**Claim No:** 1240

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| **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 |

**Partial Determination**
**21 September 2005**

## 1. Index



## 2. Summary of Determination

2.1 The claim which originated as a claim for losses from leaks to a dwellinghouse became a claim by the abovenamed claimant, Auckland City Council, as assignee of those claims against one remaining respondent, the personal author of a pre-purchase report.

2.2 It was claimed that he had personal liability as the author of that report which it was claimed was misleading or deceptive entitling the claimant under ss9, 43 and 45 of the Fair Trading Act 1986 to an order for compensation for loss or damage.

2.3 The respondent is the author of that report and the totality of its content is such that he has personal liability for the misleading and deceptive statements in it.

2.4 The report is misleading and deceptive.

2.5 It has caused loss to the original claimants amounting to the cost of repairs to the dwellinghouse, $203,861.25.

2.6 There was insufficient evidence that the original claimants (and therefore the Auckland City Council as assignee) were entitled to general damages.

2.7 The respondent, as author of that misleading and deceptive report, is liable to the Auckland City Council for such sum not exceeding $203,861.25 as will reimburse it for monies paid or value given by it in settlement of the claims made by the original claimants/owners.

2.8 This is a Partial Determination with a final Determination being given if required once the correct amount for such reimbursement is established.

## 3. Adjudication Claim

3.1 The claim in this matter originated as an adjudication claim under the Weathertight Homes Resolution Services Act 2002 (**the Act**) by Wayne Kenneth Nolan and Maree Therese Nolan in respect of the residence at 6 Maungarei Road, Remuera, in a Notice of Adjudication dated 27 January 2005 under s26 of the Act which named the following respondents:

3.1.1 Warren Christopher Marston described as "Designer/Architect";

3.1.2 Auckland City Council described as "Territorial Authority";

3.1.3 Robin Ching and Carol Ruth Ching described as "Previous Owners";

3.1.4 Vega Consultants Limited (formerly FutureSafe Building Inspections Limited (in liquidation)) described as "Pre-Purchase Inspection Company";

3.1.5 Mark Brian Russell described as "Other – Pre-Purchase Inspector";

3.2 I was assigned as the adjudicator under s27 of the Act to act in relation to the claim and I held several conferences and gave certain Procedural Orders. As a consequence of these, two further respondents were joined pursuant to s33 of the Act namely Shane Dekker, described to me as the builder of the subject dwelling, and David Parkinson, he being described as a director of the construction company, A la Mode Homes Limited (in liquidation).

3.3 As part of my process as adjudicator under the Act I directed that there be a hearing of the claims made at which all evidence and submissions the parties wished to place before me would be presented and that that was to commence (finally) at 10.00am on 24 August 2005.

3.4 On 18 August 2005 the solicitors for the Auckland City Council (**the Council**) wrote to the Weathertight Homes Resolution Service (**WHRS**) and certain other of the parties including the fifth respondent advising that a settlement had been reached between certain of the parties and as part of which the claimants had assigned all rights to the Council. They advised that the claim was to proceed against the fifth respondent, Mark Brian Russell, only and applied to have other respondents struck out

from the claim. That letter gave notice to the addressees, which included Mr Russell, of the assignment and enclosed an Amended Notice of Adjudication dated 18 August 2005. I shall refer to the content of the Amended Notice of Adjudication later.

## 4. The Hearing

4.1 I commenced the hearing mentioned at the appointed time and the only party present or represented was the Council in its capacity as assignee of the claimants' claim represented by Mr Paul Robertson, counsel. As had been arranged, the WHRS Assessor, Mr David Stewart, was present. Certain evidence was called and submissions made to which I shall refer.

4.2 The respondent, Mark Brian Russell, did not attend the hearing nor gave any notice of any involvement.

4.3 Before the hearing I had caused enquiry to be made to satisfy myself that Mr Russell was aware of the position. He had been served with the Notice of Adjudication in the first place and had served, pursuant to s28 of the Act, a response dated 29 March 2005 in which he had given his address as 20a Brixton Road, Manly, New Zealand. Communications from the WHRS to him were at that address. I understand that telephone enquiry was made of his employer before the hearing to ascertain that he was away from Auckland but to remind him of the hearing date. The letter from the Council's solicitors dated 18 August 2005 was addressed to him at the above address. The date and time and place for the hearing were fixed in Procedural Order No 4 on 5 May 2005 which was sent to Mr Russell at that address. I mentioned the date of hearing in Procedural Order No 6 dated 21 June 2005 and the date and place for hearing in Memorandum No 1 dated 25 July 2005 in which I expressly said that Mr Russell should prepare for the hearing and be ready to proceed with it in terms of the timetable. I am satisfied that he was aware of the pending hearing and chose not to participate in it.

## 5. The Present Claim

5.1 The claim is now by the Council as assignee of the original claimants, Mr & Mrs Nolan. At the hearing evidence was given of the assignment by Mr & Mrs Nolan of their rights of claim. Mr Nolan confirmed that in evidence and produced to the hearing the copy of an undated deed signed by Mr & Mrs Nolan and on behalf of the Council which referred to this adjudication claim and to the Council having been placed "in the position of the Claimants vis-à-vis all and any rights and remedies that the claimants have, or may have, against Mark Russell … in respect of the [defects to the dwelling at 6 Maungarei Road Remuera]".

5.2 The essence of the claim against Mr Russell now is that he personally carried out an inspection of the dwellinghouse before the purchase of it by Mr & Mrs Nolan and prepared a report which was misleading and deceptive or likely to mislead and deceive them on which they relied but in respect of which they have suffered loss.

5.3 Clearly the claim is of a different nature from how it commenced and what is envisaged by the Act. The purpose of the Act is described in s3 as:

> "… 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."

5.4 I was advised that there had been the settlement to which the letter referred as the consequence of a mediation conducted pursuant to the provisions of the Act involving all parties other than Mr Russell who chose not to participate.

5.5 In my view the outcome that has been achieved to date is certainly achieving the purpose of the Act. The owners of the dwellinghouse in question claimed that it was a leaky building as defined in s5 of the Act

and they have had access to a procedure which has assessed and resolved the claim so far as they are concerned. I hope that this is regarded by them as being "speedy, flexible, and cost-effective" but, without the resources that the Act has afforded to them, they may not have achieved resolution of their claims as quickly or as cost-effectively.

5.6 It was an integral part of that process that, because there was no settlement affecting Mr Russell, the assignment of the claim to the Council took place and it is pursuing the claim against Mr Russell now. I do not think that that course is precluded by the Act.

## 6. Leaks, Damage and Repairs

6.1 There was no evidence from Mr Russell to the contrary but the evidence in support of the claim is quite clear that there have been leaks to the dwelling necessitating remedial work.

6.2 In accordance with the process prescribed by the Act a report from Mr David Stewart dated 25 June 2004 was prepared which refers to the enquiries he made, the investigations he carried out, the equipment that he used and the results of his investigation. Those results refer to various causes of water entering the dwellinghouse and various damage being done. A table of moisture content shows 7 locations tested where the Pin moisture content ranged from 23.9% to 40% (and the meter does not go beyond 40%). He expressed his opinion on repairs required and quantified these as totalling $226,336.00 inclusive of GST, contingency and overhead. In evidence he said that those figures had come from a builder who he had asked to assess the respective costs of remedial work.

6.3 I was also at the hearing referred to a written witness statement of Mr Robert J Hughes, a quantity surveyor, who had been asked to evaluate the repairs which the WHRS Assessor had considered necessary and he did so using his own method of calculation to reach a figure of

$203,861.25 inclusive of GST, margins, contingency and the like. He also gave alternative quantification on the basis that instead of 5% replacement of decayed wall framing, allowance was made for 10% replacement giving a total of $210,511.25; or 20% replacement giving a total of $223,811.25 (both inclusive of GST). I do not read his written statement as saying that there was, in his view, any need for greater replacement than 5%; he was simply quantifying that. The WHRS Assessor said in evidence that his estimate of 5% replacement was very much an estimate because there had been no reconstruction work done but he thought that was a reasonable allowance to make.

6.4 On balance my view is that the most accurate quantification for me to take is that which has been done by Mr Hughes on the basis of a 5% decayed wall framing timber replacement, namely $203,861.25. I was invited at the hearing by counsel for the Council (claimant) to take the WHRS Assessor's figure of $226,336.00. At the hearing the Assessor gave evidence that his builder connections quantification represented market forces in the competitive building environment. I have formed the view that a quantity surveyor's assessment is likely to be more accurate particularly if the effect of market forces may be to reduce that assessment and that appears not to be the case here.

6.5 Accordingly I find that the cost of repairs to the residence from damage from leaks is $203,861.25.

## 7. General Damages

7.1 In the amended adjudication claim there is also sought general damages of $20,000.00, it being claimed that the entitlement for Mr & Mrs Nolan to claim those damages has been assigned to the Council. The only evidence on that was from Mr Nolan that he and Mrs Nolan:

> "… have been and will continue to be under severe stress due to the disruption to our home [and that whilst] any remedials are being undertaken we will have to move out of the property and place all our

> furniture and belongings in to storage [which] will cause disruption to our every day lives as well as to [Mr Nolan's] employment as [he would] need to take time off work."

7.2 On the basis of certain authorities cited by Council it was claimed that Mr & Mrs Nolan were entitled to claim, and would be successful in any claim, under the Fair Trading Act 1986 to the sum of $20,000.00.

## 8. Present Claim

8.1 The Amended Notice of Adjudication dated 18 August 2005 addresses the claim made against Mr Russell. It alleges misleading and deceptive conduct or conduct likely to mislead and deceive in respect of a pre-purchase report prepared by him. The claim is for $226,336.00 for cost of repairs and $20,000.00 for general damages, a total of $246,336.00.

8.2 At the hearing it was emphasised to me that the claim now relied solely on grounds established under the Fair Trading Act 1986. In a document called "Amended Statement of Claim" dated 18 March 2005 there are allegations against Mr Russell, first for negligent misstatement but secondly in respect of obligations alleged under the Fair Trading Act 1986. In each case the same claims for $226,336.00 for cost of repair and $20,000.00 for general damages were made but also claims for damages for temporary relocation costs and damages for diminution in value of the house. Those latter aspects were not pursued in the Amended Notice of Adjudication or at the hearing.

8.3 I am satisfied that Mr Russell was aware of the claims on that basis against him.

## 9. Response

9.1 The only participation Mr Russell has had in this adjudication claim is his response dated 29 March 2005. That response is under s28 of the Act.

It refers to two matters. The first is that there were a number of defects identified and advised and that the claimants were fully informed and made their own decision to proceed with the purchase and have not carried out remedial or rectification works suggested in the inspection report or regular maintenance work. The second is that at all times Mr Russell was an employee of FutureSafe Building Inspections Limited (**FutureSafe**) and that the report was signed "For and on Behalf of FutureSafe Building Inspections Limited"; and that Mr Russell has no personal liability.

10. **Fair Trading Liability**

10.1 In support of its claim as assignee of the rights of Mr & Mrs Nolan, the Council relies on certain sections of the Fair Trading Act 1986. The first is s9 which reads:

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

10.2 The second is s43(2)(d) which reads:

> "For the purposes of subsection (i) of [s43], a Court may make the following orders –
> …
> (d) an order directing the person who engaged in the conduct, referred to in subsection (i) of [s43] to pay to the person who suffered the loss or damage the amount of the loss or damage."

and s43(1) refers to a finding in proceedings that a person has suffered loss or damage by conduct constituting a contravention of Parts of the Act which include s9.

10.3 Thirdly it relies on s45(2) which provides:

> "Any conduct engaged in on behalf of a body corporate
> (a) by a director, servant or agent of the body corporate, acting within the scope of that person's actual or apparent authority; or

> (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate, given within the scope of the actual or apparent authority of the director, servant or agent –
>
> shall be deemed, for the purposes of this Act, to have been engaged in **also** by the body corporate." (emphasis added)

10.4 There are these questions which then arise (refer *AMP Finance NZ Ltd v Heaven* (1998) 6 NZBLC 102, 404):

10.4.1 Is the conduct complained of capable of being misleading?

10.4.2 Were the recipients of that conduct (Mr & Mrs Nolan) misled?

10.4.3 Was it reasonable for them to be misled?

***Conduct Capable of Misleading***

10.5 The conduct to which the Amended Notice of Adjudication refers is in relation to a Pre-Purchase Report concerning the subject dwelling prepared by the fifth respondent following an inspection on 27 February 2003. It is claimed that there were:

> "… numerous defects in construction … reasonably ascertainable … at the time of [the] inspection and report"

and that:

> "… the report is misleading and deceptive in [setting out] conclusions regarding the weathertightness of the house that were not justified or the investigations … carried out."

10.6 I have read the report and did so before the hearing and myself noticed the following extracts from a section headed "General" para (d):

> "The installation of the plaster system has been well carried out and we have found no significant defects, the design of the dwelling is such that there are no areas that are likely to cause concern in terms of water tightness."

> "Despite the fact the cladding system detailed above is without a cavity and has been constructed using untreated or kiln dried timber the risk for moisture ingress is minimal. There have been many failures of similar cladding systems with sometimes-catastrophic results. I would like to comment however that most failures are the result of poor installation of materials rather than the materials themselves. The polystyrene system installed here will allow a certain level of air movement between the substrate and the building paper below due to the flexible nature of the product."

10.7 From my own knowledge of weathertightness concerns I immediately questioned whether such remarks could easily be made in February 2003.

10.8 My personal reaction was supported first by the assessor who said in evidence before me that the content of the second paragraph was not something he would have said; and secondly by a letter produced to the hearing from Mr Steve Alexander dated 5 August 2005. Mr Alexander did not give sworn evidence but I did not require that he be available for any cross-examination and the fifth respondent was not there to require that either. That letter refers to many of the statements in the pre-purchase report and I take all of the remarks carefully into account which (without, I hope, doing them injustice) I now summarise.

10.8.1 The checklist at the front is meaningless.

10.8.2 The statement that the "footing [is] well found into solid ground" is misleading because it is not possible to know this by visual inspection.

10.8.3 There is no basis for a statement that the "timber mid floor … is in good condition …".

10.8.4 There was not an adequate or appropriate inspection carried out to enable the statement to be made that the "roof framing members are straight and true …".

10.8.5 It is unlikely that the person completing the report had the necessary electrical qualifications to refer to the adequacy of the distribution board and associated fuses or other electrical installation.

10.8.6 The reference to the presence of the "required PVC flashings both under the window joinery and around the perimeter" belies the important issue of the adequacy of installation.

10.8.7 The statement (referred to above) that "there are no areas that are likely to cause concern in terms of water tightness" is incorrect having regard to a number of design features. Mr Alexander refers to this as being "one of the most incorrect statements" and lists seven design features not mentioned at all in the report.

10.8.8 The statement (also mentioned above) that "… the risk of moisture ingress is minimal" misrepresents the house because of the numerous features of elevated risk of moisture ingress that should have been reported.

10.8.9 The reference (quoted above) to the "polystyrene system [allowing] a certain level of air movement …" cannot be substantiated such that Mr Alexander is of the view that the author of the report is claiming a level of knowledge he clearly does not possess.

10.8.10 There is no basis without hole drilling and direct moisture content testing for the statement that the enclosed balcony has been "well constructed".

10.8.11 The General section item (e) makes "confusing and incorrect statements regarding the timber treatment".

10.8.12 The General section item (g) refers to moisture testing with a Carrel & Carrel model 901 meter by scanning which is not a reliable indicator of anything and conclusions on water content exceed the information available to the person completing the report.

10.9 Mr Alexander's letter concludes that:

> "This report is a clear example of incompetent work by someone inappropriately holding themselves out as having expertise in the inspection and reporting of building condition. The combined effect of all of the statements made is that the reader is lead to believe that the investigator is a well informed and competent operator because technical explanations are made but the reader would be unaware that the statements are false and misleading.
>
> To summarise the misrepresentation the following quotations are significant:
>
> *"… should require little in the way of significant remedial work for some years to come."*
>
> *"… the design of the dwelling is such that there are no areas that are likely to cause concern in terms of weather tightness."*
>
> *"… the risk of moisture ingress is minimal."*
>
> Unfortunately most consumers do not have the ability to recognise the difference between this investigator and a more competent investigator, either at the time that they are engaged or after reading the report.
>
> It should not be expected that the pre-purchase investigator would have identified specific water ingress and the actual condition that is now understood. It is reasonable to expect that an investigator should not report conclusions beyond the available facts and give the impression that visual inspection can provide facts that are only available by destructive testing. An adequate report would have reported warnings and recommended further investigation putting the purchaser on notice that there were significant risks attached to purchase. This investigator actually did the opposite because false statements were made that would have actively encouraged the purchaser into the purchase of the property."

10.10 I am satisfied that the report in question is misleading and capable of being misleading.

***Were the claimants misled?***

10.11 Mr Nolan, the owner of the property and one of the original claimants, gave evidence at the hearing. He and Mrs Nolan had relocated from Australia where water ingress is not an issue (he says) and he had for many years followed the practise of obtaining a pre-purchase report when purchasing a property. He said the report was fundamental to the decision to purchase and indeed there was a special condition clause 14.0 in the agreement to purchase that Mr & Mrs Nolan be satisfied with a report on the structural condition of the property "from a registered builder". Mr Nolan said that prior to purchase he and his wife had noticed an area in the master bedroom of concern where there was a water mark on the west wall and it appeared there had been some repairs.

10.12 He said that Mr Russell had come to the house when his wife was present. The report was sent by e-mail and hard copy. His instructions to Mr Russell had been that he wanted a pre-purchase inspection to ensure there were no construction or compliance issues. His expectations were that the report would identify risks so he could make an informed decision on whether to proceed. He said he relied on the report in completing the purchase.

10.13 I am satisfied that Mr & Mrs Nolan were misled by the report in a way anticipated by the Fair Trading Act.

***Was it reasonable for the claimants to be misled?***

10.14 I am satisfied that Mr & Mrs Nolan acted in a perfectly reasonable manner. They had concerns about the property they were conditionally agreeing to buy. They had those concerns and any other questions investigated by Mr Russell. He reported to them in a reasonably comprehensive report which gave misleading and ill-informed

reassurance to them on the basis of which they proceeded with their purchase.

10.15 That deals with the first matter raised by Mr Russell in his response dated 29 March 2005 where he claims that Mr & Mrs Nolan were fully informed and made their own decision to proceed with the purchase. I am satisfied that they were not fully informed and that the decision to proceed was on the basis of the misleading report from Mr Russell.

10.16 He does, in that response, refer to remedial or rectification works. Mr Nolan gave evidence that there was regular internal and external maintenance including maintenance on the pergola rafters situated above the balcony off the master bedroom shortly after they took possession in June 2003 including sealing with a silicone sealant the area where the rafters penetrated the cladding. This was done as a matter of caution while the area was being readied for painting. He said they had continued with maintenance since their application to the WHRS in August 2003 including the retiling of the ensuite shower in the bathroom off the main bedroom and resealing of the floor. Mr Russell did not present any evidence to support the contention that he made on that issue and I do not find his response is substantiated.

## 11. Personal Liability

11.1 The remaining matter raised by Mr Russell in his response is that he does not have personal liability having at all times been an employee of Future Safe on behalf of which he signed the pre-purchase report.

11.2 The claim is that he does have a personal liability and reliance is placed on the word "also" in s45(2) of the Fair Trading Act referred to above. The significance of that word is emphasised in *Megavitamin Laboratories (NZ) Ltd v Commerce Commission* (1995) 6 TCLR 231 where Tipping J said that the use of that word:

> "… indicates that relevant conduct on the part of a director, servant, or agent of the company … can be regarded, in spite of the agency, as that person's own conduct as well as conduct for which the body corporate is liable."

11.3 That question was considered by the Court of Appeal in *Kinsman v Cornfields Ltd* (1997) 8 TCLR 278 suggesting that there was liability for both the director and the company under the Fair Trading Act. The judgment recorded:

> "[27] … We think that the Judge's approach in finding personal liability was the appropriate one. It will be a rare case where a director who participates directly in negotiations as to his or her company's business will be able to avoid s9 liability simply on the basis that he or she was acting only on the company's behalf. The Fair Trading Act is intended in our view to cast its net wider than that and in the circumstances of this case the representations made by Mr Kinsman must be regarded as 'in trade'."

11.4 A similar conclusion was reached in the Commerce Commission context in *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 where Gault P and Tipping J considered the effect of s90 of the Commerce Act 1986 on the personal liability of directors and other employees and emphasised that there could not be any material difference between that section and s45 of the Fair Trading Act 1986.

11.5 There is one extract in the *Giltrap City* judgment that caused me to think carefully. This was in paragraph [52] of the judgments of Gault P and Tipping J where their Honours said:

> "When liability is by attribution there is logically less room to find that the conduct of the director, servant or agent is also that person's conduct in their personal capacity. The question to be considered is, in short, whether the director, servant or agent is acting **for** the company or **as** the company: compare Lord Reid's speech in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at p170. When a person is acting **for** the company it is easier to view his conduct as both his own and vicariously that of the company. When a person is acting **as** the company it is, as just noted, more difficult, at least in general terms, to regard the conduct as that of both the company so acting and the company." (emphases are those of their Honours)

11.6 That extract is, however, in the context of considering "whether the conduct of the director, servant or agent of a company renders the company vicariously liable, or liable by attribution". It is addressed, as I read the judgment, to the vicarious or attributed liability of the company rather than, as in the present case, the other way around, namely the liability of the director.

11.7 In the previous paragraph in that judgment ([51]) their Honours had said quite clearly:

> "As we noted at the beginning of this judgment, Mr MacKenzie argued that as his conduct was also that of Giltrap City he could not be liable as a principal, albeit he might have some liability as a secondary party. The answer to this argument is comparatively simple and can be dealt with quite shortly. Section 27 of the Act says "no person" shall enter into a proscribed arrangement. Mr MacKenzie did so. Hence, being a person, he contravened s27. Section 90(2) makes his conduct the conduct of Giltrap City also. There are therefore, by dint of s90(2), two principal contraveners of s27. Mr MacKenzie does not drop out as a principal as a result of s90(2). Its effect is not to release him but to add Giltrap City either vicariously or by attribution."

11.8 That judgment is, of course, one in relation to proceedings under the Commerce Act 1986 but the judgments make clear that s90 of the Commerce Act 1986 is the counterpart of s45 of the Fair Trading Act 1986. Section 90(2) of the Commerce Act 1986 reads:

> "(2) Any conduct engaged in on behalf of a body corporate –
> (a) By a director, servant, or agent of the body corporate, acting within the scope of his actual or apparent authority; or
> (b) By any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant, or agent of the body corporate, given within the scope of the actual or apparent authority of the director, servant, or agent –
> shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate."

11.9 It will be seen that the issue of liability of a director, servant or agent under s45 of the Fair Trading Act 1986 is the same as the issue raised in s90 of the Commerce Act 1986 and especially the use of the word "also".

11.10 My reading of the judgments of Gault P and Tipping J in that case are that under s90 of the Commerce Act 1986 there is liability on both the

director and the company if the necessary prerequisites are met and particularly that a director is not **excluded** from liability simply because his conduct was in his capacity as a director of the body corporate within the scope of his actual or apparent authority.

11.11 There are features in the cases cited to me to be contrasted with the present adjudication claim. In *Megavitamin* the director, one Dr Stewart, had been found to have personally endorsed certain aspects of the product in question in a brochure with such matters as his photograph, reference to material having been "researched and compiled by him" and a tear-off portion of the brochure which requested that guidelines be sent to him. He was convicted at first instance of an offence under the Fair Trading Act with reliance having been placed on s45(2) and his appeal against conviction was dismissed.

11.12 In *Kinsman*, Mr Kinsman had discussed accountants' figures prepared by the respondents' accountants with both the accountants and with the respondents themselves and had given assurances that projections represented current performance.

11.13 The judgment of the Court includes as para [27] (as mentioned above at paragraph 11.3):

> "There is nothing in the facts of this case to suggest that the utterances of Mr Kinsman should be taken as those only of his company or that he was a mere conduit. We think that the Judge's approach in finding personal liability was the appropriate one. It will be a rare case where a director who participates directly in negotiations as to his or her company's business will be able to avoid s.9 liability simply on the basis that he was acting only on the company's behalf. The Fair Trading Act is intended in our view to cast its net wider than that and in the circumstances of this case the representations made by Mr Kinsman must be regarded as 'in trade'."

11.14 The third authority cited to me was *Specialised Livestock Imports Ltd v Borrie* [2004] BCL 50, 26 (Court of Appeal: CA72/01: 28/3/02: McGrath, Robertson and Randerson JJ) where individual directors who had made specific representations individually had been found at first instance to be

liable in trade in the course of their relevant activities on behalf of the companies in question and the judgment on appeal affirmed that.

11.15 In the present case the involvement by Mr Russell was as the (apparent) signatory to the pre-purchase report. Neither of the copies submitted to me is actually signed. There are two places for his signature. The first is on the front page where he purports to be signing as "Building Surveyor". The whole of the language on that front page is in the first person but it is limited to matters of market acceptability such as:

> "I trust that you have found our service to be of high standard …
>
> I have taken the liberty of enclosing several business cards …
>
> I have enclosed an invoice …"

That page, while written in the first person, is on the letterhead of Future Safe Building Inspections Limited.

11.16 The coversheet also with that letterhead is described as:

> "Pre-purchase report for Wayne Nolan at 6 Maungarei Road Remuera …
> Prepared by Mark Russell"

11.17 The remainder of the document is the report which contains first the "Pre-Purchase Survey Checklist"; a "Report Summary"; a section headed "Items From Checklist Above" which apparently refers to those items marked with a "X" in the pre-purchase survey checklist because of the notation at the end of that checklist:

> "Items marked with X see summary **NA** = Not Applicable",

a section headed "General"; a section headed "Provision of Land Information Summary (LIS) …"; and a section headed "Land Information Summary". That summary is noted:

> "This Land Information Summary has been prepared for the purpose of providing our client's detailed information about the property listed

> above and contains all the information listed by The Auckland City Council that is publicly available on this site. The applicant is responsible for ensuring that the land is suitable for a particular purpose. Future Safe Building Inspections Ltd will not guarantee or accept liability for the accuracy or content of any records held by the Auckland City Council."

There is some individual input into that material such as:

> "I have enclosed a drainage information plan of public sewer and stormwater systems"

(although there was not in fact any such plan attached to the copies I was provided with).

11.18 The final page concludes:

> "Dated this 28th Day of February 2003
>
> Signed For and on Behalf of Futuresafe Building Inspections Ltd
>
> Yours Sincerely
>
> Mark Russell
> Building Surveyor"

11.19 Mr Russell's response referring to that signature page belies the total layout of the report. The first page describes it boldly as having been:

> "**Prepared by Mark Russell**"

with no reference to any limitation of liability. The second page is effectively a personal promotion by him of the services presented by the report and refers to an account for "**my**" fees. The only reference to the limited liability company other than in the letterhead is in the signature page at the end which forms part of the document headed "Land Information Summary". It could well have been misinterpreted as being a statement by the company of the summary of land information. The substance of the report itself which concludes at the end of four pages

headed "General" does not contain any signatory reference and indeed concludes with the words:

> "Please note that this is a Pre-Purchase Report and must not be lodged with any territorial authority as a Safe and Sanitary Declaration"

All in all I have formed the clear view that Mr & Mrs Nolan could have been forgiven for thinking that the report was that of Mr Russell and contained the information through to the conclusion of the general pages with the remaining information being subsidiary information based on Council records. I do not regard it as nearly so obvious as Mr Russell's response would make out that the whole report is from and on behalf of the company only.

11.20 Accordingly I have formed the view that Mr Russell has a personal liability by virtue of the operation of the relevant sections of the Fair Trading Act 1986.

## 12. Damages

12.1 The amount claimed by the claimant, which is the assignee of the original claimants, Mr & Mrs Nolan, is $246,336.00 being cost of repairs $226,336.00 and general damages $20,000.00.

12.2 It claims that it is entitled to the whole of these monies from Mr Russell because of his liability which I have found.

12.3 I found at paragraph 6.5 that the cost of repairs was $203,861.25 and that is the figure that I am taking. Under s29(1) of the Act I must determine the liability that Mr Russell has to the claimant as assignee of the original claimants.

12.4 I do not consider that questions of contributions between respondents arise under s29(2). That is not how the claim is presented to me. Mr Russell has not made any claim for contribution from other respondents.

The claim against him is not based on any alleged tortious liability and so questions of contribution under s17 of the Law Reform Act 1936 do not arise.

12.5 Mr Nolan in his evidence said that had the report disclosed weathertightness issues he and his wife would not have proceeded to buy the house. They were looking for a recently built low maintenance house and had no interest in one that required repairs. They had viewed a number of other attractive houses on the market in the same price range at the time and would have sought to buy one of those instead.

12.6 I was referred to *Harvey Corporation Ltd v Barker* [2002] 2 NZLR 213 where it was held that damages in a claim under s43 of the Fair Trading Act 1986 for misrepresentation was limited to the consequences of the making of the representation and not to the consequences of the failure to perform it emphasising again the majority judgment in *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15. In that case the property was still valued at the purchase price notwithstanding the falsity of the representation made concerning access and a judgment which had been entered in the District Court was set aside on appeal to the Court of Appeal.

12.7 At paragraph 15 the Court said that the claim might have succeeded if the respondents had:

> "… shown that, had they known the true situation, they would not have purchased the property at all"

but that was not pleaded or in evidence. The judgment also referred to the requirement to show a monetary loss not merely a disappointed expectation. On the evidence that there was before the Court the respondents could have resold the property at market value and recouped all the money they paid.

12.8 The judgment emphasised that (para [14]):

> "[n]ormal measures of such a loss are whether what has been acquired is worth less than what was paid and/or whether there has been wasted expenditure."

12.9 The claimant submitted that, given that Mr Nolan's evidence was that he and Mrs Nolan would not have bought, the proper way of assessing the amount to be awarded is to take remedial costs.

12.10 No evidence of values was given to me and Mr Russell had the opportunity to do that had he participated in the hearing. I am taking it that the price paid by Mr & Mrs Nolan for the property, $540,000.00, was the market price and was paid by them on the basis of the assurances given by the report prepared by Mr Russell and in the expectation that there were no weathertightness issues.

12.11 I am also accepting that the owner of the property at any time, whether that be the vendors to Mr & Mrs Nolan or Mr & Mrs Nolan themselves, are required to spend $203,861.25 in necessary repairs to make the dwellinghouse watertight. Having purchased the property for its full market value, Mr & Mrs Nolan faced the prospect of having to spend that sum in restoring it to the condition that they understood it was in when they bought it.

12.12 I am satisfied that that sum is appropriate to compensate them for the consequences of the misleading statements made by Mr Russell's report.

12.13 However I am mindful of the fact that Mr & Mrs Nolan's claim under the Act was against (eventually) seven respondents including Mr Russell. I was told that there had been a settlement by Mr & Mrs Nolan of their claims against respondents other than Mr Russell and that as a consequence there was the assignment by them of their claims to the Auckland City Council. The Auckland City Council had been a respondent.

12.14 The assignment is dated …. August 2005 and refers to the claims made by Mr & Mrs Nolan and that Mr & Mrs Nolan and the Auckland City Council had resolved differences between them in a separate settlement deed as part of which Mr & Mrs Nolan agreed to assist the Auckland City Council to recover monies from Mr Russell (and Vega Consultants Ltd (in liquidation) – although that company had been struck out as a respondent in the adjudication claim because it was in liquidation).

12.15 The deed recites that the Auckland City Council:

> "… shall be subrogated to the rights and remedies of [Mr & Mrs Nolan] to pursue [Mr Russell] … in respect of the defects [alleged by Mr & Mrs Nolan in their dwelling] and the Council shall be entitled to be placed in the position of [Mr & Mrs Nolan] and succeed to all of their rights and remedies against such parties in respect of such defects."

12.16 I asked at the hearing the amount that had been received by Mr & Mrs Nolan towards their claims as part of that settlement but counsel declined to give that to me referring to the confidentiality provisions (s16) of the Weathertight Homes Resolution Services Act 2002.

12.17 My view is that once the Auckland City Council has taken an assignment of claims which Mr & Mrs Nolan were making under the Act or otherwise have in relation to alleged leaks to their dwellinghouse, the Council can recover no more than Mr & Mrs Nolan would have recovered had they proceeded with the claim themselves.

12.18 That inevitably must take into account the extent to which their damages have been reduced by monies received from other parties. It would be inappropriate for me to order Mr Russell to pay the full amount of the established repair costs, $203,861.25, if a part of that sum has already been recovered. The fact that that recovery may have been from the assignee is in my view irrelevant.

12.19 If this had been a commercial factoring assignment then there might be room to argue that the assignee has taken a commercial risk in taking

the assignment for whatever consideration was negotiated at arms length. The risk would be first, the litigation risk of recovery and secondly, the actual prospect of recovery of any judgment or determination.

12.20 That is not the case here. The assignee is a territorial authority which was a respondent to the claim made by Mr & Mrs Nolan under the Weathertight Homes Resolution Services Act 2002 and it has taken the assignment in the context of a resolution of differences between Mr & Mrs Nolan and the Council relating to the defects claims that were made in respect of the dwelling.

12.21 I do not think it appropriate that the Council, in that context, should recover more than the amount that it has paid or contributed to any settlement that has been reached. I reach that conclusion despite the fact that it may have taken some risks in taking the assignment. It may have taken the litigation risk that I have referred to. It certainly has taken the recovery risk insofar as there is no evidence that Mr Russell will or will not be able to meet any payment that he is ordered to make. There is no way for me on the evidence that I have to assess what that risk is (if indeed it is a real risk at all).

12.22 I do not know the exact numbers but my determination is that the Council cannot recover more than it has paid to Mr & Mrs Nolan pursuant to the settlement referred to in the Deed of Assignment and on the basis of which that assignment was entered into.

12.23 I am mindful that s94 of the Judicature Act 1908 reads:

> "**Judgment against one of several persons jointly liable not a bar to action against others**
> A judgment against one or more of several persons jointly liable shall not operate as a bar or defence to [civil proceedings] against any of such persons against whom judgment has not been recovered, **except to the extent to which the judgment has been satisfied**, any rule of law notwithstanding." (emphasis added)

That emphasises to me that had the claim proceeded as originally anticipated, Mr & Mrs Nolan could not have recovered from the respective respondents more than their total losses despite any individual liability that one or another may have had. By the same token I am of the view that the assignee, the Auckland City Council, cannot do this either.

12.24 Had this been a claim in the High Court then under r531(1) judgment entered may have been either a final judgment or a judgment directing such accounts to be taken and it could be that the Court would have directed the taking of accounts to ascertain the net loss to the assignee, the Auckland City Council.

## 13. Entitlement to General Damages

13.1 I referred at paragraph 7 to the general damages claim that Mr & Mrs Nolan had made and the Council's claim to entitlement to proceed with that pursuant to the assignment made.

13.2 The submissions for the Council referred to *AMP Finance NZ Ltd v Heaven* (referred to above) where general damages for stress were awarded in the High Court as to $45,000.00 to Mrs Heaven and $35,000.00 to Mr Heaven, the Judge at first instance having said:

> "As a result of … AMP's actions not only were the Heavens' dreams shattered but the twilight years of their lives have been ruined. I suspect no award will compensate them for the last decade of upset, worry, distress and humiliation."

The Court of Appeal did not interfere with that assessment and affirmed the availability of stress damages relying on *Sinclair v Webb & McCormack Ltd* (1989) 2 NZBLC 103, 605 and *Smythe v Bayleys Real Estate Ltd* (1993) 5 TCLR 545. It did emphasise that this was only in "appropriate cases" of the kind being dealt with there.

13.3 Reference was also made to *T R T Battersby & Anor v Foundation Engineering Ltd & Ors* (CP 26/97: Auckland High Court: 5/7/99: Randerson J) where $20,000.00 was awarded to a family where the front part of their clifftop section subsided due to instability of the ground and there had been negligence in the engineering advice they had received. In *R D Bronlund & Anor v Thames Coromandel District Council* (1999: CA) (and I was not given the citation or judgment), I was told that $20,000.00 was awarded where construction of a dwelling was stopped when the framing had been erected and only minor plumbing and drainage installed with no power points and the plaintiffs continued in that position for some three years with two children aged 5 and 3 years and Mrs Bronlund pregnant with a third (presumably from the beginning of that time). The Council was found negligent in the issuing of the permit allowing construction of the dwelling and liable for that amount of general damages.

13.4 In *Stevenson Precast Systems Ltd v Kelland* (CP 303-SD/01: High Court Auckland: 9/8/01: Tompkins J) $20,000.00 was apparently awarded as general damages but I was not given the judgment to consider.

13.5 I had occasion as co-adjudicator in the Weathertight Homes Resolution Services claim by Mr & Mrs Putman (claim 0026) to award $20,000.00 being $15,000.00 for Mrs Putman and $5,000.00 for Mr Putman where they were living for some time in a house that was significantly damaged and had rot as the consequence of water ingress leakage.

13.6 Certainly I accept that I could have awarded Mr & Mrs Nolan general damages but the only evidence that I had was that which is transcribed at paragraph 7.1. I am not satisfied that on that brief evidence this is a case where those damages are properly payable.

13.7 Of course this is a claim by the assignee of the claims that Mr & Mrs Nolan had but I do not think that disqualifies the Auckland City Council

from being entitled to make that claim as assignee. Again I presume it was part of the settlement of claims between it and Mr & Mrs Nolan referred to in the Deed of Assignment that the merits or otherwise of that claim were taken into account.

13.8 However that claim for general damages fails.

## 14. Jurisdiction

14.1 The express provisions of ss37 – 39 of the Fair Trading Act 1986 conferring jurisdiction refer respectively to the High Court, District Courts and Disputes Tribunals.

14.2 I am of the view, however, that there is jurisdiction for an adjudicator under the Weathertight Homes Resolution Services Act 2002 to consider a claim which has been accepted under s12 of that Act as meeting the criteria set out in s7(2) insofar as that claim is a claim under the Fair Trading Act 1986 against the author of a pre-purchase report. The purpose of the Act in s3 as set out in paragraph 5.3 above is:

> "… to provide owners … with access to … procedures for … resolution of claims …"

The basis for claims made may vary considerably and may be in contract (such as against the vendor of the dwellinghouse to the claimant), in tort (such as in negligent discharge of a duty of care by a territorial authority or a person carrying out construction work on the dwellinghouse), both contract and tort (such as in relation to design issues and supervision of construction) and the like. There may also be questions of causation of loss which arise which require consideration of other alleged liability. It is perhaps a question of remoteness that my view is generally that the Act has provided owners with a process to have claims resolved and if those claims involve consideration of causation questions and alleged causes of action against respondents, claimants should be entitled to bring those

claims and to have them determined by an adjudicator if that is the course they choose.

14.3 In *Waitakere City Council v Smith* (Auckland District Court (ex Waitakere District Court): CIV 2004-090-1757: Judge F W M McElrea: 28/1/05) the District Court, on an appeal from an adjudication under the Weathertight Homes Resolution Services Act 2002 affirmed that an adjudicator has power to award general damages and upheld such an award by the adjudicator in that case. That judgment considered in detail academic writing on the topic but rejected the argument that that writing had advanced. At paragraph [75] his Honour said:

> "With great respect, it does not follow that such alternative to court proceedings should not have the benefits of court proceedings. Indeed, it is arguable that without those benefits is not a true alternative. Either claimants will have to abandon their right to general damages, or they will have to seek them separately in the District Court. Cost considerations alone would rule that out, given the modest level of general damages awarded. In any event, Mr Oliver submitted that it might not be possible to split a claim between the WHRS and a court without meeting a plea of *res judicata*. While court proceedings may be necessitated anyway – where some of the defects are not related to water entry – this is no reason to restrict the value of the WHRS process to those using it."

14.4 Under s42(1) of the Act:

> "An adjudicator may make any order that a Court of competent jurisdiction could make in relation to a claim in accordance with principles of law."

14.5 I am of the view that I have jurisdiction to consider orders provided for in s43 of the Fair Trading Act 1986.

15. **Result**

15.1 Mr Mark Brian Russell, the respondent, is liable for the consequences of the misleading or deceptive conduct that he was engaged in in the preparation of the pre-purchase report for Mr & Mrs Nolan. The amount of his liability is at most the sum of $203,861.25. I consider his liability to

the assignee of the claims that Mr & Mrs Nolan had against Mr Russell, namely the Auckland City Council, is limited to the amount that it has paid to Mr & Mrs Nolan in settlement of the claims they made against it and to which the Deed of Assignment entered into in August 2005 refers. I was told that that sum had some difficulty of quantification but was not given the detail or reasons. The best I can do at this stage is to order that the respondent, Mark Brian Russell, pay to the claimant, the Auckland City Council, in its capacity as assignee of the claims that Mr & Mrs Nolan, the owners of the dwellinghouse, had to the extent necessary to reimburse the Auckland City Council for monies paid or value given in settlement of the claims against it by Mr & Mrs Nolan and which constitutes the consideration for the Deed of Assignment.

15.2 I have made this a partial Determination accordingly. If it is required that I quantify that amount then I shall do so by way of a further Determination. That may be, by analogy with rule 531 of the High Court Rules, to direct accounts to be taken.

15.3 It may be that the parties can resolve that question between themselves. I reserve leave to either party to arrange a telephone conference for further timetabling or hearing for that purpose if required. I myself convene such a conference at **9.30am on Monday 31 October 2005** to ascertain progress.

**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 partial determination or any further determination hereunder 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 or will be ordered and steps taken to enforce that judgment in accordance with the law.

**DATED** at Auckland this 21st day of September 2005

_____
David M Carden
Adjudicator