IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI 2013-100-000038
[2015] NZWHT AUCKLAND 3

BETWEEN	**JOONG SONG KWAK AND HYE SOOK KWAK** Claimants
AND	**HYUN SU (MARIO) PARK AND DUK SUN LIM (Removed)** First Respondents
AND	**HYUN SU (MARIO) PARK** Second Respondent
AND	**ROSE MARY MCLAUGHLAN (Removed)** Third Respondent

Hearing:	13 and 14 April 2015
Appearances:	Jonathan Wood for Joong Song Kwak and Hye Sook Kwak Mr Park in person
Decision:	16 June 2015

FINAL DETERMINATION
Adjudicator: M Roche

INTRODUCTION

[1] In July 2003 Mr and Mrs Kwak purchased a house at 27 Ian Marwick Place in Birkenhead. In 2007 they began to notice leaks which Mr Kwak attempted to repair. In 2011 they applied for an assessor's report under the Weathertight Homes Resolution Services Act 2006 (the Act). After carrying out inspections the assessor concluded that the house was a "leaky home" and required extensive repairs.

[2] The house was originally owned by Duk Sun Lim and Hyun Su (Mario) Park. They had purchased the section at 27 Ian Marwick Place in November 1998. Mr Park built the house which they moved into in July 2000. In October 2001 they sold the house to Mi Cha Kim. The agreement was conditional on Mr Park and Ms Lim obtaining a code compliance certificate (CCC) for the house.

[3] Mr Park had engaged the third respondent, Rose McLaughlan, as a private certifier. Her employees carried out a number of inspections at the house. In October 2001 Mr Park issued four producer statements. On 8 February 2002 Ms McLaughlan or her employees carried out a final inspection. Ms McLaughlan issued the CCC for the house on the same day.

[4] The Kwaks claim that Mr Park was acting as a developer when he built the house at 27 Ian Marwick Place and, as such, owed them a non-delegable duty of care. They claim that the developer's duty of care extends to the actions of the private certifier, Ms McLaughlan, and that Ms McLaughlan was negligent.

[5] The Kwaks also claim that Mr Park owed them a duty of care when he issued the producer statements. This is because Ms McLaughlan relied on the producer statements when issuing the CCC and the Kwaks in turn relied on the CCC when purchasing the house.

[6] On 17 January 2011, the Kwaks applied for an assessor's report. This means that any action in respect of building work carried out prior to 17 January 2001 is limitation barred.[1] There is no evidence of any relevant building work being carried out after 17 January 2001. The only events that are not limitation barred are therefore the inspections carried out by Ms McLaughlan and her employees after 17 January 2001, the issue of producer statements by Mr Park and the issue of the CCC.

---

[1] Weathertight Homes Resolution Services Act 2006, s 37.

[7] The issues that I need to address are:

(a) Was Mr Park acting as a developer when he constructed the house?

(b) If Mr Park was acting as a developer, did his duty of care extend to responsibility for the actions of the private certifier?

(c) Did Mr Park owe a duty of care to the Kwaks when he issued the producer statements in October 2001?

(d) What are the defects causing leaks and damage?

(e) Was there contributory negligence on the part of the Kwaks that contributed to their loss?

(f) What is the quantum of the damages that should be awarded?

BACKGROUND FACTS

[8] Mr Park and his wife Ms Lim immigrated to New Zealand from Korea in 1995. Unable to find work in his previous field, Mr Park retrained first in computing and then as a pilot. He did not find work in either of these fields. He worked installing blinds for approximately 15 months before becoming self employed as a handyman.

[9] Mr Park and Ms Lim bought a modest home in Henderson which they sold in August 1998 in order to purchase the section at 27 Ian Marwick Place. They had decided to move from Henderson to the North Shore because they thought the schools were better there and they had school aged children.

[10] Mr Park and Ms Lim lived in rental accommodation while Mr Park worked full time building the house at Ian Marwick Place. They were under considerable financial strain at this time because they had no income and a mortgage. They moved into the house in July 2000 and in October 2001 sold it to Ms Kim, conditional on a CCC being obtained. No GST in respect of the construction or land purchase was claimed by Mr Park who was GST registered at the time.

[11] On 30 November 2001, the house was transferred to Ms Kim who held back a portion of the settlement funds pending the issue of a CCC. An amended building consent was issued after Ms Kim took possession of the property. The CCC was also issued after the property had been transferred to Ms Kim. However

both documents were issued under Mr Park's name because he had obtained the original building consent.

[12] After selling 27 Ian Marwick Place, Mr Park and Ms Lim bought another property at 17 Cheryl Place, Glenfield. They subdivided the property into three sections and Mr Park built a house on one of the sections. They then sold the other two sections and remained in the house Mr Park had built until late 2005. They then sold the Cheryl Place house and moved into the third house that Mr Park has built, in Albany. They have remained there ever since.

[13] Mr and Mrs Kwak agreed to purchase the 27 Ian Marwick Place from Ms Kim in July 2003. The agreement was subject to the Kwaks being satisfied with a building report on the property. After obtaining a report from Futuresafe Building Inspections Limited, the Kwaks were advised by their conveyancing lawyer that the report was satisfactory and the agreement became unconditional.

[14] Although the Futuresafe report was satisfactory it raised some issues. There was a recommendation that minor roof repairs be carried out by an experienced roofing contractor and that a slope be added to the flat top parapets.

[15] Mr Kwak carried out the roof repair himself using material purchased from a hardware store and following the advice of the staff there. After leaks began in 2007 he made a number of attempts to repair the roof with waterproofing products. He did not have the parapet slope installed.

WAS MARIO PARK ACTING AS A DEVELOPER WHEN HE CONSTRUCTED THE HOUSE?

[16] Developers owe a non-delegable duty of care to subsequent purchasers. Their primary obligation is to see that proper care and skill are exercised in the building of houses.[2] The test for determining whether a person is a developer has two components. One is control over the building process; the second is the profit motivation. In *Keven Investments Limited v Montgomery*[3] Woodhouse J suggested that the business element alone may be sufficient and held that the one essential requirement for a person to have liability as a developer was that the building is constructed for the primary purpose of sale to other people. In his view it is the business element which provides the policy foundation for imposing the duty of care.

---

[2] *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234(CA).
[3] *Keven Investments Limited v Montgomery* [2012] NZHC 1596, [2012] NZCCLR 20 at [19]-[20].

[17] There are a number of cases which examine whether individuals who build their own houses are developers. In *Willis v Castelein*[4] it was held that a home owner who exercises control over a dwelling being built for their own occupation will not owe the same non-delegable duty of care to future purchasers as that owed by a property developer. In *Brichris Holdings Limited v Auckland Council*[5] Miller J held that the objective of the construction process must be considered. In that case a couple had built two townhouses intending to live in one and have their daughter live in the other. Their plans later changed and they did not occupy the townhouses. It was held that the intention they had while the townhouses were being constructed meant that they were not developers. In *Brichris,* the significance of the house being built for the purpose of sale was also emphasised. It was commented that a hope to profit from rent or capital appreciation over time was insufficient to make someone a developer.

[18] Mr Park controlled the construction process. Whether or not he was a developer depends on whether he built 27 Ian Marwick Place for the purpose of sale. Mr Park and Ms Lim have claimed that this was not the case and that 27 Ian Marwick Place was built to be their "dream home" which they sold because of their difficult financial circumstances. The Kwaks' position is that although Mr Park was not a developer in the usual sense, by forgoing an income while he built the house and taking out a mortgage, he staked his fortune on the profit expected from the development and sale of 27 Ian Marwick Place and was therefore a developer for the purpose of this single project.

[19] Mr Park is not a developer in the sense that he is in the business of constructing multiple houses for profit. He could not be considered to be a developer in respect of his house at Cheryl Place where he lived for several years or his current house which he has occupied for almost 10 years. In respect of both these houses his position is analogous to the homeowner in *Willis v Castelein* who built a house to live in.

[20] Mr Park gave evidence that he became interested in building when working as a blind installer. He said that he saw many places being built, that it seemed easy and that he wanted to try. Mr Park said that although he had originally planned to construct a modest house on the section at 27 Ian Marwick Place, he was persuaded by the designer, Ross Bell, to build a much larger house. This was

[4] *Willis v Castelein* [1993] 3 NZLR 103 (HC).
[5] *Brichris Holdings Limited v Auckland Council* [2012] NZHC 2089.

because the section's steep slope meant that a smaller dwelling would have a significant size to cost ratio.

[21] Although Mr Park and Ms Lim gave evidence of their difficult financial circumstances while the house was being built, neither claimed that these circumstances had been unexpected. The building project was commenced in the knowledge that Mr Park would have no other income while he was building the house and neither Mr Park nor Ms Lim claimed any unexpected cost overrun. Mr Park chose to construct a large house rather than the more modest dwelling he claimed to have originally envisaged. This was a deliberate decision with cost implications that could not have been unexpected. There appears to have been no reason for the decision to construct a large rather than a modest house other than its improved profitability. Although Mr Park and his family moved into the house in approximately July 2000 it was unfinished in the sense that it had not passed a final inspection or received a CCC. It was sold before either of these two steps took place. Mr Park provided no explanation for selling the house other than his financial circumstances which appear to have been a known quantity.

[22] The final piece of evidence supporting the proposition that Mr Park was a developer in respect of the Ian Marwick Place house is the profile on the Ray White website that states that after working for Window Treatments, he spent seven years as a building contractor and developer. This seven year period includes the period within which 27 Ian Marwick Place was built and sold.

[23] Having considered all the evidence, I find that the purpose of the construction of the house at 27 Ian Marwick Place was to on sell and obtain a profit to enable Mr Park and Ms Lim to move up the property ladder more quickly than would otherwise have been the case. I am not persuaded that they intended to live at Ian Marwick Place for anything other than a short term or that it was their dream home. I find therefore that Mr Park was a developer in respect of the construction.

DID MR PARK'S DUTY OF CARE AS A DEVELOPER EXTEND TO RESPONSIBILITY FOR THE ACTIONS OF THE PRIVATE CERTIFIER?

[24] The Kwaks claim that as the developer, Mr Park owed them, as future owners, a duty to ensure that all building work required pursuant to the building consent was exercised with proper care and skill. It is claimed that this duty extended until the CCC was issued. It is the Kwaks' position that in addition to being responsible for the physical building work, Mr Park was also responsible, as developer, for the certification work carried out by Ms McLaughlan. The Kwaks rely

on *Osborne v City Council*[6] where it was held that "building work" under the Building Act 2004 encompasses certification and where it was specifically held that the issue of a CCC is "building work".[7]

[25] The *ratio* of the *Osborne* decision is that claims that are not barred under the limitation provision in s 393 of the Building Act should not be construed as being ineligible pursuant to s 14(a) of the Weathertight Homes Resolution Services Act 2006. Section 14(a) requires, in order for a house to be eligible for mediation and adjudication services under the Act, that it be built within the period of 10 years immediately before the day a claim is brought. *Osborne* concerned a situation where the physical building work had been completed outside the 10 year period but inspection and certification work fell within it. The decision in *Osborne* allowed the claimants in that case to bring a claim against the Council in respect of its inspection and certification role even though claims in respect of the construction work were time barred.

[26] The issue of whether a developer's duty of care to future owners encompasses liability for the allegedly defective inspection work carried out by a private certifier was considered in these proceedings when Mr Park was removed. I concluded that the duty of a developer is to ensure that proper care and skill are exercised in the building of houses and that the ambit of the developer's duty, which is well defined in case law, is related to construction and not to inspection and certification which are regulatory functions.

[27] The Kwaks' former counsel in submissions on removal placed some emphasis on the contractual relationship between Mr Park and the private certifier and suggested that this provided a hook for the developer's liability. I noted however, that it is not the contract between a builder and a developer that gives rise to the developer's liability for construction. Rather, the non-delegable nature of the developer's duty means that he is still liable for construction work even if he contracts another to carry it out.

[28] The decision to remove Mr Park was appealed to the High Court.[8] There, Fogarty J took the view that it was not established at common law that the non-delegable duty of care of a developer extended to the acts and omissions of a private building certifier and accordingly the Kwaks were seeking to impose a novel duty of care. Fogarty J commented that the identification of a non-delegable duty of

---

[6] *Osborne v Auckland Council* [2014] NZSC 67, [2014] 1 NZLR 766
[7] At [26].
[8] *Kwak v Park* [2014] NZHC 275, (2014) 21 PRNZ 713.

care is an exceptional event and should be carried out by a superior court. His Honour noted that there was only one right of appeal from the Tribunal and transferred the proceeding to the Court of Appeal for determination of the scope of the non-delegable duty of care. However, as the appeal was allowed by consent, the proceeding was remitted to the Tribunal without the Court of Appeal expressing any opinion on this issue. The removal of Mr Park as a party was reversed but without a decision. I am therefore required to determine the issue again.

[29] In Procedural Order 2 I noted that there was no case law supporting the proposition that developers owe a duty of care in relation to inspections. Fogarty J took the same view. There is nothing before me that persuades me that there is a basis for extending a developer's duty of care to include liability for the performance of statutory functions. Developers have a non-delegable duty of care for building work because of the control they exercise over it. However in New Zealand territorial authorities (and formerly private certifiers) are responsible for the statutory functions of inspection and certification and their decisions are outside the control of developers.

[30] I find that Mr Park is not liable for the actions of Ms McLaughlan. It is therefore unnecessary to consider whether she was negligent in carrying out the final inspection on 8 February 2002. I note that there is no expert evidence before the Tribunal establishing that the final inspection or the issue of the CCC were in fact negligent, the assumption appearing to have been made that as the building failed to perform and did not comply with the performance requirements of the Building Code, the inspections were negligent. With respect to the CCC, as will be seen, producer statements signed by Mr Park fall short of what a reasonable inspector would have relied on in issuing a CCC. It follows that the issue of the CCC, to the extent that it was based on these statements, was negligent.

[31] A further issue that may have arisen was also the significance of the house having been sold prior to the issue of the CCC. Mr Wood relies on the proposition in *Kerr v South Wairarapa District Council*[9] that a developer's duty to remedy defects may continue until the development is completed by the issue of a CCC. However the principle supporting this proposition is that the duty continues so long as the developer retains control and the practical ability to remedy its breach. Having transferred the property to Ms Kim several months before the final inspection

[9] *Kerr v South Wairarapa District Council* HC Wellington CIV-2010-035-156, 9 December 2011

and the issue of the CCC, it does not seem that Mr Park retained control or the practical ability to remedy breaches.

DID MR PARK OWE A DUTY OF CARE TO THE KWAKS WHEN HE ISSUED THE PRODUCER STATEMENTS IN OCTOBER 2001?

[32] In October 2001 Mr Park issued four producer statements. Ms McLaughlan's evidence was that she would not have issued the CCC for 27 Ian Marwick Place without these producer statements and that she relied on them when doing so. Ms McLaughlan's actions were in accordance with the Building Act 1991 which provided that territorial authorities and private certifiers could, at their discretion, accept a producer statement as establishing compliance with the Building Code when issuing a CCC.[10]

[33] The primary issue to be addressed is whether the issue of producer statements by Mr Park gives rise to an action in negligence simpliciter or in negligent misstatement. This requires consideration of whether Mr Park's producer statements are 'building work' or simply statements. It is also relevant to consider the requirements for reliance on producer statements.

[34] In *Body Corporate 326421 v Auckland Council,*[11] Gilbert J stated that producer statements should not be accepted by territorial authorities without question. He also said that the extent to which a producer statement should be relied on in considering whether Code requirements had been met depended on relevant circumstances. These included the skill, experience and reputation of the person providing the statement, the independence of the person in relation to the works, whether the person was a member of an independent professional body and subject to disciplinary sanction, the level of scrutiny undertaken and the basis for the opinion.

[35] Mr Park had no building qualifications. Nor did he have any building experience apart from his handyman work.

[36] The four producer statements are as follows:

- Producer statement – waterproof on deck (18 October 2001).
- Producer statement – construction review in respect of top floor – gib nailing/bracing (24 October 2001).

[10] Building Act 1991, s 43(8) and s 56(3)(a).
[11] *Body Corporate 326421 v Auckland Council* [2015] NZHC 862.

- Producer statement – construction review in respect of membrane to roof/deck/parapets (23 November 2001).

- Producer statement – tile underlay in bathroom (18 December 2001).

[37] The producer statements relating to top floor gib nailing/bracing and the bathroom tile underlay will not be considered as they do not relate to weathertightness defects.

[38] The producer statement for deck water proofing was brief. In it Mr Park stated:

> I have done the water proofing for deck floor by using the P/U Rubber water proofing membrane. I applied two coat (3mm each coat) main resin membrane (6mm in total) over the Primer. The job has Complete with my best knowledge and technique. [sic]

[39] This producer statement provides no indication of the quality of water proofing that was carried out, or whether the completed work complied with the Building Code.

[40] The producer statement in respect of membrane to roof/deck/gutters/parapets is on a standard form issued by Ms McLaughlan's company, A1 Building Certifiers. The text is printed while spaces were available for the building consent number, property address, type of membrane and tradespersons name, address and signature to be filled in. The name Mario Parks [sic] has been inserted into the following statement so that it reads:

> I Mario Parks being the tradesperson responsible for the work identified above declare that; all proprietary products have been installed in accordance with the requirements of the NZ Building Code, approved documents, manufacturer's specifications and the approved drawings for the building consent issued for the above property.

[41] Later in the producer statement it is stated "A1 Building Certifiers Limited in accepting this producer statement do so in order to establish compliance with the requirements of the Building Act 1991 and the Building Regulations 1992".

[42] The misspelling of Mr Park's name (Parks instead of Park) and the misspelling of his address (Sheryl Place corrected to Cheryl Place) indicate that Mr Park did not personally fill in the producer statement form. I accept however that he signed it. This was not disputed at the hearing.

[43] The Kwaks' position is that Mr Park owed them, as future purchasers, a duty of care when issuing the producer statements. In closing submissions, Mr Wood argued that the issuing of producer statements, like certification by a territorial

authority, is a form of building work. He submitted that Mr Park needed to take care and exercise skill in issuing the producer statements. Without the producer statements, the property would not have come onto the market to the detriment of subsequent owners who are in a vulnerable position with limited ability to identify latent building defects.

[44] There is no authority which deals decisively with the liability in tort (if any) arising from the issue of a producer statement. Mr Wood has however referred to two cases where the imposition of such a duty was discussed.

[45] In *Pacific Independent Insurance Limited v Webber*[12] Lang J held that the signatory of a producer statement did not owe a duty of care to future purchasers. In that case Mineral Plaster Technologies Limited (MPT), supplied a coating powder applied to cladding. After the coating was applied, MPT inspected it and issued a producer statement confirming that it had been correctly prepared and applied. The producer statement was signed by the managing director of MPT, a Mr Kathagen.

[46] Lang J found that there was no basis to conclude that Mr Kathagen foresaw or ought to have foreseen that subsequent purchasers might place reliance on the producer statement. His Honour noted that the producer statement did not create the damage and that the community does not rely on the issue of a producer statement in the same way that they rely on territorial authorities to carry out their statutory functions to a particular standard.[13]

[47] In *Judge v Dempsey*[14] Osborne AJ found that there was an arguable claim that a duty of care was owed in respect of a producer statement to future purchasers. The producer statement concerned engineering work carried out by a firm of engineering consultants who had been involved in engineering calculations, structural plans, and monitoring the construction. Osborne AJ noted that the ability of a territorial authority or private certifier to rely on a producer statement in establishing compliance with the Building Code meant that the author of the producer statement makes an assessment that would otherwise be made by the certifier. His Honour determined that the question of whether the plaintiffs relied on the producer statement could not be justly undertaken in the context of the summary judgment application.

---

[12] *Pacific Independent Insurance Limited v Webber* HC Auckland, CIV-2009-404-4168, 24 November 2010.
[13] Above [41]-[43].
[14] *Judge v Dempsey* [2014] NZHC 2864.

[48] The following High Court decisions are relevant although they deal with liability arising from reports or opinions rather than producer statements.

[49] In *Lockie v North Shore City Council,*[15] Faire J considered a claim in respect of a pre-purchase report. The plaintiffs brought actions in negligence and in negligent mis-statement against the author of the report. Faire J noted that the essential ingredient relied upon was a failure to bring defects to the attention of the plaintiffs. The claim was that the report's author negligently misstated the condition of the property in making the statement he did. Faire J stated that the cause of action was of negligent misstatement and not negligence simpliciter and that the negligence action was misconceived and without merit.

[50] *Lockie* was distinguished in *Weaver v HML Nominees Ltd.*[16] *Weaver* concerned an application to strike out a claim in negligence based on a report assessing a proposed alternative solution. Smith AJ held that the report could give rise to actions both in negligence simpliciter and negligent misstatement. The decision in *Weaver* rested on a finding that the assessment made in the report was akin to design work in respect of which a duty of care is owed. His Honour found that the position of the company that issued the report was not sufficiently different from that of an architect or a person providing design advice, where duties of care are recognised, for the claim against it to be struck out on a pre-trial application. His Honour also recorded the evidence given of the Council's reliance on the author of the report because he was a well regarded and suitably qualified expert. Evidence was given that if the opinion had been provided by someone else within the company, it would likely not have been accepted (until the qualifications of the individual author had been established).[17]

[51] A claim in negligent misstatement in respect of the producer statements cannot succeed as there is no evidence of reliance by the Kwaks on them.[18] To have any chance of success, it is necessary for the Kwaks to frame the issue of Mr Park's producer statements as negligent actions rather than negligent mis-statements. Accordingly, in his submissions Mr Wood argues that the issuing of a producer statement is an aspect of building work and is not to be treated as a negligent misstatement. The difficulty with this argument is that the producer statements are indeed statements and relate to acts (the application of

---

[15] *Lockie v North Shore City Council* HC Auckland, CIV-2007-404-6546, 6 July 2011.
[16] *Weaver v HML Nominees Ltd* [2014] NZHC 2073.
[17] Above at [41]
[18] *Body Corporate 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 at [220].

waterproofing membranes) that are limitation barred having occurred 10 years prior to the claim being brought.

[52] Mr Wood seeks to draw support from the limitation provision s 393 of the Building Act 2004. Section 393(2) provides that proceedings relating to building work may not be brought after ten years from the date of any relevant act or omission. Section 393(3)(a) provides that, for the purposes of proceedings against a territorial authority, the date of the act or omission is the date of the issue of a consent, certificate or determination. Reading s 393 as a whole, it follows that the issue of a building consent or CCC is "building work" for the purpose of s 393.

[53] The purpose of s 393 is to make the provisions of the Limitation Act 1950 apply to civil proceedings arising from building work and to establish a ten year limit for bringing proceedings. The structure of s 393(2) and (3) is predicated on the basis that the acts of a territorial authority in issuing a CCC or a consent are "building work". It is well settled law that a duty of care to future purchasers is owed in respect of these acts.[19] It does not follow however that the statutory provision which ensures certification procedures are treated as "work" for the limitation provisions of s 393 renders Mr Park's producer statements "acts" or "work" upon which negligence claims can be founded rather than statements.

[54] The producer statement in question is a signed form. Its content is not akin to design work as in *Weaver* or the type of engineering certification considered in *Judge v Dempsey*. It is not established in law that a duty of care to future purchasers arises from the issue of a producer statement. As noted by Lang J, there is no general community reliance on such statements which are accepted at the discretion and following the exercise of judgement by territorial authorities and private certifiers. Section 393(3) of the Building Act is specific to the application of limitation provisions to the actions of territorial authorities. The producer statement was a negligent misstatement made to Ms McLaughlan.

[55] Even were I to find that a duty of care was owed by Mr Park to the Kwaks when signing the producer statement the issue of causation is problematic. Of the four producer statements only two are linked to defects. As discussed later, membrane related defects are a significant component of the damage but not the sole cause of damage.

[56] Having regard to the criteria identified by Gilbert J at [34] above, it was not reasonable for Ms McLaughlan to have relied on Mr Park's producer statements

[19] *Invercargill City Council v Hamlin* [1996] AC 624, [1996] 1 NZLR 513 (PC).

without further investigation. Presenting a form for signature without more, without enquiries or checks as to the accuracy or reasonableness of the content of the signed form does not pass responsibility for the loss caused by certifier negligence onto Mr Park. Mr Park caused loss to the Kwaks. However, he did so by developing and building a house with defects, proceedings in respect of which are limitation barred.

WHAT ARE THE DEFECTS CAUSING LEAKS AND DAMAGE?

[57] The claimants filed a witness statement by their expert, Richard Maiden who gave evidence at the hearing. Mr Maiden is a chartered surveyor, a registered quantity surveyor, a registered building surveyor and a member of the remediation panel of the New Zealand Institute of Building Surveyors. Mr Maiden undertook investigations at the claimants' home and annexed a building report to his brief. In his report Mr Maiden identified a number of construction defects at the house that had allowed moisture ingress and required remediation. These are:

(a) Wall cladding issues:

(1) Insufficient clearances between cladding and ground level.

(2) Minimal upstand at the apex of the main roof causing cracking on the eaves at roof level.

(3) Windows unsealed along sills.

(4) Cladding hard to the top of head flashings.

(b) Roof:

(1) The liquid applied membrane is poorly sealed.

(2) There is insufficient fall to the gutters to allow drainage.

(3) The membrane on the main upper roof has failed.

(c) Decks:

(1) The liquid applied membrane has failed.

(2) There is insufficient fall and drainage so water pools on the deck.

(d) Balustrades and parapets:

(1) There is insufficient fall to the tops of the balustrades and parapets.

(2) There is insufficient or non-existent waterproofing to the balustrades and parapets.

[58] Mr Maiden stated that the level of decay indicated that water is gaining access to the jamb of the window and running down the inside, ponding at the bottom of the framing and causing decay. The assessor, Stephen Ford also gave evidence at the hearing and his report on the defects at the house has been considered alongside Mr Maiden's report.

[59] No contrary evidence was filed by Mr Park. I accept that the defects at the property were those identified by Mr Maiden and Mr Ford. I further accept that these defects give rise to the need for a full re-clad of the house.

WAS THERE CONTRIBUTORY NEGLIGENCE ON THE PART OF THE KWAKS THAT CONTRIBUTED TO THEIR LOSS?

[60] Mr Park alleged that the Kwaks were partly responsible for the damage to the house because of their failure to properly maintain it and their failure to carry out recommendations in the Future Safe report.

[61] In his response and in his witness statements Mr Park identified three areas where he suggested that negligence on the part of the Kwaks contributed to their loss. These were their failure to add a slope to the parapets as recommended in the Future Safe report; their failure to have an experienced roofing professional carry out repairs to the roof as recommended in the Future Safe report; and, a failure to paint the house as part of the maintenance cycle.

[62] Mr Kwak confirmed that he did not carry out the suggestion in the Future Safe report that a slope be added to the parapets. The experts, Mr Maiden and Mr Ford, were asked whether this omission would have contributed to the damage to the house. Both Mr Ford and Mr Maiden expressed the view that the leaking through the flat-topped parapets would have commenced immediately upon construction and that therefore damage would have already been caused even if a slope had been added to the parapets after the purchase of the house by the Kwaks in July 2003. Mr Maiden expressed the view that the re-clad and replacement of timber would still have been required and that no additional damage could be attributed to the failure to adjust the parapets.

[63] As there is no evidence establishing that the failure to install sloped parapets caused additional damage, I find that this aspect of Mr Park's contributory negligence argument is not made out.

[64] The Future Safe report recorded that there was a small section of localised deterioration in the roof where the surface of the membrane had been penetrated. It was recommended that an experienced roofing contractor be engaged to carry out the required repairs. Mr Kwak gave evidence that rather than engaging a roofing contractor, he purchased a product from a hardware store and carried out the repairs himself relying on advice by the hardware store staff as to the application of the product.

[65] It was suggested by Mr Park that the Kwaks' failure to engage a professional to repair the roof resulted in unnecessary and additional damage. Neither Mr Ford nor Mr Maiden agreed. Mr Ford gave evidence that the widespread failure of the roof related to the basic failure of the substrate. He said that the repair of small patches would never have been enough and that the entire substrate needed to be lifted and reapplied. Mr Maiden concurred. There is no evidence that the failure of the Kwaks to engage roofing professionals to carry out the required spot repairs to the roof resulted in unnecessary or additional damage.

[66] Mr Kwak confirmed in evidence that he had not painted the house during the time he had owned it although he did describe other maintenance he had carried out. Neither Mr Ford nor Mr Maiden considered that the failure to paint the house had caused any additional or unnecessary damage. There is no evidence to support this aspect of the contributory negligence claim.

[67] After considering the evidence concerning the three issues raised by Mr Park I find that there was no contributory negligence on the part of the Kwaks that contributed to damage to the property.

WHAT IS THE QUANTUM OF THE DAMAGE?

[68] Mr Park was the builder and the developer of the house. The building work is limitation barred and I have found that Mr Park is not liable for the actions of the private certifier nor is he liable in negligence to the Kwaks for the producer statements. Mr Park is not liable for damages because of the limitation issues and the lack of liability. However, quantum was discussed at the hearing and I will determine the quantum that would have been awarded had Mr Park been found to be liable for all of the Kwaks' loss.

[69] The evidence concerning quantum consisted of an estimate for the remedial work prepared by Prendos New Zealand Limited, an estimate of costs prepared in 2012 by a quantity surveyor, R J Hughes, annexed to the assessor's report, and Mr Kwak's evidence about the consequential losses he and Mrs Kwak claimed.

[70] There were significant differences between the Prendos estimate that had been presented by Mr Maiden with his brief and the R J Hughes' estimate presented by the assessor, Mr Ford. Prior to the hearing, Mr Ford and Mr Maiden conferred regarding these differences and noted that errors had been made in respect of both estimates. At the hearing they presented a revised estimate which corrected these errors and with which they both agreed. This figure, which is the total of an itemised list distributed at the hearing, is $685,371.

[71] Mr Park was critical of the claimed cost of remedial work and stated that in his view, Asian contractors would do the work more cheaply. He presented no contrary evidence concerning quantum, however, and I accept the figure agreed to by Mr Maiden and Mr Ford represents the appropriate remedial cost.

[72] Consequential losses are claimed in the sum of $36,155.80. These represent the costs of temporary rental accommodation during the 28 week repair period, storage costs and insurance costs. The sum of $9,240 is claimed representing lost rental (28 weeks at $330) in respect of the lower level of the house. I disallow this claimed loss. Mr Park did not construct the house with an area that could be rented separately. I do not consider that this aspect of the consequential losses was reasonably foreseeable.

[73] Mr Kwak in his brief gave evidence about the stress that he and his family had experienced as a result of their ownership and occupancy of a leaky home. They have endured financial pressure and anxiety arising from the leaky home and will experience disruption in terms of the need to relocate for 28 weeks while the house is remediated. I accept that the usual award for damages should be followed in this case and general damages are set at $25,000.

Conclusion as to quantum

[74] The claim has been established to the amount of $737,286.80 which is calculated as follows:

Remedial work	$685.371.00
Consequential damages	$26,915.80
General damages	$25,000.00
TOTAL	$737,286.80

Conclusion and orders

[75] Prior to the hearing the Kwaks withdrew their claim against Ms McLaughlan in accordance with a settlement agreement they made with her that did not involve any payment. As there is no cross-claim against her she is removed as a respondent. Mr Park's wife, Duk Sun Lim, made a removal application shortly prior to the hearing. Following the completion of Mr Park's evidence, Mr Wood advised that he did not object to Ms Lim's removal. Ms Lim did not control or carry out any building work and neither did she sign the producer statements that were in issue at the hearing. I consider therefore that it is fair and appropriate in the circumstances to remove her as a respondent.

[76] The claim against Mr Park in respect of his work as a builder is limitation barred. I have found that as a developer he is not liable for the actions of Ms McLaughlan as the private certifier and that he is not liable in negligence for the issue of producer statements. Accordingly no damages are awarded.

DATED this 16th day of June 2015

_____

M Roche

Tribunal Member