

Claim No: 0677
Under the Weathertight Homes Resolution Services Act 2002
In the matter of an adjudication claim
Between **Hyun Hwa Jang**
Claimant
And **Kam Po Tse**
First respondent
And **Qixing Mo**
Second respondent
And **Deng Donglin**
Third respondent

**Determination
July 2006**

1. Index

1.	Index	1
2.	Summary	1
3.	The Adjudication Claim	2
4.	The Dwellinghouse	3
5.	The Claim	4
6.	Causation	5
7.	First Respondent – Kam Po Tse – Liability – Breach of Contract	6
8.	First Respondent – Kam Po Tse – Liability - Negligence	9
9.	Second Respondent – Qixing Mo - Liability	10
10.	Third Respondent – Deng Donglin - Liability	15
11.	Result	22

2. Summary

- 2.1 The claim is for \$130,358.25 for costs of repair to the dwelling at 16 Maidstone Place, Albany, which is leaking causing damage.
- 2.2 The claim against the first respondent succeeds first under his contractual obligation as builder to the claimant and the express warranty in the

agreement that works for which a building consent was required by law had been completed in accordance with that consent and that all obligations imposed under the Building Act 1991 were fully complied with. The work done or permitted to be done by the first respondent has not been completed in accordance with that consent and does not comply with the obligations under the Building Act 1991 and in respect of the performance standards in the Building Code.

2.3 Secondly, the extent of the involvement of the first respondent in responsibilities for building construction was such as to impose a duty of care on him to the claimant which he has breached.

2.4 The first respondent is liable to the claimant for the amount claimed.

2.5 There is insufficient evidence of the involvement of either the second or third respondents in the construction of the dwelling to impose a duty of care on them and no evidence of their negligence and the claim against them is dismissed.

2.6 No order for costs is made.

3. **The Adjudication Claim**

3.1 The claimant, Hyun Hwa Jang (**Ms Jang**), gave notice of adjudication dated 23 September 2005 under the Weathertight Homes Resolution Services Act 2002 (**the WHRS Act**) naming the first and second respondents and claiming \$130,358.25 costs for repair to the dwelling at 16 Maidstone Place, Albany, Auckland.

3.2 I was appointed the adjudicator under the WHRS Act in respect of the claim and conducted several conferences. I ordered the joinder of the third respondent in an order dated 2 December 2005.

3.3 I conducted a hearing of the claim commencing on 24 April 2006 attended by the claimant with her lawyer, Mr T W Kwon, the first, second and third respondents and the WHRS assessor. There were interpreters present for Chinese Mandarin, Chinese Cantonese and Korean. I continued the hearing on 26 April and then resumed on 12 May 2006. The reason for the latter was to give the respondents an opportunity to consider certain documents provided by the claimant in English and to call any further evidence or make submissions in respect thereof and because the claimant had indicated that the claim was to be increased, both matters which I referred to in Procedural Order No 5 dated 2 May 2006. Following the conclusion of the hearing on 12 May 2006 I gave the respondents until 1 June 2006 to provide any written submissions in reply to the submissions from the claimant and there have been submissions accordingly from the first and second respondents which I have taken carefully into account.

4. **The Dwellinghouse**

4.1 The dwellinghouse at 16 Maidstone Place, Albany, North Shore, was built between May and December 2000 with a code compliance certificate being issued on 20 February 2001 by an independent certifier, Approved Building Certifiers Limited (a company which is not a party to this adjudication claim and indeed which I think may be in liquidation).

4.2 It was purchased by the claimant, Ms Jang, with her husband Bang Duk Kyu (and Ms Jang was then named Bang Hyun Hwa) by agreement dated 15 August 2001 from the first respondent, Kam Po Tse.

4.3 Leaks were noticed to the dwellinghouse and in due course on 7 February 2003 a claim was made under the WHRS Act with this adjudication claim being then made on 29 September 2005. Ms Jang remains the owner of the dwellinghouse, she having separated from Mr Bang.

5. The Claim

- 5.1 The claim was for \$130,358.25 including GST. This was the amount assessed by the WHRS assessor in his report as being the likely cost of repairs based on a quantity surveying assessment. These repair works were for removal of decking, barge boards and cladding, removal of windows, removing the cladding and texture coating, demolition and removal of wall framing, replacement of windows, framing, membrane, tiling and cladding and the usual scaffolding, contingency etc sums.
- 5.2 The amount claimed was not disputed by any of the parties and I am taking it that it is accepted that those repair works are necessary and that that is the reasonable cost thereof.
- 5.3 At the hearing the assessor said that it was likely that costs had risen since that quantity surveying assessment was completed in November 2003 but he was unable to give any accurate indication of likely increase. On the basis of that the claimant applied to increase the claim. Following the part hearing on 24 April 2006 I indicated to the parties that the application to increase the claim would be dealt with at the resumed hearing and that there would need to be evidence of increase. At the resumed hearing Mr Kwon advised me that there was no evidence to be given. Although I indicated that I might consider an increase in the claim consistent with the cost of living increase, I have formed the view that, in fairness to the respondents, I cannot embark on that exercise in the absence of any information from the parties. A relevant factor may well be that the estimate of repair costs includes replacement "to a vent clad system", the use of H3 treated timber and tanalised plywood and redesign of the deck, barrier and drainage. In his final submissions Mr Tse questioned the quantum of repair costs on the basis that the claimant had moved into the house in August 2001 but the assessment was made in October 2003; and further questioned whether there was not some maintenance factor in the sum claimed for "wear and tear kind of damage during the two years of residence". The submissions also raise betterment issues in saying:

"Besides, as far as I know, some materials prohibited by the government at present were allowed for use in 2000."

Although this was in the context of some submission that responsibility may lie with those responsible for authorising the materials in question, it is also an allusion to betterment issues. I am satisfied on balance that any extra factor for betterment or the like is offset by the increased costs that will now be incurred. The fact that repairs may now cost more than when Ms Jang purchased in the first place is not something that I can hold against her. Had she expended the monies then there would have been interest factors to take into account.

6. **Causation**

6.1 The assessor's report identifies three causes of water entry:

6.1.1 Incorrect installation to the exterior wall cladding with a failure to provide control jointing moisture breaks at ground level and wall cladding penetration faults.

6.1.2 Waterproofing faults to the decking areas.

6.1.3 Some roof cladding detailing causing water leakage.

6.2 None of the respondents effectively challenged the assessor's views as to the cause of leaking to the dwelling or the damage caused. As I mention below, it was a question of roles played rather than questioning the merits of the claim or the amount claimed.

6.3 For some unexplained reason Mr Tse has sent as part of his closing submissions an air ticket receipt and flight itinerary for what appears to be a one way ticket from Auckland to Hong Kong but I do not see that affecting questions of liability for repairs.

7. First Respondent – Kam Po Tse – Liability – Breach of Contract

7.1 The claim against the first respondent, Kam Po Tse, is twofold. First, under contract as the vendor of the dwellinghouse to Ms Jang and secondly as the developer, it being alleged that he has been negligent in his failure to exercise the duty of care as developer/owner/head contractor/builder.

7.2 The contract between Ms Jang and Mr Tse dated 15 August 2001 for sale of the dwellinghouse included as clause 6.2(5):

"The vendor warrants and undertakes that at the giving and taking of possession:

...

- (5) Where the vendor has done or caused or permitted to be done on the property any works for which a permit or building consent was required by law:
- (a) the required permit or consent was obtained;
 - (b) the works were completed in accordance with that permit or consent;
 - (c) where appropriate, a code compliance certificate was issued for those works; and
 - (d) all obligations imposed under the Building Act 1991 were fully complied with."

7.3 The claim relies first on the last obligation set out above, that is relies on the warranty that all obligations imposed under the Building Act 1991 were fully complied with. It is claimed that Mr Tse did cause work to be done to the property which required a building consent, namely the construction of the dwellinghouse, and that the warranty that the obligations imposed under the Building Act 1991 were fully complied with has been breached. There is no doubt that he did cause that work to be done and he acknowledges that he had the dwelling built for him.

7.4 The requirements of the Building Act 1991 were that a building constructed needed to meet the performance standards in the Building Code which is in the schedule to the Building Regulations 1992. These included clause E2 which read:

"Functional Requirement

E2.2 Buildings shall be constructed to provide adequate resistance to penetration by, and the 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."

7.5 The evidence presented for the claimant, particularly in the report of the WHRS assessor, confirms that the building did not meet that building performance standard. The WHRS assessor carried out his investigations which included invasive drillings and moisture meter readings and found that there had been a failure to fit the external wall cladding to the manufacturer's specifications. He found that there was a requirement for a 50mm clearance around the bottom edges between the finished paving or ground levels and that this had not been met. He found that there were no control joints fitted to the cladding system with evidence of cracking joint lines in part. He found that the parapet detailing around the deck barrier walls did not show to have been finished properly with insufficient drainage angle and some cracking joint lines showing. He found that the wall cladding had not been fitted correctly around the door and window head flashings. His report referred to the concealed gutter and metal fascia system showing fault issues. There were a number of serious water leakage and decay faults associated with the deck areas. There was water leakage occurring through the garage ceiling. There were no spreaders to the floor downpipe drainpipes discharging into the mid-roof sections. He found the causes of water entry as I have outlined above. His report is comprehensive. I am satisfied on the basis of it that there has not been compliance with the functional requirements of the Building Code as mentioned above.

7.6 Mr Tse did not really challenge those findings or present any evidence to counter them.

- 7.7 The thrust of Mr Tse's response to the claim was to draw attention to other persons responsible. He said that he had been involved in the building of the house only for a few days but did some gardening and fence work to try to save money. He worked in with Mr Donglin Deng, the third respondent. The person who did the major part of the building was a person named either Yam Cheng Man and Yan Cheng Man. Although he had a telephone number for that person he had been unable to trace him and suspected he had returned to China.
- 7.8 Mr Tse said that he arranged for this person to do the work and that he found his name in the newspaper. There seems to have been little enquiry about the building qualifications or experience but Mr Tse said that he asked Mr Yan to do the work legally.
- 7.9 In his closing submissions Mr Tse referred first to his reasons for buying the property and then in turn for selling and he denied that he was a property developer. Secondly, he questioned why he should undertake responsibilities for the construction when there was no "five-year Master Builder guarantee in the purchase and sale contract". That seems to completely ignore the obligations in clause 6 to which I have referred. Thirdly, he questioned the quantum of repair costs as I have mentioned above. Fourthly, he raised questions about any entitlement that he may have to compensation from the Government for any payment he may make for repairs to the dwellinghouse; and this is not a question for me to answer. Finally he mentioned how stressful this has been to him and his mother who has returned to Hong Kong asking whether he was entitled to compensation. This is not a question for me to answer. This case is about his liability to Ms Jang and that is what I have to determine.
- 7.10 Nothing in his closing submissions denies that he was the vendor of the property to Ms Jang or that the dwelling did not comply with the performance requirements of the Building Code at the time of sale.

7.11 I have therefore concluded that he has breached the warranty in the agreement for sale and purchase to Ms Jang and is liable to her for that breach.

7.12 That liability is the reasonable cost of repairs. Mr Tse has not challenged those in any significant way. I have dealt with those above. I find that he is liable to Ms Jang for breach of contract in the sum claimed, \$130,358.25.

8. **First Respondent – Kam Po Tse – Liability - Negligence**

8.1 There is the further claim against Mr Tse in negligence which I now deal with.

8.2 It is claimed that as the developer or builder of the dwellinghouse, Mr Tse owed a duty of care to Ms Jang and he has been negligent in the discharge of that duty by virtue of the defects identified in the assessor's report and to which I have briefly referred. Reliance is placed on such cases as WHRS claim 119, *McQuade v Young & Ors*, Determination 26/4/04; and *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 and I certainly accept that on the authority of those cases and others there is a duty of care owed by the builder of a dwellinghouse.

8.3 Mr Tse denied that he was a property developer and in his closing submissions gave his reasons for having bought and then sold the subject dwelling.

8.4 I have outlined above his role in finding the builder.

8.5 There was certainly also evidence of his involvement with Mr Deng, the third respondent, to which I shall refer in more detail shortly. There was no direct evidence of Mr Tse having actually done construction work and indeed he said that his "hands on" work was limited to gardening and landscaping. Although there is no evidence for me to find that Mr Tse did

not actually do the work himself, there is adequate evidence, in my view, that he took responsibility for the construction. He found Mr Yan and appears to have undertaken responsibility for choosing him to carry out the construction. He personally, or at least in conjunction with Mr Deng, arranged for the plans to be completed by the designer and for the obtaining of the necessary building consent. He arranged for payments to be made to Mr Yan and Mr Deng. Contractors may have been employed by Mr Yan but it appears they were paid from money supplied by Mr Tse. Certainly that would have been required to be done because he was the owner having the job completed.

- 8.6 I have formed the view that Mr Tse was responsible for the building of the dwellinghouse sufficiently to impose on him a duty of care. It may be that that duty of care is no greater than the contractual obligation he had under the agreement for sale and purchase to which I have referred and which I have found that he has breached. The authorities certainly impose a duty of care owed by a developer to subsequent purchasers of the property.
- 8.7 On the evidence as presented I find that there was a duty of care owed by Mr Tse to Ms Jang; that he has breached that duty by employing persons to carry out the construction of the dwelling in ways which do not comply with the performance standards of the Building Code and that he was negligent in so doing.
- 8.8 I find that Mr Tse is liable to Ms Jang in negligence and the extent of that liability is the amount claimed, \$130,358.25.

9. **Second Respondent – Qixing Mo - Liability**

- 9.1 Mr Mo was named in the Notice of Adjudication in an alleged capacity as "Builder (Main Contractor), Designer/Architect".

- 9.2 Throughout the adjudication Mr Mo has strenuously denied any involvement in construction. He applied to be struck out as a respondent on that ground which I declined.
- 9.3 The claim against him was articulated at the hearing as being as "joint head contractor/builder/designer" which again Mr Mo strenuously denied.
- 9.4 There is some evidence which implicates Mr Mo to the subject property at 16 Maidstone Place, Albany, and that was alluded to in the Procedural Orders I made when I declined to strike him out.
- 9.5 Mr Mo owned number 14 Maidstone Place and he produced as exhibit B the agreement for sale and purchase dated 22 November 1999 under which he purchased that property (Lot 19 DP 192523) from Wistill Resources Limited. He says that as owner of Lot 19 (number 14) he was asked to consent to the proposed construction of the dwelling at number 16 (Lot 16 DP 110520) because of certain non-complying features of the structure. His consent is endorsed on a plan drawn for the proposed dwelling on Lot 16 as being the "neighbour's consent for height to boundary" issues and he acknowledged that that was his signature. He said that that was his only involvement in the development and construction and he has no liability to the claimant.
- 9.6 Against this, however, there are some factors which appear to implicate him.
- 9.6.1 In the same plan, showing the proposed dwelling for Lot 16 DP 110520, there are the words:

"Proposed Dwelling
For Mr Mo
Lot 16 DP 110520
Maidstone
Browns Bay"

That, of course, is in direct conflict with the endorsement by Mr Mo as a neighbour giving consent.

- 9.6.2 On that same plan the "Neighbour's consent" signed by Mr Mo actually describes him as:

"I, QiXing Mo, owner of Lot 16 ..."

That description is also in conflict insofar as the plan is for the proposed dwelling on Lot 16 and therefore any description of a neighbour's consent as coming from the owner of Lot 16 would be wrong.

- 9.6.3 The application for building consent to the North Shore City Council dated 11 February 2000 shows the applicant as Mr Mo. This refers to number 16 Maidstone Road. However Mr Mo denied that he ever gave instructions for that application to be made in his name. It was made by a person named Anna North of Approved Building Certifiers Limited purportedly as agent for the applicant and Mr Mo says that that person never had authority from him to make application in that way because he, Mr Mo, was never the owner of number 16. The form is also incorrect in that, where it first described the property as Lot 16 DP 110520 that has been corrected by someone to refer to Lot 16 DP 192523 (apparently wrongly).

- 9.6.4 The Project Information Memorandum no A15474 from North Shore City Council in relation to the application for building consent refers to Mr Mo as the Applicant but, of course, that simply follows from the information that was on the form.

- 9.6.5 A producer statement from one John B Chapman in relation to the dwelling which certifies aspects relating to construction refers to Mr Mo as the owner but again I expect that came from information

already wrongly on the file in relation either to the building consent application or the plans.

9.6.6 In a document obtained by the claimant from J B Chapman Limited, Consulting Engineers, dated 7 February 2000 and referring to Lot 16 Maidstone Street there is reference to 73 pages of calculations and 12 pages of detail. The document is addressed to Mr Mo at 2/641 Richardson Road, Mt Roskill. It refers by job number to "Deng 003" and the designer as "D & M" which Mr Wong argued could be construed as a reference to Mr Deng and Mr Mo. Apparently there were no other documents obtained from J B Chapman Limited. I am not prepared to assume that the reference to "D & M" is a reference to Mr Deng or Mr Mo. Certainly the document is addressed to Mr Mo and refers to the project being a new house at Lot 16 which is number 16 but I was not given any other detail as to what the consulting engineers did or on what authority or instruction.

9.7 In the documents presented by the claimant at the hearing there are other Council documents relating to number 16 Maidstone Place. These in fact show the applicant for resource consent as the third respondent, Mr Deng, and include as "Affected Person's Approval" approval from Mr Mo stated to be the owner or occupier of Lot 19, 14 Maidstone Place. Also produced was a plan of "proposed dwelling for Mr Deng Lot 21 DP 110520 Maidstone Place Browns Bay" which had endorsed on it the consent of Mr Mo as owner of Lot 19. When asked whether that was his signature he said he could not remember.

9.8 There is no doubt that the Council records are significantly inaccurate. There is first the obvious illogicality of the neighbour's consent by the owner of Lot 16 being given for a proposed dwelling on Lot 16. There is no correlation between the documents filed showing Mr Mo as the applicant and the title to Lot 16 which has never shown him as the owner. I cannot comment on the Council processes in relation to checking the authenticity

of consents to resource applications, boundary/height restrictions and the like, but certainly there are some significant inconsistencies in this case.

- 9.9 Mr Mo was examined at length about the fact that he is not at any time shown as being an owner of Lot 19 (number 14) which was transferred from Wistill Resources Limited to Lam Hiu Fai and Deng Donglin (the third respondent) on 26 September 2000. However Mr Mo explained that he had bought the property on builder's terms which did not require immediate payment of the price and therefore transfer of the property to him and it was during that interim period that he signed the consent form as neighbour but that in due course he reached agreement with Ms Lam and Mr Deng that Lot 19 should be transferred direct to them. I accept that evidence.
- 9.10 There was evidence from Ms Jang's mother, Young Soon Jun, who said that she had seen Mr & Mrs Mo along with Mr Deng when they were building an adjoining home at number 12 Maidstone Place. That was denied by Mr Mo who challenged the identification evidence on the grounds that he and his wife always wore glasses until October 2003 when he and his wife went to China for corrective surgery and he produced passport photographs and an account to substantiate this. Mrs Jun's evidence was unclear as to whether the persons she saw (and she referred also to Mrs Mo) wore glasses.
- 9.11 It is the case for the claimants that there was collaboration between certain persons in respect of the houses built between 2000 and 2001 and numbers 12, 14 and 16 Maidstone Place, Albany. Certainly Mr Mo knew Mr Deng having first met him in 1999 after he had arrived in New Zealand earlier that year. Mr Mo signed up to buy number 14 (Lot 19) in November 1999 and that was on builder's terms. Mr Deng by Deed of Nomination dated 31 May 2000 nominated Ms Lam and Mr Deng as purchasers under that agreement and they accepted that nomination.

9.12 Looking carefully at all the evidence there has been and taking into account the references to Mr Mo in documents concerning Lot 16, I have nevertheless come to the conclusion that Mr Mo was not involved in the construction of the claimant's dwelling, at least to any extent which might impose any obligation to her in respect of matters for which she now claims. There was no contract that he had with her. There is no real evidence that he was involved in the construction of the dwelling and there is no evidence that would lead to his having owed her a duty of care. He has adamantly denied throughout that he had any such involvement in the construction.

9.13 I dismiss the claim against him and find he has no liability to the claimant.

9.14 In his documents he referred to compensation for the stress that this has caused him. I am in no position to award that. The only consideration I could have would be for costs but I decline any order for costs on his behalf. This is first because I am not aware of his having incurred cost other than loss of time and the like and secondly, and perhaps more importantly, the grounds for costs under s43 of the WHRS Act are not made out where I would have to find that he has incurred costs unnecessarily by bad faith on the part of the claimant or other parties or allegations that are without substantial merit. The allegations against him did have merit at the time they were made and it was necessary, as I have alluded in Procedural Orders, to inquire fully into the matter before understanding the true position.

10. **Third Respondent – Deng Donglin - Liability**

10.1 The initial adjudication claim did not name the third respondent, Mr Deng, as a party and he was subsequently added as a respondent on the application of the claimant for the reasons I set out in Procedural Order No 3 referring to certain information that was then available to this adjudication claim.

- 10.2 At the hearing it was claimed that Mr Deng was "builder/designer" of the dwellinghouse and also the "head contractor or project manager".
- 10.3 It is claimed for the claimant that Mr Deng was integrally involved in the construction of three houses on Lots 21, 19 and 16 which are numbers 12, 14 and 16 Maidstone Place, Albany. It is claimed that Mr Deng "took care of" all these works including employing subcontractors and purchase of tools and material.
- 10.4 Mr Deng's position has been throughout that he purchased number 14 from Mr Mo as described above and then had the same builder build the house on number 14 as built the house on number 16 for Mr Tse. He named that person in his response as Mr Changman Ren and that name appears similar to the name given by Mr Tse as his builder on number 16.
- 10.5 Mr Deng has denied having any design involvement in number 16. As to the entry on the J B Chapman Limited page addressed to Mr Mo referred to at paragraph 9.6.6 above to the job being "Deng 003" for Lot 16 (number 16), he says that he suspects Mr Changman Ren listed the job under his name. He speculated in his response that the reference to designer "D & M" may have been a reference to the ownership of Lot 14 which had been Mr Mo and then became Mr Deng. That does not reconcile with the fact that the document refers to Lot 16. Unfortunately that document on its own does not really establish a lot, particularly in the absence of other evidence from the consulting engineers or as to the totality of the work they were doing and for whom.
- 10.6 Mr Bolderson, the WHRS assessor, said in evidence that the issues arising in this case were construction issues and not design issues. He said there were some design features because this was a high risk area but ultimately it was for the builder to ensure that the dwelling was built best to eliminate risks. He confirmed that his report made no criticism of design issues and did not mention the designer as a person who should be a party to this claim.

- 10.7 I was given no evidence that there were design issues arising in this claim and I do not need to consider further any allegation that Mr Deng has a liability as the designer of the house even if there were evidence that he was such (and there was no such compelling evidence in any event).
- 10.8 I turn then to his alleged role as builder, head contractor or project manager for the building works.
- 10.9 The starting point must be that the owner was Mr Tse, the first respondent, and he employed a person to build the home apparently named Yam Cheng Man or Yan Cheng Man (or, in Mr Deng's response, named Changman Ren).
- 10.10 It was argued for the claimant that the three homes at numbers 12, 14 and 16 Maidstone Place were significantly similar in appearance.
- 10.11 Number 14 Maidstone Place (Lot 19) had been purchased by Mr Mo under builder's terms that I mentioned and then on-sold by him to Ms Lam and Mr Deng. Ms Lam bought number 12 (Lot 21) and this was transferred to her on 26 September 2000, the same day as the transfer of number 14 to her and Mr Deng.
- 10.12 Ms Jang (then with her husband) bought number 16 from Mr Tse under agreement dated 15 August 2001 which provided for possession on 24 August 2001. She said at that time the house at number 14 (owned by Ms Lam and Mr Deng – Lot 19) had already been built but the home at number 12 was still in the course of construction and Mr Deng was building it.
- 10.13 She said that there was a leak from the ceiling to her property at number 16 and she asked Mr Deng to have a look at it and to fix it and that he worked for three days doing so. Ms Jang said that Mr Deng tore the veranda apart because of leaks, waterproofed it and painted and tiled it.

She said that he worked alone but she could not recall specifically whether he was using a hammer. Mr Deng conceded that he did work there but said this was because he was unable to locate Mr Ren, the builder, and Mr Tse had asked him to find someone to do the repairs. He said that he arranged a tiler to do the tiling work. He said that this was all the assistance he gave to Mr Tse whom he knew and should not be regarded as any concession by him that he was the builder of number 16 or involved in that building. Ms Jang said that she had not seen Mr Deng again after the house at number 12 was built.

- 10.14 When asked exactly what work she saw Mr Deng doing at number 12 Ms Jang conceded that she did not know exactly because she was at work by day and was relying on what her mother had said to her.
- 10.15 Ms Jang's mother, Mrs Jun, gave evidence saying that she lived with her daughter at number 16 Maidstone Place and had done so since arriving in New Zealand in August 2001. She confirmed that Mr Deng had carried out the repair work when it was leaking. She said that she saw him building the home at number 12 and the repair work at number 16 was done from time to time during the time he was doing the work at number 12. She described the work as "carrying things" and "doing things inside" but I had no clear picture of the detail of what she saw him doing or was able to confirm what he was doing at number 12.
- 10.16 Additionally there were issues concerning the involvement of Mr Mo to which I have referred. On balance I have decided that the evidence of Mrs Jun was not significantly helpful to me as to Mr Deng's involvement at number 12 and certainly as to any involvement in the construction of number 16 which is the subject of this claim.
- 10.17 Evidence was given from a Mr Geoffrey C Brand who had obtained a Baycorp Advantage Consumer Credit Check in the name of Donglin Deng and produced this which confirmed credit from Placemakers Wairau Park on 20 November 2000 and Carters Auckland Regional Office on 12

September 2000. Mr Brand said he made enquiries of those companies and learned that Mr Donglin Deng had bought \$2,000.00 worth of power tools and "a substantial amount of house building materials ... using Orient Housing as a company name". That evidence is, of course, hear-say but I am, as an adjudicator under the WHRS Act, entitled to take into account to the extent it helps me. Mr Deng's response to this was that \$2,000.00 worth of tools was not enough to build a house and the materials were within a few thousand dollars which would not nearly go to the cost of building the dwelling either. He said the tools were for gardening and landscaping.

- 10.18 I heard a significant amount of evidence about Mr Deng's involvement and alleged involvement in number 16 Maidstone Place. There is no doubt that he had been acquainted for some time with Mr Tse. Mr Deng came to New Zealand at the end of 1996. In 1998 or 1999 he went to Unitech to study but because his English was not good enough he could not continue. At that stage he was a delivery man for a fast food outlet and he was studying carpentry.
- 10.19 In 1999 he was on a vacation trip to the South Island and Mr Tse and Ms Lam were also on the same trip.
- 10.20 After Mr Tse sold property in Hong Kong and moved to New Zealand he asked Mr Deng to help him to find a property and in due course number 16 Maidstone Place was found. Mr Deng, of course, had interest in the adjoining properties.
- 10.21 Mr Tse then asked Mr Deng to help him with the construction of the dwelling at number 16. It was the evidence of both of them that it was Mr Tse who found Mr Ren as the builder. There is some conflicting evidence about design. As I have said, the JB Chapman Limited document dated 7 February 2000 referring to Lot 16 (number 16) does refer to "Job No DENG003" which I was invited to construe as being the third of at least three jobs done by JB Chapman Limited for Mr Deng. That document is

addressed to Mr Mo but at 2/641 Richardson Road, Mt Roskill, which was apparently Mr Deng's address at the time. As I have said, design issues are apparently not relevant in this case and so the question of the identity of the designer of the house at number 16 and/or involvement of Mr Deng in design issues is of limited relevance.

- 10.22 As to construction, the evidence was again vague. Apparently funds were paid from Mr Tse's resources to Mr Ren and/or subcontractors and this was variably either direct through Mr Ren or direct to subcontractors or indeed even through Mr Deng. Mr Tse said that he paid Mr Deng some \$200,000.00 as the cost to complete the house but there was also varying evidence from him about that. Mr Tse said that he paid Mr Deng nothing for the help that Mr Deng gave.
- 10.23 Mr Deng was questioned about a North Shore City Council application for water supply connection in respect of number 14 Maidstone Place which showed his name as "builder" but he was not certain that he signed it and in any event it relates to a different property.
- 10.24 Having weighed up all the evidence I have heard I have formed the view that Mr Deng's involvement in the construction at number 16 was relatively minimal. He was unqualified to be a builder at the time. He was not the owner of the property. The builder who in fact carried out the work was found by Mr Tse and paid by him. It was that builder (Mr Ren) who took responsibility for documentary formalities and completion of forms (and this may have involved insertion of detail or signatures without authority – I am not quite sure). There was no evidence that Mr Deng found or supervised subcontractors. This may have been done by Mr Ren but there was no evidence about that. There was no evidence about Mr Ren's qualification or experience and apparently neither Mr Tse nor Mr Deng made any inquiry of him about this. While Mr Deng may have returned to the property in the context of the remedial work mentioned, that seems reasonably explained by his having been at number 12 at the time and being a friend of Mr Tse and having helped him with the construction; and I

do not think that of itself is sufficient evidence of a significant involvement in the original construction by Mr Deng.

- 10.25 The basis on which the claim against him was advanced on behalf of the claimant was that he was the builder of the house in control of the management of the construction and therefore owed a duty of care to future owners to build in accordance with the building permit and relevant Building Code and bylaws and reliance was placed on WHRS claim 119 *McQuade v Young & Ors*, Determination 26/4/04; *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234; *Bowen v Paramount Builders (Hamilton) Ltd & Anor* [1977] 1 NZLR 394; and WHRS claim 134 *Kelleway v Insar & Ors*, Determination 29/9/03.
- 10.26 Those authorities and others to which they also refer make it clear that there needs to be more involvement in the construction for a builder to have this duty of care than I have found to be the case with Mr Deng. For example, in *McQuade* the evidence was that Mrs Young, the owner while the majority of construction work was carried out, was in control of the building after the transfer of the property. While employed as a motelier at the time and found not to have been "physically ... involved with the construction", it was found that she "organised everything to do with the development from having revised drawings prepared, contacting the local authority and organising all parts of the contract and subcontractors"; and on the basis of which she was found to be in effect the main contractor.
- 10.27 That is far from the case here in respect of Mr Deng. The principal involvement I find in the construction lay with Mr Tse on the one hand but, perhaps more importantly, Mr Ren on the other.
- 10.28 Accordingly I find that there is no liability on the part of the third respondent, Deng Donglin.

11. **Result**

- 11.1 The claim against the first respondent, Mr Kam Po Tse, succeeds and I **ORDER** that he pay the claimant, Hyun Hwa Jang, the sum of \$130,358.25.
- 11.2 The claim against the second and third respondents, Qixing Mo and Deng Donglin, fails and I make no order against them.
- 11.3 As to costs for the claimant, the ground for costs under s 43 is only if I find that one party has incurred costs unnecessarily by bad faith on the part of the other party or by allegations which do not have substantial merit. In the case of Mr Tse I have formed the view that there is no evidence of bad faith. Likewise I do not think it a case where the position he has taken is without substantial merit. Certainly there is an element of naïvety about his position in this claim and his exposure to liability. On the other hand there have been other issues affecting other respondents which have formed the major part of the allegations and claims made and taken the major part of the hearing time and therefore costs. In all the circumstances I do not make any order for costs against the first respondent, Mr Tse, in favour of the claimant, Ms Jang.
- 11.4 Questions of costs to the other respondents effectively do not arise because they have represented themselves but in any event I have formed the view that there is no basis for any order for costs against the claimant, Ms Jang, in favour of either the second or third respondents, Mr Mo or Mr Deng.

DATED at Auckland this day of July 2006

David M Carden
Adjudicator