Claim No: 2442

Under the Weathertight Homes Resolution Services Act 2002

In the matter of an adjudication claim

Between **Zhen Zhen Mao** and **Ying Peng**

Claimants

And **Douglas Mackay Howitt**

Respondent

Determination
Tuesday 29 August 2006

1. **Index**

2. **Summary**

2.1 The claim for remediation costs to the dwelling at 670A Mt Eden Road, Mt Eden, Auckland, was settled against certain respondents (and the adjudication terminated against those respondents) leaving the balance claimed for remediation, $218,136.00.

2.2 The respondent, **Douglas Mackay Howitt**, has not taken active steps in the matter in recent times although he had instructed counsel initially and had participated initially. I have drawn the inference under s38 of the Weathertight Homes Resolution Services Act 2002 (**WHRS Act**) from his non-participation that he accepts liability to the claimants and that he accepts that his construction of

the dwelling was defective and did not comply with the Building Code or discharge his duty of care to the claimants as subsequent purchasers.

2.3 The respondent, **Douglas Mackay Howitt**, had obligations under the Building Act 1991 to meet the performance criteria of the Building Code and he owed a non-delegable duty of care to the claimants to build in accordance with proper standards. He has breached those duties.

2.4 The respondent, **Douglas Mackay Howitt**, is liable to the claimants, **Zhen Zhen Mao** and **Ying Peng**, in the sum of **$218,136.00**.

2.5 I have also ordered interest on that sum from the date of this Determination to the date of payment pursuant to clause 15 Part 2 Schedule WHRS Act.

2.6 There is no order for costs.

3. The Adjudication Claim

3.1 The claimants gave Notice of Adjudication dated 29 May 2005 under s22 of the WHRS Act in respect of their home at 670A Mt Eden Road, Mt Eden, Auckland, naming the respondent, Douglas Mackay Howitt, and others as respondents to the claim.

3.2 There have been various conferences and applications made and Procedural Orders. These included applications for joinder of respondents and applications to be struck out as respondents.

3.3 I then convened a hearing/conference for 10.00am on 17 August 2006. At that conference I was told that a settlement had been reached between the claimants and all respondents other than Douglas Mackay Howitt and the claim could be terminated so far as those other respondents were concerned. I was advised that there were no cross-claims that any of the respondents who had settled wished to

make and there had been no notification of any cross-claims against them. The claims against those other respondents are therefore terminated.

3.4 The respondent (**Mr Howitt**) was initially represented by counsel, Mr Horrocks, and on Mr Horrocks' death by Mr Rendall, solicitor, Rotorua. Mr Howitt participated in the adjudication claim initially including an application for joinder of a respondent. I was told that Mr Howitt normally lived in Rotorua and from time to time during the adjudication he was off-shore. In June 2006 Mr Rendall advised that he was not receiving instructions from Mr Howitt and all attempts to contact him had been unsuccessful and he sought leave to withdraw as counsel. While that is a matter of courtesy to the adjudication, in my view leave is not required. It is for Mr Howitt and any other respondent in an adjudication to make sure that any participation they wish to have in the adjudication is done.

3.5 There is a further obligation on a respondent to an adjudication claim, that is to participate fully in the claim and to provide information and comply with requests. It is important that respondents understand that this is a different process from the Court process. The adjudicator has wide powers under s36 of the WHRS Act which include requesting submissions, requesting copies of documents, setting deadlines, calling conferences and requesting the parties to do "any other thing … that [is considered] reasonably may be required to enable the effective complete determination of the questions that have arisen". Respondents must realise too that under s37 an adjudicator's power to determine a claim are not affected by the failure of a respondent; and also that under s38 if there is a failure by any respondent the adjudicator may draw inferences from that failure and determine the claim on the basis of information available.

3.6 One of the factors I have taken into account in this adjudication is that Mr Howitt has not provided the information that has been requested of him and he has not attended the conferences that have been held including the final conference/hearing and I draw the inference from that that he must acknowledge

he has a liability to the claimants in relation to their claim and has no real answer to the claims made.

4. The Claim

4.1 The dwelling at 670A Mt Eden Road, Mt Eden, Auckland, was designed by Ross K Dustin and built by Mr Howitt between 1994 and 1995 with a Code Compliance Certificate having been issued on 18 December 1995. It is of three levels and oriented to the west. It is of monolithic cladding construction, namely Harditex, with apparently external H1 treated timber and aluminium joinery. The roof is iron and butyl rubber membrane.

4.2 Mr Howitt then sold the property in February 1996 to subsequent purchasers who in turn sold to the claimants in March 2002 (although they had attended an open home when the property was listed in April 2001).

4.3 The claimants became aware of water entry and damage and made a claim under the WHRS Act in June 2004. The assessor appointed carried out inspections and analyses and reported in March 2005. During the course of this adjudication the assessor reconsidered certain factors and lodged a supplementary report in August 2006.

4.4 The assessor's view was that the dwelling was leaking and there were causes for concern due to the particular design and the construction defects. These included:

- No cappings to parapets.
- Inadequate ground clearance in relation to ground floor level.
- Timber cappings with no purpose-made metal flashings to deck balustrades.

- Inadequate cladding clearance to deck surface and the exterior ground.
- Deck slope back to the building to an inappropriate discharge point and overflow provision.
- No rainhead or overflow provision to the north elevation internal gutter.
- Flashings cut short and flush with the window facings.
- The extension of the head flashings inadequate to cover the opening awning windows.
- No garage opening head flashings.

4.5 The assessor conducted certain non-invasive moisture readings most of which were between 35% and 68%; and certain invasive moisture readings, most of which recorded 40% MC off the scale. Samples of destructive testing were sent for analysis and a report on that was provided. The assessor concluded that the main causes of water entering the structure were the design of the dwelling which he said "is inherently flawed", the entry of water through the parapets, water entry into the exposed upper western elevation, entry of water at beam to wall junctions, entry of water around raking head windows, flashings and facings, initial entry of water around openings before the installation of awnings, water entry at the junction of the deck surface and wall cladding, water entry around the drainage discharge point of the deck surface, entry of water down through the deck balustrade capping and into the living area, entry of water at the deck balustrade to wall junction, water rising up into the bottom plate and cladding due to inadequate clearance, intrusion of water through vertical joints in the cladding, and moisture rising into the bottom plates, no DPC.

4.6 The assessor estimated repair costs at $215,121.87 including GST. Mr Dustin was aware of that estimate and that that was the amount claimed against him, it having been also referred to in the Notice of Adjudication.

4.7 In the supplementary report the assessor increased his estimate of the cost of repairs and there was discussion about that at the conference/hearing. There had been criticism of the methodology adopted by the assessor in a Review (unsigned) prepared by a technical adviser to one of the parties. In the statement of evidence proposed from that adviser, Mr Clinton Smith, however, that criticism was not maintained. In essence the criticism had been that there was a duplication of labour claimed insofar as the per unit cost for individual items in the assessor's estimate was inclusive of labour but the assessor had then added further labour charges and time which the Review suggested was a duplication. As I have said, that criticism was not maintained in the statement of proposed evidence (also unsigned) and Mr Clinton Smith did not give evidence at the hearing nor was he therefore questioned about this issue. I raised the matter with the assessor who said to me that the methodology he had followed was quite appropriate in that the resource material he had had access to, namely Rawlinsons, was structured on a labour-inclusive-per-unit basis which was a quite appropriate and acceptable method of assessing cost. I noted that the labour allowance he had initially made was 1,120 whereas the Review from Mr Smith had calculated some 1,840 hours of labour from an alternative pricing from Commercial Carpentry Limited that had been obtained. Perhaps that is a partial if not full explanation of the reduced number of hours taken by the assessor in addition to the labour inclusive per unit rates. That matter was discussed at the conference hearing. There was no input from Mr Clinton Smith nor any attendance or challenge from Mr Howitt. I have formed the view on balance that the approach taken by the assessor is appropriate as the method of quantifying the repair costs.

4.8 As I have said, a settlement has been reached with other parties who had been respondents and these are the designer, the territorial authority and the vendors of the property to the claimants. I was not privy, of course, to the considerations that led the parties to the settlement that they reached because that is confidential to a mediation under the WHRS Act but it can be taken that the

claimants accepted that the settlement was in satisfaction of the claims that they had against those other parties insofar as they had, or may arguably have had, an exposure to liability.

4.9 The net result is that there remains claims by the claimants for their quantified estimated repair costs to their dwellinghouse being claims they make against Mr Howitt in the sum of $218,136.00.

5. Liability: Douglas Mackay Howitt

5.1 As I have said, one factor I take into account in determining Mr Howitt's liability to the claimants is the fact that he did not participate in the adjudication process and I have drawn the inference from that that he accepts liability to them.

5.2 Mr Howitt was the owner of the property and the builder of the dwellinghouse. He signed the application for building consent dated 17 January 1995 showing himself as the builder. The drawings for the dwelling describe the project as "Howitt house".

5.3 The obligation under s7(1) of the Building Act 1991 (then applicable) was:

> "(1) All building work shall comply with the building code to the extent required by [the Building Act], whether or not a building consent is required in respect of that work."

5.4 The functional requirements and performance standards of clause E2.2 and E2.3.2-5 are:

> "**Functional Requirement**
>
> E2.2 Buildings shall be constructed to provide adequate resistance to penetration by, and accumulation of, moisture from the outside.
>
> **Performance**
>
> E2.3.2 Roofs and exterior walls shall prevent the penetration of water that 'could' cause undue dampness or damage to building elements.

E2.3.3 Walls, floors and structural elements in contact with the ground shall not absorb or transmit moisture in quantities that could cause undue dampness or damage to building elements.

E2.3.4 Building elements susceptible to damage shall be protected from the adverse effects of moisture entering the space below suspended floors.

E2.3.5 Concealed spaces and cavities in buildings shall be constructed in a way that prevents external moisture being transferred and causing condensation and the degradation of building elements."

5.5 That in itself imposed on Mr Howitt the obligation to comply with the Building Code and achieve the performance standards stated. The evidence is that the dwelling did not and it is clear that Mr Howitt has not discharged his obligations under those statutory provisions.

5.6 There is clear authority that a builder/developer of a site has a duty of care in the construction of a dwelling to subsequent purchasers and that duty is non-delegable (*Bowen & Ors v Paramount Builders (Hamilton) Ltd & Anor* [1977] 1 NZLR 394; *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234; Weathertight Homes Resolution Service claims 119 and 92 – *McQuade v The Maureen Young Family Trust* and *Widdowson v Bekx*).

5.7 That too is a fundamental basis on which Mr Howitt has a liability to the claimants as subsequent purchasers.

6. General Damages

6.1 At the hearing the question of entitlement for the claimants to general damages was raised. This is the first time that was raised. I indicated that I did not think I could consider a claim for general damages that had not been served on, or otherwise notified to, Mr Howitt and that claim was withdrawn.

7. Interest

7.1 There was also sought an order for payment of interest by the claimants.

7.2 Under clause 15 Part 2 Schedule WHRS Act an adjudicator has the discretion to order the inclusion of interest not exceeding the 90-day bill rate plus 2% for the whole or part of the period between the date when the cause of action arose and the date of payment.

7.3 The claimants have not in fact incurred any cost in remedial repairs as yet. They have lived with the damage from the leaks during most of the period of their ownership but any stress or inconvenience to them in that regard would be more properly the subject of a claim for damages (mentioned above). On balance I do not think it appropriate that I should order the inclusion of interest in this case where there has been no financial cost incurred. It would have been different had the claimants actually borrowed or spent the money in effecting repairs because they would have incurred interest cost or loss of use of return on those funds in that case; but that is not the case here. It may be that the greater deterioration from the passage of time has some reflect in increased cost of repair but I was given no evidence about that; and that would, in any event, be a matter rather of mitigation of loss. I do not think that it is appropriate that interest be awarded up until the present time.

7.4 Conversely, however, I do think it appropriate that interest should accrue now to the date of payment. I am advised that the claimants are to proceed with remediation work now and will borrow funds for that purpose. That will inevitably incur cost to them in interest and in the loss of use of any capital they may use. Under clause 15 I can award interest up until the "date of payment in accordance with the judgment" at such rate not exceeding the 90-day bill rate plus 2% as I think fit. On balance I have come to the view that interest should be paid from the date of this Determination to the date of actual payment by Mr Howitt of the sum claimed at the rate of 9.48%, being 2% above what I have been told on my enquiry is the current 90-day bill rate.

8. Costs

8.1 No claim for costs was made by the claimants against the respondent and that seems appropriate. Although they were assisted at the conference/hearing by a person who has legal qualification there was no evidence of their having incurred legal costs in the course of this adjudication nor indeed of any other costs incurred by them in relation to the adjudication. The ground for an order for costs under s43 of the WHRS Act is if one party has caused costs to be incurred unnecessarily by bad faith or allegations or objections without substantial merit. In this case most of the adjudication claim has concentrated on the liability of other parties. Indeed I am not aware that Mr Howitt has raised any objections but, as I have said, has rather failed to participate at all. It cannot be said that he has raised objections without substantial merit nor can it be said there has been bad faith on his part. There are no grounds for any order for costs.

9. Conclusion

9.1 Accordingly I find that Mr Howitt is liable to the claimants for the remaining cost of repairs to their dwelling, $218,136.00, for repairs and remediation work from damage caused by the leaks and building defects to which the assessor's report and this adjudication claim refers and I **ORDER** the respondent, **Douglas Mackay Howitt**, to pay to the claimants, **Zhen Zhen Mao** and **Ying Peng**, the sum of **$218,136.00** forthwith.

9.2 In addition I **ORDER** that the respondent, **Douglas Mackay Howitt**, pay the claimants, **Zhen Zhen Mao** and **Ying Peng**, interest on that sum from the date of this Determination to the date of actual payment at the rate of 9.48%.

DATED at Auckland this 29th day of August 2006

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David M Carden
Adjudicator

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.