whole and a select committee. Indeed, many Members of Parliament urged the Government to refer the Bill to a select committee, lest the "many problems with it"[20] result in it becoming a "Leaky Weathertightness Bill".[21] Nevertheless, the WHRS Bill received its third reading under urgency on 19 November 2003 – the same day it first came before Parliament, and received the royal assent a week later on 26 November 2002.

The purpose of the Act is set out in section 3: "to provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible, and cost effective procedures for assessment and resolution of claims relating to those buildings". It should be noted that the Act is not concerned merely with 'effective' dispute resolution but with 'cost effective' dispute resolution.

2. Structure and Provisions

The resolution procedure in the WHRS Act consists of three complementary stages: assessment, mediation and adjudication. The first stage, assessment, is compulsory and establishes that a claim qualifies for resolution under the Act. The claim can then be referred to either mediation or adjudication at the option of the claimant. It is important to remember that the WHRS is not the only mechanism for resolving leaky home disputes. It does not seek to oust the jurisdiction of the ordinary courts to hear claims made by owners of leaky homes.[22] Indeed, if a claimant commences an action in the ordinary courts at any time during the WHRS dispute resolution process, the claim will be removed from the jurisdiction of the WHRS.[23]

(a) Eligibility Criteria

A crucial provision in the Act is section 7, which sets out the criteria for the eligibility of claims to the WHRS. Section 7 provides that for a claim to be eligible it must be brought by the owner[24] of a dwellinghouse. The dwellinghouse[25] must be a leaky building[26] "in the opinion of an evaluation panel, formed on the basis

20 (19 November 2002) 604 NZPD 2187 (Dail Jones).

21 Ibid.

22 Nothing bars an applicant homeowner from proceeding through the WHRS against parties who agree to participate in mediation, and then proceeding against non-participants in the District Court. Section 58 is the only interference with the parties' rights to choose the Court rather than the WHRS. Under s 58 District Court and High Court Judges may "on their own motion" order that a claim be transferred to the WHRS.

23 WHRS Act, s 23.

24 bid s 7(1)(a).

25 Ibid s 5. Dwellinghouse is defined as: "(a) ... any building, or any apartment, lat, or unit within a building, that is intended to have, as its principal use, occupation as a private residence; and (b) includes any gate, garage, shed, or other structure that is an integral part of the building; but (c) does not include a hospital, hostel, hotel, motel, rest home, or other institution."

26 Ibid s 7(2)(b).

of an assessor's report".[27] Damage to the dwellinghouse must have resulted from the dwelling being a leaky building.[28] The house must have been built or subject to alterations within the ten years preceding the application.[29]

One consequence of requiring claimants to be the current owner of the leaky dwellinghouse is that the owner is unable to sell the house until the claim can be resolved. Given the delays that claimants are experiencing,[30] this is a significant problem with the WHRS.

(b) Assessment[31]

The first stage of the WRHS process is for the owner of a dwellinghouse to apply under section 9 to the Chief Executive of the WHRS to have an assessor's report prepared. The claim is referred to an assessor appointed by the Chief Executive under section 8 of the Act.[32] The assessor must prepare a report setting out the assessor's view as to a number of matters specified in section 10. This report is paid for by the WHRS, which saves the claimant a significant expense. The provision of the assessor's report, at no cost to the claimant, is perhaps the most significant benefit of the WHRS procedure.

An evaluation panel must be convened under section 11 to evaluate the assessor's report in accordance with the requirements outlined in section 12 and to decide whether a claim meets the eligibility criteria set out in section 7(2). If the panel decides that the criteria are not met, the claimant may apply to the Chief Adjudicator for a review under subsections 12(4) to 12(6). If the Chief Adjudicator determines that the decision of the panel was correct then the claim is outside the jurisdiction of the WHRS, and the claimant must rely on ordinary court procedures or other dispute resolution mechanisms. The decision of the Chief Adjudicator is open to ordinary judicial review.

Where the panel decides the criteria are met, the then claimant and any other parties to the claim may agree to refer the claim either to mediation (under section 14), or to adjudication (under section 22(1)).[33]

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27 Ibid s 7(2).

28 Ibid s 7(2)(c). Leaky Building is defined in s 5 as "a dwellinghouse into which water had entered from outside the dwellinghouse through the external wall cladding systems as a result of any aspect of the design, construction, or alteration of the dwellinghouse, or materials used in its construction or alteration".

29 Ibid s 7(2)(a).

30 See supra note 4, 27-31.

31 See generally supra note 4, 25-30 for the author's full evaluation of the assessment process.

32 Whilst regard must be had to their knowledge, skills and experience, the suitability of assessors is a matter of the Chief Executive's opinion.

33 WHRS Act, s 22(3) provides, however, that the owner of a dwellinghouse may not refer a claim to adjudication to the extent that a claim is subject to an arbitration that has already commenced, or other proceedings initiated by the claimant.

(c) Mediation[34]

Mediation is a confidential service.[35] The Chief Executive decides how mediation services will be provided[36] and must engage mediators to provide mediation services.[37] The mediator decides what services are appropriate to the particular case and may follow such procedures as he or she thinks fit.[38] However, the mediator is not empowered to make a decision, even at the request of the parties.[39]

The Act appears to allow the claimant to choose between mediation and adjudication. In practice however, if any respondent does not agree to mediation, the claimant is forced to pursue her claim through either the adjudication service or other means of dispute resolution. The Act contemplates that claims may be mediated between the claimant and some respondents even though other respondents do not agree to mediation.

The fact that different channels may be used to resolve the same dispute in relation to different respondents may create conflict between provisions of the Act that are designed to ensure that mediation is confidential and final, and provisions of the Act that provide for public and transparent adjudication. The same conflict may arise where a dispute is privately settled in respect of one party, but where WHRS adjudication or mediation against other parties is still pending.

If parties agree to mediation a referral to mediation must be signed by all parties and accompanied by a $200 fee.[40] If the parties do not agree to mediation, or where the claimant prefers adjudication, the claimant may initiate adjudication under section 26.

(d) Adjudication

The claimant may commence adjudication by serving a notice of adjudication on the other parties and the WHRS, and paying a $400 fee.[41] Where the claimant has already attempted mediation, the $200 mediation fee will be deducted from this $400.[42] The notice of adjudication specifies the nature of the claim and provides a brief description of the parties involved, the remedy sought, and the names and addresses of the parties.[43] On receiving the adjudication claim, the

34 See generally supra note 4, 32-38, for the author's full evaluation of the WHRS mediation process.
35 WHRS Act, s 16.
36 Ibid s 13(2).
37 Ibid s 13(1).
38 Ibid s 15.
39 Ibid s 15(3).
40 Ibid s 14(2). Section 14(4) provides that the $200 fee is the responsibility of the claimant.
41 Ibid s 26.
42 Ibid s 26(4).
43 Ibid s 26(2).

respondent has 25 working days to serve a written response on the adjudicator and every other party.[44]

The Chief Adjudicator of the WHRS must assign an adjudicator to the claim under section 27. Adjudicators are appointed by the Governor General on the recommendation of the Minister.[45] The adjudicator is required to determine the liability of any of the parties and any remedies that are appropriate[46] within 35 days[47] (plus any additional time that the parties agree).[48] The adjudicator has broad discretion to control proceedings and may conduct the adjudication "in any manner he or she thinks fit".[49] In addition, the adjudicator has express power under the Act to make orders including: the removal of any party from proceedings,[50] the joinder of any party as a respondent,[51] and transfer of the claim to the District Court.[52]

WHRS adjudicators appear to have been awarded considerable discretion, however there are a number of limits. Adjudicators must provide a determination in writing,[53] and provide reasons.[54] Furthermore, section 42 provides extensive requirements for the substance of adjudication decisions. The requirements exist for a number of reasons. First, adjudications are intended to be final (although they are subject to appeal under section 44), and binding. Parties must comply with determinations, which are immediately effective.[55] Secondly, as a result of section 49, adjudication decisions are deemed to be an order of the District Court and may be enforced as such. Finally, because section 49 provides that adjudication decisions are open to appeal, it is important that parties are given reasons for the decision.

Other controls on the adjudicators are provided by section 51, which states that adjudication proceedings will ordinarily be conducted in public; and section 53, which provides that adjudication determinations will be publicly available. This raises one aspect of adjudication decisions that the Act does not expressly address: what is the status of adjudication decisions under the Act as a matter of precedent? It would appear that adjudication decisions in respect of questions of law are likely, in practice, to be regarded as authoritative in other adjudication proceedings until such time as they are overturned on appeal.[56]

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44 Ibid s 28(3).
45 Ibid s 24(2).
46 Ibid s 29(1)(a)(b).
47 Ibid s 40(1)(a).
48 Ibid s 40(1)(b).
49 Ibid s36(1)(a).
50 Ibid s 34.
51 Ibid s 33(1).
52 Ibid ss 58 and 59.
53 Ibid s 41(1)(b)(i).
54 Ibid s 41(1)(b)(ii).
55 Ibid s 48. Note also s 47, which provides that an appeal does not operate as a stay of the adjudicator's determination.
56 Dobbie, Interview with John Green, WHRS Adjudicator and Arbitrator (Takapuna, Auckland, 17 December 2003).

Importantly, section 43 provides that the parties must meet their own costs, unless the adjudicator considers that because of bad faith or unmerited allegations unnecessary costs have been incurred. The effect of section 43 is that in most cases the parties will be forced to meet their own costs. The resulting potential for under-compensation will be examined in part IV below.

Also important is that the Act does not affect the substantive law relating to leaky building liability; it is procedural and not substantive in scope. In an adjudication hearing, claimants are required to prove their case on the balance of probabilities, and where no liable party with the resources to pay can be found the claimant is left without a remedy.

3. Summary

The Act has obvious strengths. It is sufficiently flexible to allow mediators and adjudicators to mould a cost effective and speedy dispute resolution service. It puts in place a procedure for addressing leaky home disputes that provides homeowners with an alternative to the overburdened courts. All this is provided at a maximum cost of $400. The free assessment service facilitates the discovery of the full extent of leaky home damage, and provides homeowners with expert advice that they might not otherwise be able to access or afford.

However, assessment also creates a significant limitation on the speed of the WHRS in dealing with claims. The difficulty of finding skilled assessors and the time-consuming nature of the assessments themselves has meant that the Service has been unable to keep up with the significant number of applications that it has received.[57] The Act makes assessment a prerequisite to dispute resolution, and this may significantly slow the Service.

The Act has other limitations. It does not assist the claimant when the respondents are unwilling to mediate. In such circumstances, the claimant may be forced to refer the matter to adjudication.

IV: Issues In Adjudication

Eligible claimants have the right to refer their claim to adjudication under section 22 of the Act. As at August 2003, 22 claimants had elected to pursue adjudication, whereas 71 claims had entered mediation.[58] By the end of 2003, 48 claims had been resolved: 32 using the mediation service, compared to 2 by adjudication.[59] The first two adjudications to be resolved by the WHRS highlight issues that must be addressed either on appeal or by lawmakers.[60]

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57 See generally supra note 4, 25-30.

58 Building Industry Authority, *Weathertigtness* News No 3 (BIA, August 2003) <http://www.bia.govt.nz/e/publish/weathertightness/printer_aug_03_no1.shtml> (at 11 July 2004).

59 Weathertight Homes Resolution Service *WHRS – latest figures* <http://www.weathertightness.govt.nz> (at 11 July 2004).

60 As at 1 August 2004, the WHRS had made eight further adjudication decisions.

1. Kelleway v Insar, *Waitakere City Council & Tennent ("Kelleway")*[61]

This section focuses on two significant issues raised by *Kelleway*. The first is the standard of care that the decision imposes on local authorities. The second is the nature of personal liability that building company directors may have in tort.

On 6 April 1997, Phillip and Pritty Kelleway purchased a plaster-clad dwellinghouse in Glendene from Manu Insar and Christine Tennent. Insar and Tennent were responsible for the house's construction.[62] In November 2000 the Kelleways commenced proceedings in the District Court against the Waitakere City Council, alleging damage caused by water leaking through the dwelling's exterior cladding. Upon the inception of the WHRS they applied for assessment and discontinued District Court proceedings. The Kelleways then commenced adjudication under the Act against the Waitakere City Council, and Insar and Tennent (as the former owners, vendors, and a parties responsible for the construction). Adjudicator John Green heard the claim.

The Kelleways claimed damages of $48,900 against all three respondents and alleged concurrent and several liability. Five major causes of damage were alleged: poor plaster mix and inadequate curing; improper installation of mesh in the exterior cladding; lack of control joints; continuation of cladding below ground level preventing drainage; and lack of sill and jamb flashings.[63]

Insar and Tennent (the first and third defendants) did not appear at the hearing and were not represented at it. Both the Council and the Kelleways had counsel present. Despite the number of issues of both law and fact that were raised, the hearing took only two days. Adjudicator Green attributes the brevity of the hearing to the uniquely flexible adjudication procedure developed by the WHRS.[64] Since all evidence is provided to both parties and the adjudicator prior to the hearing, and because all experts and witnesses statements are taken as read, the hearing focuses on the issues in dispute between the parties.[65]

(a) Liability and Contribution

The Adjudicator awarded damages of $40,022.29 against Insar, Tennent, and Waitakere City Council, jointly and severally.[66] It was held, based on ordinary principles of tort law, that liability was concurrent.[67] The consequence of this is that both the Council and the builders are separately liable for the whole of the

61 (29 September 2003) unreported, Weathertight Homes Resolution Service, Determination No 00134 ["*Kelleway*"].
62 Ibid [4].
63 Ibid [51].
64 Ibid.
65 John Green, "Guidance notes for parties/counsel", 17 December 2003.
66 *Kelleway*, supra note 61, [363]. The liability of Insar and Tennent in negligence was the slightly higher sum of $40,311.58, which included damages for nail popping.
67 Ibid [342].

Kelleways' loss.[68] However, it was noted that the Council could seek contribution from Insar and Tennent under section 17 of the Law Reform Act 1936.[69] For this reason the liability of the Council was set at 20 per cent and that of Insar and Tennent at 80 per cent,[70] relying on the decision in *Mt Albert Borough Council v Johnson*.[71]

(b) Liability of Insar and Tennent in Contract

Insar and Tennent, as named vendors in the agreement for sale and purchase, were liable for breach of the express warranty that the building work completed by them complied with the Building Act 1991. This was because the building work did not comply with the Building Code, and that non-compliance was in turn a breach of section 7(1) of the Building Act 1991.[72] This reasoning follows that of the Court of Appeal in *Riddell v Porteous*.[73]

(c) Liability of Insar and Tennent in Negligence

The Adjudicator had no difficulty finding Insar and Tennent personally liable in negligence.[74] In support of his conclusion that Insar and Tennent owed a duty of care to future owners he cited *Chase v De Groot*:[75]

> 1. The builder of a house owes a duty of care in tort to future owners.
> 2. For present purposes that duty is to take reasonable care to build the house in accordance with the building permit and the relevant building code and bylaws.
> 3. The position is no different when the builder is also the owner. An owner/builder owes a duty of care in tort to future owners ....

Morton v Douglas Homes Ltd[76] was also cited as authority for the proposition that a developer who is also the builder owes a duty of care to subsequent purchasers.[77] In the present case, it was an owner who completed the building

68 Ibid [343].
69 Ibid [346].
70 Ibid [355].
71 [1979] 2 NZLR 234 (CA).
72 *Kelleway*, supra note 61, [212].
73 [1999] 1 NZLR 1. That case was cited as authority for the proposition that the vendor will be liable to the purchaser for a breach of warranty that building work by the vendor complies with the Building Act 1991, but the case only deals with liability in negligence. This conclusion was actually reached in earlier decisions in relation to the same matter.
74 *Kelleway*, supra note 61, [242].
75 Ibid [229], citing [1994] 1 NZLR 613.
76 [1984] 2 NZLR 548.
77 *Kelleway, supra* note 61, [230].

work. The Adjudicator saw no distinction between cases involving developer/builders and those involving owner/builders.[78]

The Adjudicator went on to hold that a failure to comply with the Building Code was a "clear and unequivocal breach of the duty of care"[79] and "clearly causative of the loss suffered by the Kelleways".[80]

It is also clear that the standard of care owed by the builder was not limited to compliance with the Building Code. This is evidenced by the way the Adjudicator dealt with the issue of nail popping: whilst not a breach of the Building Code, this was "most certainly a result of negligent construction"[81] and damages against the builder were awarded accordingly.[82]

(d) Liability of Waitakere City Council in Negligence

A further issue was whether the local authority's failure to ensure that the building complied with the Building Code amounted to a breach of a duty of care owed to the Kelleways.[83]

The Council argued that it could not have identified the causes of leaking from a visual inspection.[84] This argument was rejected. There was "no doubt that all of the defects that ... caused the stucco plaster cracking could have been identified by the Council if it had inspected the works before completion".[85]

In addition, it was submitted that the claimants suffered their loss at the time they purchased the property, which was prior to the Council's inspection, and therefore that the Council's inspection was not causative of the loss.[86] The Adjudicator squarely rejected this argument on the basis that but for the Council's breach, the Kelleways would have had remedies in May or June 1997.[87] They then could have deducted the cost of repairs from money payable to the vendor at that time.[88] The loss was suffered on 19 June 1997 when they paid the purchase price in "reliance on the Council having discharged its duties".[89]

The Adjudicator defined in detail the standard of care required of the Council,[90] and found that it was in breach of duty. He articulated the source of the failure to conduct inspections before completion:[91]

78 Ibid [231].
79 Ibid [234]
80 Ibid [237].
81 Ibid [241].
82 Ibid [242].
83 Ibid [245].
84 Ibid [246].
85 Ibid [248].
86 Ibid [247].
87 Ibid [331]
88 Ibid.
89 Ibid [333].
90 See (e) below.
91 *Kelleway, supra* note 61, [314].

> [It was] born of a woeful, but avoidable lack of knowledge by the Council's building officers, brought about by a failure of the Council to gather and provide such information as was necessary to enable the Council's officers to effectively carry out its duties under the Building Act, and that failure was a breach of its statutory obligations.

The Council argued that for reasons of time and cost they had to limit the number of inspections. However, this point had been conclusively addressed by the Court of Appeal in *Stieller v Porirua City Council*:[92]

> The short answer to this submission is that the Council's fee for the building permit is intended to include its charges for making inspections in the course of construction, and it does not limit these in numbers or by stages.

Adjudicator Green consequently rejected any argument that the number of inspections was limited by cost, because "inspections were matters solely at the Council's discretion and the number and timing of the council's inspections were not limited in any way by cost, policy, or legislation".[93]

Another argument the Council made was that their conduct was "the usual and common practice of Territorial Authorities at that time".[94] Adjudicator Green rejected this argument, stating that the common conduct of councils cannot be substituted for the standard of reasonableness, particularly where that conduct is not reasonable in the circumstances.[95]

Adjudicator Green suggested that the failure to conduct inspections of the stucco plasterwork was a breach of the Co uncil's statutory obligations.[96] The Council had "breached the duty of care it owed to home owners by failing to conduct inspections of the stucco plaster work before it was completed".[97]

However, the Adjudicator also noted that "the decision not to inspect ... was not negligent"[98] in this case, because the Council did not know that stucco plaster cladding would be used (as this was not the cladding proposed on the application for building consent).[99]

The author submits that the apparent inconsistency is explained by the fact that the earlier comments were meant to be of general application to situations where a council knew that a home would be clad in stucco plaster. Where a council had such knowledge, it would be obliged to inspect at such times as would allow it reasonably to satisfy itself that the plaster clad home complied with the Building

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92 Ibid [283], citing *Stieller v Porirua* City Council [1986] 1 NZLR 84, 94 [*"Stieller"*].
93 *Kelleway, supra* note 61, [285].
94 Ibid [287].
95 Ibid [289].
96 Ibid [314].
97 Ibid [315].
98 Ibid [316].
99 It is usual practice for councils to allow builders to make modifications to the design during construction. If the council is reasonably satisfied that the building at the end complies with the building code then they will still issue a Code Compliance Certificate. Interview with John Green, supra note 58.

Code. Here, the Council did not know that the home would be clad in stucco plaster, and therefore was not negligent in failing to inspect the home during the application of the cladding. Nevertheless, the fact that the Council certified the work at the final inspection, when they did know that stucco plaster had been used, but had no way of knowing if the stucco plaster complied with the Building Code, was negligent.[100] Thus, the decision on this point may be regarded as an obiter dicta statement that a council will be negligent where it knows that the cladding is stucco plaster, but nevertheless fails to make inspections at such times as would enable it to be satisfied on reasonable grounds that the building complies with the Building Code.[101]

This may cause practical difficulties. The obvious question is: what should a council do in circumstances like those in *Kelleway*? Should it order the removal of the entire cladding merely because it cannot be satisfied that the cladding complies with the Building Code? The short answer is that the council should request whatever testing, demonstration, or reconstruction is necessary to satisfy them on reasonable grounds that the work complies with the Building Code. In doing so, the council will discharge both its statutory duty and its duty of care.

It was held that the liability of Waitakere City Council therefore amounted to $40,022.99, being the cost of repairing the damage to the house.[102]

(e) Does the Finding That Waitakere City Council was Negligent Extend the Duty of Care Owed by Local Authorities?

Territorial authorities face two sources of potential liability: for the negligent issuance of a Building Consent; and for the negligent issuance of a Code Compliance Certificate due to negligent inspection or failure to inspect.

In an article "Chaos comes closer", David Heaney, a lawyer specializing in the representation of local authorities, espouses the view that *Kelleway* "dramatically extends the duty of care" and comes close to requiring councils to be "clerks of works".[103] He argues: "The extension of the duty of care in this way makes a mockery of the Building Act and the functions of the BIA."[104] The perception that *Kelleway* has somehow extended the duty of care has also been voiced by the media. The New Zealand Herald called the decision a "benchmark ruling [that] has opened the way for owners of leaky buildings to claim millions of dollars in compensation from local councils".[105]

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100 *Kelleway*, supra note 61, [324]-[325].

101 In practice this may not be overly onerous; the author submits that the cutting of a number of small holes in the cladding may be sufficient to demonstrate to an inspector that the cladding is properly applied and complies with the Building Code. These holes can then be plastered over.

102 *Kelleway*, supra note 61, [336]. That amount is the full liability of Insar and Tennent, less only $288.59 for nail popping, which was not caused by non-compliance with the building code.

103 Heaney, "Chaos comes closer" (October 2003) Local Government NZ, inside back cover.

104 Ibid.

105 "Leaking homes blow for councils", *New Zealand Herald*, Auckland, 23 October 2003.

This perception that the decision breaks new ground deserves careful examination, because nothing in *Kelleway* suggests that Adjudicator Green considered his findings extended the duty beyond existing authority. This section summarizes existing authority on the scope of the duty of care owed by councils. It considers whether, and to what extent, *Kelleway* extends that duty. It will be seen that findings in *Kelleway* are largely supported by existing authority, and the decision does not break any significant new legal ground.

Tipping J stated the duty of care owed by councils in general terms in *Chase v De Groot*:[106]

1. A council through its building inspector owes a duty of care in tort to future owners.
2. For present purposes that duty is to exercise reasonable care when inspecting the structure to ensure that it complies with the permit and all relevant provisions of the building code and bylaws.

Robin Cooke (as he then was), writing extra-judicially, summarized the general rule for New Zealand:[107]

> The point is simply that, prima facie, he who puts into the community an apparently sound and durable structure, intended for use in all probability by a succession of persons, should be expected to take reasonable care that it is reasonably fit for that use and does not mislead. He is not merely exercising his freedom as a citizen to pursue his own ends. He is constructing, exploiting or *sanctioning* something for the use of others. Unless compelling grounds to the contrary can be made out, and subject to reasonable limitations as to time or otherwise, the natural consequences of failure to take due care should be accepted.

Thus, the duty of care is owed equally by councils that "sanction" buildings and by builders who "construct" them.

There is some doubt as to whether a danger to safety and health is required for a duty to be recognized in New Zealand. There is authority for this requirement in *Willis v Castelein*.[108] However in *Stieller v Porirua City Council*,[109] the Court of Appeal held that the duty exists even where there is no danger to safety and health.[110] Furthermore, as discussed above, there is no need to show actual physical damage caused by the building defects; even if the damages are characterized as pure economic loss they are likely to be recoverable in New Zealand.[111]

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106 *Chase v De Groot* [1994] 1 NZLR 613, 620.

107 Cooke, "An Impossible Distinction" (1991)107 LQR 46. Emphasis added.

108 [31 August 1993] Court of Appeal, Wellington, CA89/93.

109 Supra note 92.

110 Ibid 94: "A Council may be liable for defects in exterior cladding even though questions of safety and health do not arise."

111 However, in the context of WHRS adjudication, it might be treated in the same fashion as *Godinich* (infra note 138) and therefore be outside of the scope of the Act.

In *Kelleway* the Adjudicator made at least five points about the duty of care imposed on local authorities:[112]

1. The Council (inspector) act as a reasonably prudent council (inspector) would act;
2. The standard of care in relation to an inspection or a decision as to whether, when, and how to inspect, would depend on the degree and magnitude of the consequences of the decision;
3. "The standard of care does not extend to identifying defects within the building works which cannot be detected without a testing programme being undertaken";
4. "The Council is obliged to put in place proper inspection processes, at appropriate intervals and stages during the construction of a building to *maximize* the inspectors' ability to ensure compliance with the building code"; and
5. "The Council must ensure that it undertakes such research and gathers such information as is necessary to ensure its officers and inspectors are suitably qualified, experienced and informed in relation to current building standards and practices, to enable them to effectively carry out the Council's functions under the Building Act 1991".

The first point outlines the duty of care in its most basic form: a general obligation of local authorities and their officers to act as a reasonably prudent, or careful, council (or council officer) would be expected to act in the circumstances.

The second point was authoritatively determined by the Court of Appeal in *Stieller v Porirua City Council*.[113] The case confirmed that a local authority cannot rely on cost or internal policies to limit the number, duration, and frequency of inspections. Rather, a council has complete discretion to organize inspections so as to discharge both the duty of care and the statutory duty. This finding is consistent with the general principle: "No group of individuals and no industry or trade can be permitted, by adopting careless or slipshod methods to save time, effort, or money, to set its own uncontrolled standard at the expense of the rest of the community."[114]

The third point makes clear that a local authority is not required to detect defects that cannot be identified without undertaking a programme of testing. This is consistent with a council's statutory duty to be reasonably satisfied, and a council's common law duty to take reasonable care. Councils are not

112 *Kelleway*, supra note 61, [261]. These points are paraphrased unless a direct quote is indicated. Emphasis added.

113 Supra note 92, 94.

114 *Low v Park Price Co* (1972) 95 Idaho 91, 503 P 2d 291, cited in Prosser, Wade, and Schwartz, *Cases and Materials on Torts* (7 ed, 1982), 166.

required to undertake scientific testing to search for defects that are not otherwise detectable.[115]

Thus, while Heaney criticizes the adjudication on the grounds that it extends liability to defects that cannot be detected by inspection,[116] it appears that the decision does not extend the duty to defects that cannot be detected by reasonable inspection. This is evidenced by how the Adjudicator determined whether the Council met the requisite standard of care. The Adjudicator considered whether or not the Council "could have identified the defects which have caused the stucco plaster cracking if it inspected the works before completion",[117] and found on the facts that the Council could indeed have identified each of the defects had they inspected the property.[118]

Heaney also criticizes the case on the basis that it "comes close to requiring Councils to be clerks of works".[119] *Kelleway* expressly acknowledges that a council is not required to be a clerk of works,[120] and applying this to the facts, the Adjudicator recognized that the Council could not be held liable for the failure to discover the defective plaster mix and curing, as these were matters that could only be regulated by a person performing the role of clerk of the works.[121]

The fourth point identifies the obligation of a local authority to organize inspections so as to discharge the duty of care. An issue might arise from the choice of the word "maximize". A better way to state this duty might be in terms already used: a council must conduct such inspections as are necessary in order to be reasonably satisfied that the home complies with the Building Code and the Building Act 1991. The use of the word "maximize" in the context of the other comments made by the Adjudicator cannot be read as requiring councils to do anything over and above the requirements of reasonableness.[122] Councils are not required to take steps to be certain that the building complies, and the use of the word 'maximize' is not intended to impose an alternative standard to reasonableness. Therefore, the comments should be read as consistent with existing authority on the content of the duty of care imposed on territorial authorities.

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115 This does not exclude the possibility that a council that does not have reasonable grounds to satisfy itself that the home complies with the Building Code might require a homeowner to obtain evidence such as tests on the cladding. These could then be used by the council as reasonable grounds to believe that the home complied with the Code.

116 Heaney, supra note 103.

117 *Kelleway*, supra note 61, [268].

118 Ibid [271]-[275]. Adjudicator Green found that the Council could have identified: the defects in the extension of the plaster cladding below ground and the inadequate drainage [271]; the inadequate casing bead [272]; the inadequate placing of the reinforcing mesh [273]; the inadequate waterproofing around the window joinery [274]; and the lack of proper provision for expansion in the plaster cladding [275].

119 Heaney, supra note 103.

120 See eg *Kelleway*, supra note 61, [276]-[277].

121 Ibid [276].

122 Interview with John Green, supra note 58. Green indicated that the word 'maximize' arose from the submissions of counsel and was carried over to the decision for convenience, and was not intended to be of any legal consequence.

The fifth and final point is that a council's duty of care and statutory duty requires them to undertake research to train building inspectors. This is unsurprising given that territorial authorities have duties under section 24(e) of the Building Act 1991 "to enforce the provisions of the building code and regulations", and under section 24(g) "to gather information and undertake or commission research so far as is necessary to enable them to carry out their functions under the Act". These duties are additional to the councils' duty to reasonably satisfy themselves that the building complies with the Building Code. Even in the absence of these statutory duties, it is submitted that a council's duty of care would require that inspectors had the reasonable knowledge, experience and training to discharge their duty.

In summary, nothing in *Kelleway* extends the duty of care (or indeed the statutory duties of local authorities). Existing authority supports the conclusions of law in the decision. Perhaps what has gained the attention of councils is the application of the existing law to the factual context of leaky buildings, which shows that council practice to date has been inadequate to meet the requisite standard of care. *Kelleway* makes clear that failure to conduct inspections during the application of stucco plaster cladding is negligent. This is because councils know, or should know, that the only way they can be reasonably satisfied that the building complies with the Building Code (and thereby satisfy both their duty of care and their statutory duty) is to conduct inspections during the application of the cladding. Such a conclusion is not new. In 1986 the Court of Appeal rejected the argument put by the Porirua City Council that it was not in breach because the Building Code did not require inspections during the application of weatherboard cladding.[123] Times and types of cladding may have changed, but nothing in the nature of a council's duty of care has changed since 1986. Although this makes the enormous liability exposure of councils apparent, it is not the imposition of a new legal rule. Rather it is the first of many decisions in which the practices of local authorities over the last ten years will be put to the test.

(f) Personal Liability of Building Company Directors in Tort

Adjudicator Green had no difficulty finding Insar and Tennent personally liable in negligence[124] despite the fact that they operated through companies. The author submits that this point may not have been so easily conceded had Insar or Tennent been present or represented at the hearing. The issue of whether builders or developers who are also directors, shareholders, or employees of building companies (or other contracting companies) can be personally liable in tort is an important one.

123 *Stieller*, supra note 92, 94.

124 Ibid [242]. There is no direct discussion of this point, rather it is assumed, based on cases such as *Morton v Douglas Homes* [1984] 2 NZLR 548.

Neil Campbell notes a widely held perception that builders and developers are usually "'shell companies', behind which so-called 'flash Harrys' will be able to shelter".[125] Being able to make the builder or 'flash Harry' personally liable in tort will be important in situations where homeowners contracted with, or are owed a duty by, a building company that owns little or no assets, or that has subsequently been liquidated.

Green suggests that many building company directors will be joined personally as parties to claims before the WHRS.[126] Perhaps this is because claimants believe that they can bring evidence that respondent building company directors were personally involved in supervising or conducting the negligent work and therefore are personally liable as tortfeasors, or perhaps it is based on an erroneous view of the law in respect of director's liability.

Kelleway seems to assume that the builders are personally liable in tort. Insar and Tennent were characterized as the 'owner/builder' and were found liable on the grounds that this was no different to being a 'developer/builder'. Whilst Insar and Tennent may have been 'behind' the construction effort, the works seem to have been supervised by another man[127] who coordinated contractors and subcontractors. It is clear then that Insar and Tennent did not personally undertake the construction work, nor did they supervise it. They were also the directors and shareholders of the plastering company that completed the exterior cladding, but again it is unclear whether they personally undertook that work or whether it was completed by employees and contractors of their company. So the question arises: upon what grounds does the law hold such persons liable in tort?

There are broadly two possible approaches to the liability of building company directors in tort. Under the first, which Neil Campbell calls the "simple approach",[128] whilst a director/shareholder will "not be liable for an obligation of the company by reason only of being a shareholder",[129] they will be liable for any work carried out "as agent on behalf of the company, whether in the capacity of director or otherwise".[130] This approach means that the directors and employees of building companies "receive no immunity by saying 'I built that shoddy home on behalf of my company'".[131] Therefore, the claimants will succeed whenever they can prove the elements of the cause of action against the individual tortfeasor (irrespective of their position as a company director).[132]

125 Campbell, "Leaking Homes, Leaking Companies?" [2002] CSLB 101 ["Leaking Homes"].
126 Interview with John Green, supra note 58.
127 Dobbie, Interview with Dane Tui, (Auckland, 24 December 2003). The Kelleway's solicitor considered pursuing him but did not because he could not be located, and was unlikely to have assets to satisfy any judgment.
128 Campbell, "Claims Against Directors and Agents" [2003] NZLJ 109 ["Claims against directors"].
129 Companies Act 1993, s 97.
130 Campbell, Leaking Homes, supra note 125.
131 Ibid 128.
132 See also *Lee v Lee's Air Farming Ltd* [1961] AC 12.

An alternative approach is advanced by Professors Rickett and Grantham:[133]

> As a juristic entity it is the company that bears the rights and liabilities generated from the conduct of the business. For those who are recognized as being a part of or inside the company, the effect is to insulate them from those liabilities.

They suggest that "[t]he board is now regarded as an organ of the company of at least equal status with shareholders"[134] and, therefore, that "the company law regime modifies the normal consequences of the director's actions so as to direct liability to the company rather than to the director personally".[135] Furthermore, they argue that this position is supported by the weight of authority, saying that "for most non-intentional torts it has long been accepted that liability should be met from the company's assets and not those of insiders".[136]

Whatever the approach that WHRS adjudicators and the courts choose it is important that they recognize the difficult issues that arise in this area. It should not be assumed that directors are personally liable in tort. Rather, such decisions should only be made after a careful consideration of the authorities and the facts. In any event, it is unlikely that the difficult issues in this area will be resolved until they are considered on appeal.

(g) Costs

After reviewing section 43, Adjudicator Green, describing the jurisdiction of WHRS adjudicators to award costs, stated: "I think it is fair to summarise the legal position by saying that an adjudicator has a limited discretion to award costs which should be exercised judicially, not capriciously."[137] Accordingly, he held that the parties should bear their own costs. This decision appears to be correct on the clear wording of section 43, which allows costs to be awarded only in extreme circumstances. As a result of this, the Kelleways will bear the cost of any legal bills that they have incurred. The issue of awards of costs is examined in IV(3) below.

(h) Conclusions on Kelleway

The case was heard over just two days, making it a less time-consuming and costly process than the District Court. Overall, the decision demonstrates the usefulness and expediency of WHRS adjudication to resolve leaky home disputes.

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133 Grantham and Rickett, "Company directors' liability for torts" [2003] NZLJ 155, 156.
134 Ibid.
135 Ibid.
136 Ibid.
137 *Kelleway*, supra note 61, [361].

The decision highlights two important legal issues relating to leaky home liability. The author submits that the decision does not extend the duty of care owed by local authorities. However, it draws attention to the vulnerability of council practices over the last decade to negligence actions. The decision involves but does not explicitly discuss the personal liability of building company directors.

2. *Godinich v Guan Thye Heng Co Ltd & Approved Building Certifiers Ltd ("Godinich")*[138]

This decision imposed two prerequisites for recovery in WHRS adjudication. This section will focus on analyzing and critiquing those prerequisites.

In April 2002 the claimants, Franco Godinich and Susan Godinich, purchased a house in Mairangi Bay, on Auckland's North Shore. The claimants alleged weathertightness defects in the home and claimed repair costs totalling $22,654.00.[139] The designer of the home had been a respondent, but was struck out as a party to the adjudication by Adjudicator AMR Dean. The adjudication continued against the builder, Guan Thye Heng Co Limited, and the building certifier, Approved Building Certifiers Limited.

Notices were served on the builder company and its directors, but the company did not respond to the notices or appear at the hearing. The certifier company appeared at the hearing and was represented by its managing director. The claimant also appeared without counsel. The author submits that the fact that neither party was represented by counsel explains the lack of submissions on liability issues. The decision is developed very much in terms of the facts. Adjudicator Dean outlines the approach that he took in the form of five questions:[140]

1. Does the building leak?
2. What is the probable cause of the leak?
3. What damage has been caused by the leak?
4. What remedial work is needed?
5. And at what cost?

(a) Liability and Contribution

Both the first and second respondents were found liable for $5,000.[141] This was $15,654 less than the amount claimed.

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138 (6 October 2003) unreported, Weathertight Homes Resolution Service, Determination No 00036 ["*Godinich*"].

139 Ibid [3.1].

140 Ibid [4.2].

141 Ibid [8].

It was held that the builder and the certifier were concurrent tortfeasors and "each liable in full for the losses that their negligence has caused".[142] Just as in *Kelleway*, for the purposes of contribution the apportionment in *Mount Albert Borough Council v Johnson*[143] was followed; therefore the builder bore 80 per cent of the responsibility and the certifier bore 20 per cent.

(b) Analysis of the Decision

This decision makes it clear that there is no presumption of liability under the Act. The onus is on the claimant to prove his or her claim to the ordinary civil standard. In particular, the Adjudicator identified two requirements for recovery in the WHRS. First, there must be evidence of actual leaking prior to the hearing.[144] Secondly, there must be evidence that the construction work is not compliant with the Building Code.[145] Each of these requirements will be examined in turn.

(i) The Requirement for Actual Leaking Prior to the Hearing

The Adjudicator made clear that he was unable to "allow a claim where there is no evidence of a leak".[146] He identified this requirement as arising from the definition of a leaky home in section 5 of the Act.

Whilst the assessor's report identified a defect that indicated construction was "less than is necessary to effectively waterproof the wall/balcony joinery",[147] because there was "no evidence to show that any water ha[d] penetrated the building at this point"[148] there could be no liability under the Act.

On this approach, where a dwelling has defects[149] that may allow the entry of water in the future,[150] but as yet no water has entered through those defects, there can be no recovery in the WHRS for those defects. Such a home could not be reasonably called 'weathertight', yet a homeowner would have to wait for water to enter the home through known defects before a WHRS claim to repair those defects could succeed. This approach is impractical. Building defects appear and

142 Ibid [6.1].
143 *Mt Albert Borough Council v Johnson* supra note 16.
144 *Godinich, supra* note 138, [4.5.2].
145 Ibid [4.9.3].
146 Ibid [4.5.2].
147 Ibid [4.5.1].
148 Ibid.
149 Liability for defects only arises where the water entry is caused by defects in the building and not merely the absence of ordinary maintenance.
150 Including situations in which water entry has occurred in the past, but because of good weather conditions the water has dried up. In these situations it may be difficult to provide evidence of leaking using ordinary methods at the time of testing prior to the hearing. However, it may be clear to an expert inspector that the exterior cladding or other aspects of the building are inadequate to achieve weathertightness and recovery should be allowed.

cause damage at different rates depending on the different environmental factors affecting the features of the home. It is normal, for example, for the effects of weather to show on one side of a house before another. In a hypothetical example of a house with windows on two sides, it is probable that climatic conditions will result in the defects on one side of the home causing leak damage before the defects on the other side of the home do so. Thus, homes may have a number of defects, some already causing damage by water leaking, and others that may cause damage by water leaking in the future. On the basis of *Godinich*, the owner of such a house could not recover for all of the defects. He or she would need to proceed in both the District Court[151] and the WHRS, or transfer the entire claim to the courts. This undermines the ability of the WHRS to resolve leaky home disputes, and may result in many claimants preferring the courts. The approach defies commonsense and potentially frustrates the policy of the Act.

Furthermore, the approach in *Godinich* effectively imposes additional requirements for certain causes of action such as a breach of section 28 of the Consumer Guarantees Act 1993. Under section 28 there is no need to prove that actual damage has been sustained;[152] it is sufficient for the claimant to prove that the service was not carried out with reasonable skill and care. If a claim has been declared eligible by the WHRS evaluation panel, it is suggested that the claimant should be able to recover damages under section 28 of the Consumer Guarantees Act, even where there is no evidence of actual leaking to date.

Another problem with the requirement for actual leaking is that it excludes recovery for pure economic loss, meaning diminution of value of the property or 'inchoate damage' that has not yet crystallized into actual damage by leaking. Requiring the homeowner to wait until defects actually cause damage by water entry requires the drawing of what Lord Denning called "an impossible distinction":[153]

> He suggested, therefore, that although the council might be liable if the ceiling fell down and injured a visitor, they would not be liable simply because the house was diminished in value. ... I cannot accept this submission. The damage done here was not solely economic loss. It was physical damage to the house. If Mr. Tapp's submission were right, it would mean that if the inspector negligently passes the house as properly built and it collapses and injures a person, the council are liable; but if the owner discovers the defect in time to repair it – and he does repair it – the council are not liable. *That is an impossible distinction. They are liable in either case.*

151 Or the High Court if the value of the claim exceeds the statutory limits on the civil jurisdiction of the District Court.

152 Tokeley, "Leaky Buildings: The Application of the Consumer Guarantees Act 1993" (2003) 20 NZULR 478, 494: "In the case of an action under [the] Consumer Guarantees Act for defective services it is not necessary to prove actual damage in order to claim redress. In respect of section 28 of the Act it is sufficient to prove that the service was not carried out with reasonable skill and care."

153 *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373, 396. This 'impossible distinction" was restated by Cooke, supra note 107. Emphasis added.

Nevertheless, in *Murphy v Brentwood District Council*[154] the House of Lords subsequently found this to be "a fundamentally sound distinction which should be restored and preserved."[155] Lord Bridge addressed this point in *D & F Estates:*[156]

> But if the hidden defect is discovered before any such damage is caused, there is no longer any room for the application of the *Donaghue v Stevenson* principle.... It may be valueless or it may be capable of economic repair. In either case the economic loss is recoverable in contract by a buyer or hirer of the chattel entitled to the benefit of a relevant warranty of quality, but is not recoverable in tort by a remote buyer or hirer of the chattel.

However, this is little more than a restatement of the argument that there should not be a concurrent action in both tort and contract, and that the parties should be afforded freedom of contract to determine the nature and scope of any warranties between themselves. This is not a distinction of principle; rather, the "choice was a policy one".[157] Nor is it a distinction that has been maintained in New Zealand law. In *D & F Estates* Lord Oliver accepted that recovery for pure economic loss is now firmly established in New Zealand.[158] Furthermore, the availability of a duty of care in New Zealand may be more important than in the United Kingdom because of the absence of protections such as the National House Building Council's warranty scheme[159] and the statutory duty under the Defective Premises Act 1972.[160]

Thus, the 'actual leaking' prerequisite for recovery is highly problematic. Is this approach justified by the Act, in particular by the definition of leaky dwellinghouse in section 5?

Such an approach is erroneous because it effectively treats the Act as a source of liability. The Act does not function to create liability; rather it provides a dispute resolution procedure to determine liability under the ordinarily applicable law. Once the WHRS evaluation panel finds that a claim is eligible for resolution by the WHRS (in accordance with section 12), the role of the adjudicator is not to consider whether it complies with the definition of "leaky building" in section 5 of the Act. Instead, in accordance with section 29, the adjudicator is required to determine the "liability (if any) of any of the parties to the claimant" and "remedies in relation to any liability determined". Section 29 does not limit the jurisdiction of the adjudicator to issues in relation to leaky buildings as defined

154 [1991] 1 AC 398. Emphasis added.
155 Cooke, supra note 107, 56.
156 [1989] AC 177, 206.
157 Cooke, supra note 107, 57.
158 Ibid 66. See also *Mount Albert Borough Council v Johnson*, supra note 16 (referred to by Lord Oliver); *Brown v Heathcote County Council* [1987] 1 NZLR 720; *Invercargill City Council v Hamlin*, supra note 16.
159 Todd (ed) *The Law of Torts in New Zealand* (3 ed, 1999), 302, n 193.
160 Ibid 302. For further discussion see Cooke, supra note 107.

in section 5, rather it grants a wide jurisdiction "in relation to any claim that has been referred to adjudication".

A better approach exists. If a claim has been inappropriately admitted to the WHRS the appropriate course is for a respondent to challenge the decision of the evaluation committee using ordinary procedures of judicial review,[161] or apply to the adjudicator to transfer the claim to the courts on the grounds provided in section 58. Once a claim is put before the adjudicator, he or she has jurisdiction to decide questions of liability and remedies in relation to all aspects of the claim. This is true even where aspects of a claim do not satisfy section 5 because, for example, there is no evidence of actual leaking to date.

The author considers this alternative approach to be preferable. It does not threaten the ability of the WHRS to resolve effectively all aspects of a leaky home dispute, does not drive claimants to the courts, and avoids creating an "impossible distinction" between damage caused by the leaking and the defects in the home. It correctly emphasizes the fact that adjudication is to determine the liability of the parties and the remedies under ordinary principles of law, and does not focus erroneously on the narrower criteria for assessment under the Act.

(ii) The Requirement for Evidence of Building Code Non-Compliance

The second prerequisite to recovery that Adjudicator Dean sought to impose was a requirement that evidence be adduced that the construction work did not comply with the Building Code. In effect, this equates the builder's duty of care with a duty to ensure that building work complies with the Building Code. This appears to be an incorrect characterization of the duty of care owed by builders. It is submitted that the duty of care is a wider one: to construct buildings in a workmanlike manner.

The courts have always been the final arbiter of the duty of care. Standard industry practices and regulatory standards may approximate the duty of care but they do not replace the legal standard determined by the courts. The Court of Appeal examined this issue in *McLaren Maycroft v Fletcher*:[162]

> [T]hat there was no sufficient proof that the architect failed to exercise the amount of skill properly expected from skilful and experienced members of his profession. Since the Court must ultimately itself determine the question of negligence as a fact in all the circumstances of the case, I do not rest my finding on evidence as to the general practice of the profession alone. The Court may come to the conclusion that the standards deposed to by the witnesses do not reach the standard required by law – namely, a reasonable and prudent architect engaged on a work such as this....

161 WHRS Act, s 12(4) provides an appeal for the claimant to the Chief Adjudicator where the evaluation panel determines that a claim is not eligible for resolution in the WHRS. No equivalent appeal is available to respondents.

162 *Sulco Ltd v E S Redit & Co Ltd* [1959] NZLR 45, 88. These comments were approved by the Court of Appeal in *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100, 107.

The duty of care was not replaced by a statutory standard when the Building Act 1991 was passed. In fact, it was the opinion of the Court of Appeal in *Invercargill City Council v Hamlin* that "[t]he Building Act 1991 contains no limitations on what has now been for over 18 years the law of New Zealand".[163] The author submits that if the Building Act did not change the law in respect of local authority liability it is unlikely to have affected the duty of care owed by builders.

In *Kelleway* it was clear that the standard of care amounts to more than mere compliance with the Building Code. Nail popping, although not a breach of the Building Code, was "most certainly a result of negligent construction".[164] Another example might be a failure to comply with manufacturer's instructions and specifications – while not a breach of the Building Code, this may breach the duty of care. Indeed, any conduct that does not meet the standard of care expected of a reasonable builder in the circumstances should be regarded as a breach of duty, irrespective of the Building Code.

In conclusion, it appears that the duty of care imposed on the builder in *Godinich* was incorrect. However, the conclusion that there was compliance with the Building Code in respect of the other defects claimed does appear to be correct.[165] Therefore, as against the Building Certifier, whose duty is likely to be limited to taking reasonable care to ensure that the building complied with the Building Code, the decision is likely to be correct. It is submitted that the builder may owe a wider duty of reasonable care and workmanlike practice, including, but not limited to, compliance with the Building Code. Therefore, the builder may have been in breach of duty in respect of some of the other defects claimed.

In many cases it will be easier than it was in Godinich to prove breaches of the Building Code. This is because the Building Code is "performance based".[166] Thus, where a building is not weathertight, unless the cause is a something other than the initial failure to comply with the Building Code (for example, a failure to maintain the building properly), there will be a breach. The Building Code requires that buildings be constructed to provide adequate resistance to penetration by, and the accumulation of, moisture from the outside.[167] This readily leads to the conclusion that:[168]

> [I]f the structural timber of an external wall, or flooring, is rotting away within a few years because of water penetration then the functional requirement of the Building Code simply cannot have been met. Those building elements are supposed to have durability to last for the expected lifetime of not less than 50 years in most cases.

163 *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA).
164 *Kelleway*, supra note 61, [242].
165 *Godinich*, supra note 138, [5.11]-[5.17].
166 Keyte and Murphy, supra note 13.
167 Building Code 1992, E.2.2.
168 Keyte and Murphy, supra note 13.

(c) Costs

The Adjudicator determined costs:[170]

> It is normal in adjudication proceedings under the Act that the parties will meet their own costs and expenses, whilst the WHRS meets the adjudicator's fees and expenses. However, under s43(1) of the Act, the adjudicator may determine that one party will be responsible for more than its own costs if these costs are unnecessarily caused by bad faith or allegations or objections that are without substantial merit.

(d) Conclusions on Godinich

Despite an assessment report that suggested they had suffered $22,654 in leaky home losses, Mr and Mrs Godinich succeeded in recovering only $5,000 in damages. Although this makes the very important point that there is no presumption of liability in the WHRS, and that claimants are required to prove their case to the ordinary civil standard, the substantial difference between the amounts claimed and recovered does require some consideration.

In the author's opinion, the Adjudicator was incorrect to impose the two prerequisites for recovery discussed above. The failure to observe problems caused by the two prerequisites may be attributable to the lack of counsel. Because the claimants were not represented or advised at the hearing they were not able to provide legal argument about the approach the Adjudicator should take. Nor were they able to understand what evidence the Adjudicator might require in order for their claims to succeed. In particular, it is unrealistic to assume the Mr and Mrs Godinich could recognize the significance of proving breaches of the Building Code, let alone identify such breaches. The case therefore illustrates the dangers of adjudication where parties are not represented by counsel. Had the claimants been represented by counsel and been able to make legal submissions with regard to the standard of care owed by the builder, it is possible that the outcome of *Godinich* might have been different.

3. Awards of Costs

The jurisdiction of WHRS adjudicators to award costs has been an issue in both adjudications that the WHRS has completed to date, and has also been of significant interest to news media. The Act provides adjudicators with jurisdiction to make awards of costs only in very limited circumstances, so that, in the majority of cases, the parties will be left to carry their own costs irrespective of the outcome.

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170 *Godinich*, supra note 138, [7.1].

The costs that a claimant may be burdened with include the cost of legal representation and also the cost of any additional expert evidence and testing (including destructive testing) that the claimant may consider necessary to prove her claim.[171] The same costs may also be incurred by respondents – it is highly unlikely that a claim could be successfully defended without engaging an expert witness. Furthermore, many respondents, particularly corporations and local authorities, will consider legal advice and representation essential. This section considers the provisions of the Act and the reason for this approach, and suggests that this aspect of the Act is ripe for reform.

(a) Section 43

Section 43 of the Act provides adjudicators with the power to award costs only in circumstances of bad faith on the part of the other party or where allegations or objections are made by the other party without substantial merit.

The Act clearly contemplates a dispute resolution process without lawyers. This approach to costs may be ascribed, at least in part, to naïvety. Ignorant of the complexity of the factual and legal issues involved, the Government assumed that parties could meet and have their dispute mediated or adjudicated without the expense of a lawyer. The improbability of this utopia free of lawyers becomes apparent when one reviews the common list of respondents. It includes local authorities, building certifiers, and insurers, who are all likely to be represented by counsel.

Perhaps this approach to costs also stems from a general policy inclination to exclude lawyers where possible. This was certainly the way the Green Party saw the issue, as evidenced by Sue Kedgley's statement in Parliament:[172]

> We have had people coming to our committee who have paid between $70,000 and $30,000 in legal fees. Some of those people will feel quite aggrieved when they realise that, had they waited until we had set up this procedure, they would not have had to pay those legal fees. But never mind, at least this legislation is a start, and one of the Green Party's objectives is to try to reduce the legal fees of the hundreds, or perhaps thousands, of New Zealanders who will, I am sure, have recourse to this procedure. We were somewhat concerned when United Future's Murray Smith said that he advised everybody using the mediation service to consult their lawyer first. Our whole objective in support of this legislation was to try to avoid the expense of litigation and lawyers, but now we are being told that people would be advised to see a lawyer before they use the service.

The assumption that lawyers would not be needed in the WHRS is also apparent from comments by Nick Smith:[173]

171 Such expert building advice and testing would be additional to the assessment report and associated testing provided at the expense of the WHRS.

172 (2002) 604 NZPD 2913 (Sue Kedgley).

173 (2002) 604 NZPD 2073 (Nick Smith).

> [T]he only advice the government has for homeowners was those infamous words of the Prime Minister: 'See your lawyer.' Does the Prime Minister have any ideas what it might cost to pursue a council, a builder, or a building certifier who has let the side down and allowed shonky building practices? I say that the Prime Minister has no idea and that is why this National proposition of a disputes resolution process is the right answer and the right way to go forward.

But what is not apparent from these comments is why Members of Parliament thought that the WHRS would remove the need for lawyers. Did they think that providing mediation and arbitration would somehow reduce the inherent complexity of the problems? It can be conceded that there is truth in the proposition that the WHRS reduces the need for legal advice and representation, but it is doubtful that it completely eliminates the role of legal counsel.

The media, public, and claimants have been critical of the inability of adjudicators to award costs. *Kelleway* prompted criticism from "[c]onsumers' advocates ... calling for an urgent law change to allow adjudicators to award legal expenses to owners of leaky homes, rather than just the cost of repairs".[174] An editorial in the New Zealand Herald asserted that "[e]ven at an early stage, it is clear the Weathertight Homes Resolution Services Act has major cracks of its own".[175] In *Kelleway*, the claimants were awarded just over $40,000, but media reports indicated that they had incurred legal costs of $16,000.[176] In fact, the Kelleways' legal bill is likely to be around $12,000 (including $4,000 for expert building advice and destructive testing),[177] and furthermore, the Kelleways are eligible for legal aid, with a cap of $16,000.[178]

The New Zealand Herald suggested: "The solution is relatively simple. Homeowners who seek adjudication should qualify for legal aid."[179] In fact, legal aid is available – but only to claimants who qualify for it. Section 64 of the Act amended the definition of civil proceedings in section 4(1) of the Legal Services Act 2000, which now includes "proceedings under ... sections 22 to 55 of the Weathertight Homes Resolution Services Act 2002". Section 7 of the Legal Services Act provides that legal aid may be granted in respect of proceedings before an adjudicator under the Act. However, the claimant must qualify for legal aid under the ordinary criteria in section 9.[180] It appears that few homeowners, at least in Auckland, will qualify.

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174 "Leaky law hits reeling homeowners", *New Zealand Herald*, Auckland, New Zealand, 31 October 2003.

175 "Glaring gaps in leaky homes plan", *New Zealand Herald*, Auckland, New Zealand, 31 October 2003.

176 "Leaky homes blow for councils", supra note 105.

177 Interview with Dane Tui, supra note 127.

178 Ibid. The Kelleways may also have additional legal costs from the earlier discontinued District Court proceedings.

179 "Glaring gaps in leaky homes plan", supra note 175.

180 Legal Services Act 2000 s 9, requires that the applicant has less than the disposable income and disposable capital prescribed in regulations made under the Act. The current regulations SR 2000/281/4(1) provide that the applicant must have less than $2,000 disposable income and disposable capital, calculated in accordance with Schedule 1 of the Legal Services Act, in order to be eligible for legal aid.

Section 43 tends to surprise most people. It is particularly surprising to lawyers, because for many this is the first dispute resolution mechanism they have encountered in which costs do not follow the outcome. Indeed, costs are often regarded as a basic requirement of justice, because in the absence of costs parties are not provided with full compensation for their losses. However, this proposition only holds if it is indeed necessary for the parties to incur costs. Therefore, the question arises whether legal counsel and to expert building advice are realistically needed in order to utilize the WHRS.

(b) Legal Representation and Expert Advice at WHRS Adjudication

(i) Legal Representation for the Claimant

Construction disputes are often "notoriously complex".[181] The complexity is both factual and legal:[182]

> Probably the most significant barrier is homeowners' lack of knowledge about their legal rights. Many homeowners may be unaware that they are entitled to redress. Even when homeowners are aware that they are likely to have some legal rights they may not know how to discover the specific content of these rights or how to enforce them.[183] Seeking advice from a lawyer on the matter is expensive and time consuming. In addition it may be difficult to discover the exact reason for a leakage problem and this information may be necessary in order to establish a right to compensation.

Even where homeowners are aware that they have legal rights they are unlikely to know the specific content of these rights, nor how to enforce them.[183] Factual complexity arises in the context of leaky homes because there may be numerous types of damage, each with a number of possible causes, which require significant technical knowledge to assess. Causes may be attributable to any number of different defendants. The potential complexity of leaky building disputes is exemplified by *Kelleway*, which involved three respondents, a significant number of submissions, and culminated in a 94-page decision.[184]

Anecdotal evidence from adjudicators and mediators suggests that a significant proportion of claims before the WHRS will involve local authorities, and large corporate defendants that are likely to be represented by counsel.[185] This is due to the fact that most claimants will wish to seek compensation from a party who has deep pockets (which are not usually found on sole trader builders and private house vendors in New Zealand). In particular, many claimants will seek to prove

181 Interview with Dane Tui, supra note 127.
182 Tokely, supra note 152, 495-496.
183 Tokely, supra note 152, 496.
184 Interview with Dane Tui, supra note 127.
185 Interview with John Green, supra note 56.

liability against building certifiers or their insurers, local authorities, and large manufacturers of building systems.

It can be argued that the availability of a right of appeal to the District Court reduces the need for counsel. Some may argue that the right of appeal provides the unsuccessful claimant who loses out – because of a lack of understanding or inability to argue the law – with the option of engaging counsel for an appeal. This justification merely promotes delay, uncertainty and inefficiency in dispute resolution.

Another possible argument against the need for counsel in adjudication is based on trust in the skill and ability of adjudicators. It could be that adjudicators with experience in both construction and law can ameliorate the need for counsel. Adjudicators may be able to assess both the factual matrix and the law in order to reach conclusions as to the liability (if any) of respondents without the assistance of counsel. Indeed, WHRS adjudicators do have significant skill and experience in the areas of construction law and dispute resolution. However, the adjudicator is an independent party who is required to be unbiased and appear to be unbiased. The role of the adjudicator is not to argue the case for either side. In practice, the adjudicator may not have the time and resources to put the claimant's case for him or her.

The WHRS still requires the claimant to prove their case to the balance of probabilities. This necessitates knowledge of the components of a cause of action, and it is clear from *Godinich* that this is something claimants cannot be expected to have. An adjudicator is employed to hear the dispute, not to serve as counsel for the claimant. The adjudicator can only lead the claimant so far in identifying the components of a cause of action, and the relevant evidence that will prove a claimant's case.

It is submitted that the absence of counsel will be of greatest disadvantage to claimants in complex cases, where the claimant will have greater difficulty understanding what evidence to draw to the adjudicator's attention. It is true that in most cases the claimant will have an assessor's report that shows that they are the owner of a leaky home, and will not be prevented entirely from recovery. However, on portions of their claims that are not 'clear-cut', the claimant who is not represented may not be able to draw the adjudicator's attention to relevant evidence. Furthermore, they may not be able to argue subtle points of causation and remoteness. The claimant who is without legal representation is therefore likely to gain less compensation than a claimant who is represented. Counsel for the respondent will be able to draw the adjudicator's attention to legal arguments in favour of their client's case, but claimants are unlikely to understand these arguments or to be able to provide argument in response. This point is illustrated by *Godinich*, where the claimants were able to recover only the most clear-cut components of their claim – amounting to only $5,000 out of over $20,0000 claimed.

(ii) Claimant's Need for Expert Witnesses and Expert Testing

Expert assistance may take the form of the expert appearing as a witness for the claimant, and may include the provision of testing services and expert advice. The issue is whether claimants can rely on the official assessor as a witness and thus have the assessor's report form the basis of their case, or whether claimants require additional expert assistance. Problems with using the assessor as a witness include that he or she is perceived as independent and not as a witness for the claimant.[186] The assessor may be more equivocal and open to debate than perhaps a witness engaged by the claimant would be.[187]

Indeed, in *Kelleway* the claimant's case was supported by the evidence of an additional building expert. Dane Tui, counsel for the claimants in that case, describes additional expert advice as "very useful, but not essential".[188] Additional experts may be important where the respondent engages multiple experts in an effort to outweigh the evidence of the assessor.

In practice, then, it is likely that only a minority of claimants will engage experts to provide additional advice and testimony. Employing an expert to do the job of an assessor could cost as much as $20,000 to $30,000 for a complex dispute and will often be upwards of $10,000.[189] Where the claimant can afford it, engaging additional experts is likely to be advantageous, but in most cases it may be an unnecessary expense that, because of section 43, the claimant will be unable to recover.

(iii) The Respondent's Need for Legal Representation and Expert Evidence

Large corporations and local authorities are particularly likely to engage legal counsel. Where multiple respondents are joined the total cost of legal advice and representation at hearings may be significant. Whilst, arguably, such large respondents are in a better position to meet their own legal expenses, it is true that in most forums they would be entitled to a contribution towards costs if successful.

Respondents are unlikely to be able to defend a claim without expert building evidence to refute the findings in the assessor's report. Such evidence may question the extent of the damage, its causes, and cost of repair work.

(iv) Conclusions on the Need for Legal Advice and Expert Advice

Legal advice for claimants at WHRS adjudication is highly desirable. Counsel will often represent respondents, and decisions may turn on complex

186 Interview with Dane Tui, supra note 127.
187 Ibid.
188 Ibid.
189 Interview with John Green, supra note 56.

legal or factual arguments. Murray Smith placed the issue before Parliament very succinctly during the third reading of the Bill:[190]

> I believe that the new resolution process is dealing with a very complex matter. It involves architects, designers, builders, subtrades, local authorities, building certifiers, previous owners, building consultants, real estate agents, and lawyers, all of whom may have given advice to a homeowner or other parties in the process along the way. I feel that this will be a very dangerous process for homeowners because they will have a false sense of protection from the Government. ... I express extremely strong warnings to homeowners when embarking on this process. Firstly, I caution that they must ensure they obtain legal advice before they file for mediation or adjudication. Secondly, they must make sure they are represented, so that before they agree to any proposal they understand exactly what they are doing ....

(v) Conclusion: Should Awards of Costs be Available at Adjudication?

Cost awards must be considered in the context of the WHRS system, which enables a party to bring a complex and technical claim without employing a building expert.

The current approach to cost awards has advantages. The system discourages the use of lawyers where they are unnecessary (although it may also discourage legal advice where it is necessary) and thereby reduces costs. The system encourages the settlement of disputes at an early stage (although it may place pressure on the claimant to settle early). The fact that currently there can be no award of costs against the claimant allows the claimant to join multiple respondents without fearing a large cost bill should their claim fail against one or all of the respondents. Advantages for the claimant include a greater chance of finding a liable and solvent respondent, an increased chance of determining who is genuinely liable, and being able to fairly distribute the losses between respondents. A potential disadvantage is that it may result in the joining of parties with only a tenuous link to the claim, but the wide discretion of the adjudicator to strike parties out makes this unlikely to be problematic.

However, although the ability to join a wider variety of respondents provides a reason for preventing respondents from recovering costs against claimants, it is not a reason for preventing the claimant from recovering costs against respondents. The fact remains that where the claimant succeeds in adjudication and incurs costs, any award that does not include costs will under-compensate the claimant. It has been shown that in most cases claimants will require legal representation and consequently will incur costs. No grounds have been offered that override the ordinary principle of justice that an award of costs should follow the outcome.

190 (2002) 604 NZPD 2187 (Murray Smith).

For a maximum fee of $400, the WHRS attempts to provide the claimant with an affordable and accessible form of justice. But there are limitations on the 'justice' that this system affords the claimant who has no legal representation. Claimants without representation are unlikely to be as successful in resolving complex leaky home disputes, and are unlikely to be satisfied even by a successful result. It is no wonder then that the Kelleways do not feel that the WHRS provided justice:[191]

> What money is that? Is that going to rebuild my life again? Everything we had, our future, our money was put into that house. We didn't get any compensation for what we have been through and they tell me the Weathertight Resolution Service is helping us?

V: Conclusion

With so few claims having been adjudicated it is too early to reach conclusions about the success of the WHRS adjudication service. It is not too early, however, to make some observations about the strengths and weaknesses of WHRS adjudication in practice.

Adjudication provides a flexible and cost effective method of resolving disputes. The WHRS has engaged adjudicators with significant experience and knowledge in building disputes who are well equipped to resolve leaky home disputes.

However, there are a number of limitations that may undercut the success of the WHRS. In particular, the limited jurisdiction of adjudicators to award costs threatens to undermine the ability of the WHRS to provide full compensation for the losses that homeowners have suffered.

It is apparent that the provisions in the Act that prevent the adjudicator making an award of costs stem from a naïve assumption that legal advice and representation are not required in the WHRS. This article has given reasons for legal advice and representation being essential. Therefore it is submitted that awards of costs should be available to successful claimants, and that accordingly the Act should be reformed.

The biggest limitation of the WHRS from the claimant's perspective is that it does not affect the substantive law relating to leaky building liability. The Act merely provides a procedural dispute resolution mechanism. This means that where the claimant cannot find a solvent respondent, and prove liability to the ordinary civil standard, she will not be able to recover for her losses.

The first two adjudication decisions to have been heard by the WHRS also illustrate difficulties with liability for leaky homes. First, there is significant uncertainty about the exact content of the duty of care owed by local authorities,

191 "Glaring gaps in leaky homes plan", supra note 175.

building certifiers, and builders. Secondly, it is unclear in what circumstances the directors of building companies will be personally liable in tort. This will be particularly important for claimants pursuing one-man companies and 'flash Harrys'[192] where the only way to satisfy a judgment may be to pursue the individuals responsible. The legal issues in this area are difficult and may not be resolved until a decision is taken on appeal.

The effects of this legal uncertainty are felt strongly by claimants and unfortunately, many of these issues are unlikely to be resolved until they are heard on appeal. These legal uncertainties reinforce the importance of legal advice for participants in the WHRS.

Advising the owner of a leaky home has not become any easier after the passing of the Act. The same factual and legal complexity surrounds leaky home cases, but counsel have the additional dilemma of whether to advise clients to pursue their claim in the WHRS or the District Court. The WHRS may be quicker and will provide them with a free assessment report, but will not allow them to recover costs against the respondents. The District Court, which is likely to be more expensive and time-consuming, will provide the homeowner with a contribution to costs. However, on balance, it is suggested that in most cases the WHRS will be the better option for the homeowner.

192 Campbell, Leaking Homes, supra note 125.