

Claim No: 1240

Under the Weathertight Homes Resolution Services Act 2002

In the matter of an adjudication claim

Between **Auckland City Council** (as assignee)
Claimant

And **Mark Brian Russell**
Respondent

**Final Determination
14 February 2006**

1. **Index**

Para No	Heading	Page
1.	Index	1
2.	Summary of Determination	1
3.	Quantification	1

2. **Summary of Determination**

2.1 In the Partial Determination dated 21 September 2005 I found that the Auckland City Council was entitled to recover from Mark Brian Russell a sum comprising the difference between the amounts that the claimants would have been entitled to and the amount or amounts that Mr & Mrs Nolan received from, or credits that were otherwise given by, respondents other than the Auckland City Council in settlement of their claims.

2.2 I now have information concerning those amounts and on the basis of that have determined that Mr Russell is liable to pay Auckland City Council the sum of \$70,000.00.

3. **Quantification**

3.1 In the Partial Determination dated 21 September 2005 I found that the liability that the respondent, Mark Brian Russell, had to the Auckland City

Council as assignee of the claimant was limited to the difference between the sum of \$203,861.25 (the amount the claimants would have been entitled to) and the amount or amounts that they received from, or credits that were otherwise given by, respondents other than the Auckland City Council in settlement of their claims.

- 3.2 I invited the parties to resolve the question between themselves but they have been unable to do so and I have been requested to finalise the determination accordingly.
- 3.3 In a letter dated 9 November 2005 the Auckland City Council (through solicitors) asked that the Determination be for the sum of \$70,000.00. There were submissions made in that letter. It was accompanied by an affidavit of Wayne Kenneth Nolan sworn 31 October 2005.
- 3.4 That material was supplied to Mr Russell who had, pursuant to Procedural Order No 9, 12 working days to reply. That time is now well and truly passed. I understand that the case manager has made approaches to Mr Russell to seek any response from him. Although Mr Russell advised the case manager on 30 November 2005 that he had completed a response and would be supplying this, in fact that has not occurred.
- 3.5 I am satisfied that he has notice of the application by the Auckland City Council and has had more than enough time to respond to it.
- 3.6 The material presented does not in fact follow the formula that I had anticipated in the Partial Determination as set out above. The apparent reason for this is that there has been a settlement between Mr & Mrs Nolan and other respondents which included the contribution of labour and materials as well as cash.
- 3.7 The added complication is that as part of that settlement Mr & Mrs Nolan apparently required permission from all parties to release details of contributions made. The confidentiality of settlements reached through

mediation services provided under the Weathertight Homes Resolution Services Act 2002 (**the Act**) is emphasised in s16. The relevant provision is:

"16. Confidentiality

- (1) Except with the consent of the parties **or the relevant party**, a person who ... is a party to a mediation ... must keep confidential any ... document created or made for the purposes of the mediation (including a settlement under section 17) ...
- (3) No evidence is admissible ... before any person acting judicially ... of any statement, admission, document, or information that, by subsection (1), is required to be kept confidential."

3.8 Mr Nolan has sworn the affidavit mentioned on 31 October 2005. The Auckland City Council has, by its solicitors, provided the information contained in its letter of 9 November 2005.

3.9 To the extent that those parties are affected by the disclosures, I am treating those documents as representing their consent to the admissibility of the content of those documents despite that including information about the settlement reached.

3.10 Mr Nolan's affidavit includes this:

- "5. I have not been given permission by all the other parties to release details of the contributions they made. However, I can confirm that the overall settlement involved the letting of a contract for remedial work ("the Contract") and that the scope of that work was (with refinements) in accordance with the work proposed by the assessor.
- 6. The value of the remedial work to be carried out under the Contract is \$200,000, to which some of the parties contributed labour and materials and other parties contributed cash. The work is commencing in January 2006. This is an immediate shortfall to us of \$3,861.25.
- 7. Mrs Nolan and I contributed \$20,000 in cash towards the remedial work. In addition, we have ongoing liabilities including paying for relocation and storage (\$8,500 estimated), alternative accommodation (\$8,000), for supervision of the remedial work under the Contract (\$7,000 estimated), and Contract Works insurance (\$2,500). The

Contract itself will only cover replacement of a maximum of 10% damaged timber. If more than 10% is replaced, that additional cost is at our expense.

8. The Auckland City Council contributed \$50,000 in cash in part towards the remedial work under the Contract and in part for the assignment of our claims."

3.11 The letter from Heaney & Co dated 9 November 2005 includes:

- "2. In accordance with the partial determination, we invite the Adjudicator to enter judgment for \$70,000.
3. The \$70,000 reflects the cash contributions made by the Auckland City Council (\$50,000) and the Nolans themselves (\$20,000).
4. As can be seen from the affidavit, \$70,000 is more than justified given their own cash contribution, the \$3,861.25 shortfall between the 'global settlement' of \$200,000 and the quantum as assessed in the partial determination, and the liabilities that the Nolans have that they have still to meet. Paragraph 7 of the affidavit refers."

3.12 The actual cost appears to be different from the sum of \$203,861.25 referred to in the Partial Determination and I discern from the extracts from Mr Nolan's affidavit that the actual cost is some \$200,000.00 plus the further expenses that he mentions at paragraph 7 of the affidavit totalling some \$26,000.00 (some of which are estimated). It would seem that the total cost is in excess of the amount estimated on which the Partial Determination was based.

3.13 It also appears that:

3.13.1 The amount of cash and value of materials or service from **all** parties was \$200,000.00 (paragraph 6).

3.13.2 The Auckland City Council contributed \$50,000.00 to the remedial work (paragraph 8) and Mr & Mrs Nolan \$20,000.00 (paragraph 7).

- 3.13.3 That means payments or credits from other respondents (other than Auckland City Council and Mr Russell) of \$130,000.00.
- 3.13.4 Applying the formula that I had prescribed in paragraph 15.1 of the Partial Determination that is the amount which should be deducted from the sum of \$203,861.25 which leaves a balance of \$73,861.25.
- 3.14 So far as Mr & Mrs Nolan are concerned they have reached a settlement and have no further personal entitlement to claim from Mr Russell in respect of the matters mentioned in paragraph 7 of the affidavit.
- 3.15 So far as the Auckland City Council as assignee of their claims is concerned it is entitled to recover from Mr Russell the sum of \$73,861.27. As the Council claims only the sum of \$70,000.00 I limit the order to that amount.
- 3.16 I order Mark Brian Russell to pay to the Auckland City Council forthwith the sum of \$70,000.00.

Notice

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

DATED at Auckland this 14th day of February 2006

David M Carden
Adjudicator