IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2012-100-000011
[2013] NZWHT AUCKLAND 28

BETWEEN	JOO-YUN KIM AND AE-KYUNG KIM Claimants
AND	AUCKLAND COUNCIL First Respondent
AND	SHUET MUI FOO Second Respondent
AND	DAVID MOORE Third Respondent
AND	STEPHEN O'LEARY Fourth Respondent
AND	PETER YAU Fifth Respondent
AND	BRANZ LIMITED Sixth Respondent

Hearing: 14, 15 and 29 August 2013

Appearances: Mr C McLean, counsel for the first respondent
Mr J Duckworth, counsel for the fourth respondent
Mr D Wilson, counsel for the fifth respondent

Decision: 27 November 2013

FINAL DETERMINATION
Adjudicator: P J Andrew

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INTRODUCTION

[1] Mr and Mrs Kim's house at 32 Middlefield Drive, East Tamaki, Auckland, was built in 2001-2002. There were substantial defects in the original construction that have caused significant moisture ingress and damage. A full re-clad of the house is now required.

[2] At a mediation in April 2013, Mr and Mrs Kim settled their claims against the Auckland Council, the first respondent. Pursuant to the settlement agreement, Mr and Mrs Kim subrogated to the Council their full entitlement to recover damages from the other respondents.

[3] The Council paid to Mr and Mrs Kim $245,000 in settlement. Pursuant to its right of subrogation, the Council, standing in the shoes of Mr and Mrs Kim, now sues Mr O'Leary, the fourth respondent and Mr Peter Yau, the fifth respondent, in negligence for a total sum of $290,088. Mr O'Leary was the labour-only builder of the house. The Council claims that Mr Peter Yau was a developer and/or project manager.

[4] The Council does not contest its liability and consents to the entry of judgment against it, in Mr and Mrs Kim's favour, in the sum of $290,088. Mr O'Leary and Mr Yau both dispute their liability and challenge the quantum of the proposed remedial works.

[5] The issues for my determination are:-

a) Was Mr Peter Yau a developer of Mr and Mrs Kim's dwellinghouse and thus liable on a non-delegable basis for defects in the construction?
b) Alternatively, did Mr Peter Yau act as a project manager who personally owed and breached a duty of care to Mr and Mrs Kim, causing damage?
c) Does Mr O'Leary's bankruptcy for the period May 2002 until May 2005 absolve him from any liability to Mr and Mrs Kim?
d) What is the quantum of damages that Mr and Mrs Kim have proven?
e) What orders for contribution, as amongst the liable respondents, should the Tribunal make pursuant to s 72 of the

Weathertight Homes Resolution Services Act 2006 (the 2006 Act)?

FACTUAL BACKGROUND

[6] The property at Middlefield Drive was purchased by Shuet Mui Foo, the second respondent, in June 2001. Shuet Mui Foo is the wife of Mr Peter Yau. The house was built during the following ten months and then immediately sold by Shuet Mui Foo to Tye Gyegong Yun on 15 April 2002.

[7] Mr Yau commissioned Mr David Moore, the third respondent, to prepare and draft plans for the house. Mr Yau engaged Mr O'Leary as the labour-only builder to erect the timber framing, install the Hardibacker and the windows, including the head and sill flashings. Mr O'Leary had previously built at least two other houses for the Yau family. This included the family home at 11 Maldon Court, Dannemora, East Auckland. Mr Yau also engaged all the other sub-contractors, including the plasterer, the roofer, and the drainlayer, Mr Morete. Mr Yau also made all the orders and arrangements for the purchase and delivery of the construction materials.

[8] During the inspection process, the Council building inspector raised an issue with Mr Yau about the cladding clearance at ground level. Mr Yau contacted Mr Moore, who in turn made contact with BRANZ Ltd, the sixth respondent, to develop and recommend a cut and sealant solution. A code compliance certificate (CCC) was subsequently issued by the Council.

[9] Mr and Mrs Kim purchased the property in April 2003. In approximately 2007 they noticed that there was extensive cracking of the cladding (stucco plaster over Hardibacker). Both elevations were repaired but not successfully.

[10] In September 2011 Mr and Mrs Kim applied to DBH for an assessor's report. In an eligibility report dated October 2011, the WHRS assessor, Mr Young, concluded that the house had systemic weather tightness deficiencies on all four elevations. In a follow up report of December 2011, Mr Young recommended that all external walls be fully re-clad.

[11] In addition to Mr and Mrs Kim settling their claim against the Council at mediation in April 2013, they entered into a "side-agreement" with another respondent. Under this "side-agreement", the claimants were paid an additional $75,000. All parties accept that the side-agreement sum of $75,000 must be taken into account in calculating the quantum.

The Weathertight Defects and Damage

[12] Expert evidence was given at the hearing on the issue of the defects in construction causative of moisture ingress and damage. The two experts called were the WHRS assessor, Mr Young and Mr Simon Paykel, registered building surveyor and witness for the Council.

[13] There has been no serious challenge to the evidence of the two experts who are essentially in agreement as to the causes of the leaks and the need for a full re-clad to repair the resultant damage.

[14] I am satisfied that the evidence establishes that the house has the following defects that have allowed moisture to ingress and caused damage:

a) Unsealed gap between the sill flashing ends and the cladding.
b) Cladding brought down to the finished ground level.
c) Unsealed jamb\cladding junctions (no jamb flashings installed).
d) Unsealed cladding\electrical meter box junction.
e) Poorly constructed roof\wall junctions: inadequate provision to divert water to the exterior face of the cladding at the apron flashing ends.
f) No sill flashing installed in places.
g) Unsealed joinery head flashing end\cladding junction.
h) No visible vertical or horizontal control joints.

[15] In his report, the WHRS assessor concluded that there was no damp proof course, being an impenetrable waterproof layer that should sit between the bottom of the framing and the top of the concrete. In his evidence, Mr O'Leary was adamant that a DPC had been installed. In its closing submissions, the Council accepted that the DPC issue "was not resolved". It suggested there may have been sections of the house with a DPC or that the DPC was a non-plastic variety that had degraded. In the circumstances, it is not necessary for me to resolve this issue.

ISSUE ONE – WAS MR YAU A DEVELOPER?

[16] The Council contends that Mr Yau was the developer who owed Mr and Mrs Kim a non-delegable duty of care to ensure that the house was built with proper skill and care. That duty was breached because the house was built with the defects described at paragraph [14] above. In this context non-delegable means a duty that cannot be avoided by delegation to an independent contractor.[1]

The Relevant Law

[17] The Building Act 2004, although not definitive, gives some useful guidance as to the definition of a "residential property developer". For the purposes of that Act, a residential property developer is defined in s 7 as:

> A person, who in trade, does any of the following things in relation to a household unit for the purpose of selling the household unit:
> a) builds a household unit; or
> b) arranges for the household unit to be built; or
> c) acquires the household unit from the person who built it or arrange for it to be built.

[18] A helpful definition of a developer can also be found in *Body Corporate No 188273 v Leuschke Group Architects Ltd,*[2] which reads as follows:

> The developer, I accept there can be more than one, is the party sitting at the centre and directing the project, invariably for its own financial benefit. It is the entity which decides on and engages the builder and any professional advisors. It is responsible for the implementation and completion of the development process. It has the power to make all important decisions. Policy demands that the developer owes actionable duties to owners of the buildings it develops.

[1] *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).
[2] *Body Corporate No 188273 v Leuschke Group Architects Ltd* (2007) 8 NZCPR 914 (HC) at [32].

[19] Harrison J also observed that the word developer is not a "term of art or a label of ready identification" unlike a local authority, a builder, architect or engineer. He regarded the term as:[3]

> A loose description, applied to the legal entity which, by virtue of its ownership of the property and control of the consent, design, and construction, approval and marketing process qualifies for the imposition of liability in appropriate circumstances.

[20] It is the function carried out by a person or entity that gives rise to the reasons for imposing a duty of care on the developer. Whether someone is called a site manager, project manager, or a developer does not matter. The duty is attached to the function in the development process and not the description of a person.

[21] In *Body Corporate 187820 v Auckland City Council*[4] Doogue AJ concluded that there are two essential conditions that give rise to a non-delegable duty of care imposed on a developer. These are:

a) direct involvement or control of the building process, for example by way of planning, supervising, or directing the work and;
b) the developer being in the business of constructing dwellings for other people for profit.

[22] In both *Keven Investments Limited v Montgomery*[5] and *Brichris Holdings Ltd v Auckland Council*[6] the High Court emphasised the essential business element of the definition of developer, namely the requirement that the person be in the business of having a building or buildings constructed for the primary purpose of sale to other people. Miller J *in Brichris Holdings Limited* referred to the need to define the term developer with care:

> It does not include those who build a home, or have one built, hoping to profit from rent or capital appreciation over time. *It*

[3] See n 2 above at [31].
[4] *Body Corporate 187820 v Auckland City Council* (2005) 6 NZCPR 536 (HC).
[5] *Keven Investments Limited v Montgomery* [2012] NZHC 1596, [2013] NZAR 113.
[6] *Brichris Holdings Limited v Auckland Council* [2012] NZHC 2089.

does include those who build homes, or have them built, in trade and for the purpose of sale.[7]

The Case for the Council

[23] The Council contends that Mr Yau was at the centre of and directing the construction of the house for his own, and his wife's, financial benefit. Mr Yau engaged Mr Moore as the designer and Mr O'Leary as the builder. He also engaged all of the other subcontractors including the roofer, waterproofer, the plasterer, the drainlayer, the engineer, the electrician and the plumber. Mr Yau was the chief contact point for all correspondence in dealing with the Council and completed the application for building consent.

[24] In contending that the land was purchased and the house constructed for the primary purpose of sale, the Council places particular emphasis on the chronological sequence of events from the time the property was purchased by Shuet Mui Foo in June 2001 and then sold less than ten months later, in April 2002. The plans were commissioned by Mr Yau in May 2001 prior to the settlement of the sale to Shuet Mui Foo. Likewise, the building consent was applied for prior to that settlement. An agreement for sale and purchase of the property was entered into by Shuet Mui Foo, as vendor, and Tyae Gyeong Yun as purchaser, in January or February 2001, well before the CCC issued on 26 February 2002.

[25] Mr Yau was an auditor for a bank in Hong Kong before he and his wife, Shuet Mui Foo, emigrated to New Zealand in 1989. He has now retired, but from 1990 until 2011, Mr Yau worked for Ponsonby Real Estate, Howick, as a real estate agent. The Council produced evidence of what it says is a history of Mr Yau real estate agent, buying sections and building dwellings and then selling them. Based on the following table, the Council says that there is a pattern of Mr Yau buying land and constructing houses ostensibly for family members and then arranging to sell them shortly afterwards, for a profit. Mr O'Leary was engaged as a builder and Mr Moore as the designer, in relation to a number of these houses. By the time Middlefield Drive was developed Mr Yau had considerable experience with developments and was able to arrange a very swift purchase construction and sale sequence.

[7] See n 6 above at [43].

	The Property	Registered Proprietors	Date of Purchase	Date of Sale
1	6 Henderson Place	Mr Peter Yau	1989	Still owned by Mr Peter Yau
2	13 Parramatta Place, Botany Downs, Auckland	Shuet Mui Foo (wife)	September 1989	December 1994
3	Simmental Crescent, Sommerville, South Auckland	Mr Peter Yau	September 1991	Still owned by Mr Peter Yau
4	11 Maldon Court ,Dannemora (the family home)	Both Mr Peter Yau and Shuet Mui Foo (i.e. husband and wife).	April 1997	Still owned by Mr Peter Yau and Shuet Mui Foo
5	Fortunes Road, Half Moon Bay, Auckland	Mr Peter Yau	November 1998	February 2004
6	10 Navan Place, Dannemora, Auckland	Mr Gilbert Yau (son)	December 1999	April 2001
7	**32 Middlefield Drive**	**Shuet Mui Foo**	**June 2001**	**April 2002**
8	20 Killeen Place, Flatbush, Auckland	Shuet Mui Foo (wife)	July 2002	October 2003
9	13 Donegal Park Drive, Flatbush, Auckland	Mr Gilbert Yau (son)	July 2002	September 2003

The Case for Mr Yau

[26] Mr Yau contends that the facts in this case could not possibly satisfy the business element of the definition of a developer. It was always the intention of he and his wife that the Middlefield Road property would be their family home. Title to the property was only ever held in the name of the wife. If it had become their family home then the legal ownership may have been altered by relationship property and equity considerations.

[27] In his evidence, Mr Yau explained that in 2000 his wife had money made available to her from her family in Hong Kong. As a result, they wished to move from Maldon Court to a new home. To achieve this, his wife purchased in her name the property at Middlefield Drive.

[28] When the house was nearing completion, they tried to sell their home at Maldon Court and they had it on the market for quite a long time. They then found themselves stuck with owning two substantial homes and did not want this to continue. Accordingly, they decided to put the new house at Middlefield Drive on the market as well. The new house also cost more than they had expected so they also experienced some financial pressure. The house at Middlefield Drive sold first, resulting in their staying at Maldon Court as their family home.

[29] In his evidence Mr Yau also sought to explain the purchase and sale of other properties referred to by the Council. In 2002 his wife purchased the section at 20 Killeen Place, Flatbush. She did so because relatives of hers were coming to New Zealand and it was arranged between Shuet Mui Foo and the relatives that she would buy the property and then on-sell it to the relatives. However, the relatives decided to go to Australia, so Shuet Mui Foo then sold the property.

[30] Both the Navan Place and Donegal Park properties were owned by their son, Mr Gilbert Yau. Navan Place was intended to be the son's home. Donegal Drive was the section which Gilbert Yau purchased and resold.

[31] Both Shuet Mui Foo and Mr Gilbert Yau, also gave evidence. Shuet Mui Foo gave the same explanation as Mr Peter Yau about building the house at Middlefield Drive to be their family home. She also said that Maldon Court was put on the market when Middlefield Drive was nearing completion. Mr Gilbert Yau also stated that the house at Maldon Court remained on the market for a considerable period, but that it did not sell. He confirmed the evidence of his parents that it was their intention for Middlefield Drive to be their family home.

[32] Mr Gilbert Yau explained how the house at Navan Place was to be the family home for him and his wife. However, he and his then girlfriend both relocated back to Hong Kong and have remained there ever since. He bought the section at Donegal Park and sold it just over a year later. He did this because his mother was hopeful that he and his wife would return to New Zealand and have a family here.

[33] Further evidence was given on Mr Yau's behalf by Mr Stephen Leong, Manager of Ponsonby Real Estate, where Mr Yau had been employed as a real estate agent for some 11 years. Mr Leong said that the property at Maldon Court was on the market for more than three months. He recalls the Middlefield Drive property also being listed for sale and says he went to look at the house while it was being built. Mr Yau and his wife were, according to Mr Leong, building a new home for themselves to live in. Ponsonby Real Estate has not retained any documentary records about either listing.

Analysis

[34] There is no doubt that Mr Yau played a significant and key role in the creation of the dwellinghouse at Middlefield Drive and its subsequent sale. Mr Yau commissioned the designer, the builder and the other sub trades, ordered all the building materials and played a pivotal role in the general organisational and administrative tasks required to erect a house (e.g. applying for the building consent and calling for inspections etc). He attended the building site virtually every day to attend to many of these tasks and to participate in important decisions about construction.

[35] In terms of the definition of "residential property developer" in s 7 of the Building Act 2004, he "arranged" for the household unit to be built. This is essentially another way of saying that he had direct involvement in the building process thus satisfying the first element of the definition referred to by the High Court in *Body Corporate 187820 v Auckland City Council*.[8] I accept that Mr Yau was very reliant on the expertise of Mr O'Leary, as the builder, and the other sub-trades but without the planning, directing, organisation and decision making of Mr Yau, this house would never have been built.

[36] The crucial issue, as the parties have identified, is whether the Council has established the essential business element of the definition of a developer – i.e. did Mr Yau and Shuet Mui Foo, intend to build this house for the purpose of sale to others. In addressing this issue it is also necessary to

[8] See n 4 above.

consider the relevance and the effect of the title being held in the sole name of Shuet Mui Foo.

[37] There is no single piece of evidence that is determinative of this issue. Rather, it is necessary to consider all of the evidence in total and its cumulative effect. It is important to recall that the Council carries the burden of proof to the civil standard of the balance of probabilities. In assessing the intention of Mr Yau and his wife of more than ten years ago (i.e. did they intend to build the house for the purposes of sale) it is also important to focus on the chronological sequence of events and the dates that can be ascertained from the documentary record.

[38] I conclude that the Council has established that Mr Yau and his wife Shuet Mui Foo had the house constructed for the primary purpose of selling it for a profit. The essential business element of the definition of a developer has thus been satisfied. It is the cumulative effect of the following factors that give rise to this finding:

a) The section was bought, the house constructed and then sold to a third party (Tyae Gyeong Yun) within a space of eight to ten months. Mr Yau, who was the person conducting the purchase negotiations for the sale to his wife, had house plans drawn up before the title was transferred to his wife on 19 June 2001. The payment of the deposit for the sale by Shuet Mui Foo to the third party was paid to Shuet Mui Foo's solicitors on 27 February 2002, indicating that the house was put on the market for sale well before the CCC issued on 26 March 2002. The Council records, including the field inspection cards, indicate that at the time the house was placed on the market, there remained some outstanding compliance issues, including the issue of cladding to ground clearances. The whole process of construction and sale was concluded swiftly. Against that background, the explanations put forward by Mr Yau I find to be implausible. The contentions by Mr Yau that they had tried to sell Maldon Court when Middlefield Drive was nearing completion and they had Maldon Court on the market for quite a long time and when it did not sell, they put Middlefield Drive

on the market, is quite inconsistent with the time line apparent from the documentary records.

b) The claim by Mr Yau that he and his wife were under some financial pressure and couldn't keep both houses is also implausible. There was no mortgage registered against Middlefield Drive, Maldon Court or Navan Place and Mr Yau was gainfully employed at the time as a real estate agent. Mr Yau's own evidence and that of his wife was that his wife had her own independent means. Mr Gilbert Yau (the registered proprietor of Navan Place) was a trainee accountant at the time but it was apparently not necessary for him to take out a mortgage. Both Donegal Park Drive and Killeen Place were purchased not so long after the sale of Middlefield Drive (i.e. less than six months later) and at the time Mr and Mrs Yau continued to own and live at Maldon Court. Neither Killeen Place nor Donegal Park Drive had mortgages registered against their title. Mr Wilson submitted that the family have reasonably significant assets but are by no means wealthy. However, the evidence here clearly suggests that the Yau family had a comfortable level of wealth such that they were in no way under any financial pressure at the time of the sale of Middlefield Drive.

c) If it was intended that Middlefield Drive be the family home, it is surprising that the title was held in Shuet Mui Foo's name only. Title to Maldon Court which was and still is the family home, is held in both names.

d) The history of the purchase and sale of other properties by members of Mr Yau's family, all of which more than likely involved Mr Yau as the real estate agent, tend to suggest that at least some of the other properties were also bought for the purposes of on-selling for profit. This includes the properties at Navan Place, Killeen Place and Donegal Park Drive. Killeen Place and Donegal Park Drive never had houses built on them at the time Yau family members owned them and at no stage did Mr Gilbert Yau live in the house at Navan Place. Killeen

Place and Donegal Park Drive were both transferred to members of the Yau family on the same day from the same vendor, Donegal Residential Limited. Killeen Place was transferred to, Shuet Mui Foo and Donegal Park Drive to Mr Gilbert Yau. The Donegal Park Drive and Killeen Place sections are located close to each other; the roads intersect. Both properties were sold by Shuet Mui Foo and Mr Gilbert Yau at a similar time, less than 18 months after their purchase. Mr Gilbert Yau, who held title to Donegal Park Drive, had returned to Hong Kong approximately two years before that property was purchased. The explanations given by Mr Yau and Mr Gilbert Yau about the reasons for purchasing Killeen Place and Donegal Park Drive, I do not find to be persuasive.

e) The evidence in relation to Navan Place, where Mr Yau was again actively involved in organising construction and where many of the same subcontractors were engaged, supports the conclusion that the title to these various other properties being held in the name of other family members (Middlefield Drive, Navan Place, Killeen Place and Donegal Park Drive) was a deliberate ploy or device to enable Mr Yau to act as the real estate agent in relation to the various sales. As Mr Stephen Leong, real estate agent explained, had the property been owned by Mr Yau, then that fact would have needed to have been brought to the purchaser's attention and certain protocols followed. In my view, it is more than likely that Mr Yau had a direct financial interest in the development and sale of these properties.

f) The current owner of the property at Navan Place, Mr Dassanayake gave evidence of his dealings with Mr Yau as the real estate agent and how Mr Yau returned to site after the sale to attend to some boundary and drainage issues. Mr Dassanayake, who I found to be credible witness, said that Mr Yau had told him that the Navan Place property had been built for an ex-patriot coming from Hong Kong but that the ex-patriot had subsequently decided not to migrate to New Zealand.

That was of course untrue since the property was in fact owned by Mr Gilbert Yau, who had been living in New Zealand.

g) Mr Dassanayake said that he became upset with Mr Yau, when on one occasion post-sale, Mr Yau returned to Navan Place and began to move what Mr Dassanayake and his family had understood to be the boundary line with the neighbouring property. At that time Mr Yau told Mr Dassanayake that he, Mr Yau, had been involved with lots of developments and that he was the person to fix the boundary line. As a result of this incident and Mr Yau's involvement in addressing the drainage issue and promising to address other matters, Mr Dassanayake became suspicious that Mr Yau was not just a real estate agent who had sold him the property but someone who had had a far greater involvement with its construction than had been disclosed. Mr Dassanayake says that the builder of the house subsequently told him that Mr Yau was the owner and developer of their house but asked Mr Dassanayake not to tell Mr Yau that he, the builder, had told him about this. In evidence Mr Yau accepted that he was on site during construction of Navan Place at least four days per week. He engaged virtually the same contractors, including Mr O'Leary and the plasterer, that he subsequently used to build Middlefield Drive. Mr Gilbert Yau, was working full time at that stage and was unable to do this.

h) Mr Yau used Mr O'Leary and the same other subcontractors, including the designer, Mr Moore, to construct the houses at Maldon Court and Navan Place. Both Maldon Court and Navan Place were built prior to Middlefield Drive. Mr Yau had essentially developed a successful template for an efficient construction process, in which on-selling the Middlefield Drive property for profit was likely to have been a viable and attractive proposition. As a real estate agent and former auditor, Mr Yau was well placed to make this assessment.

i) Mr O'Leary said in evidence that at no time did he discuss with Mr Yau the purpose for which the house was being built. If it

was intended to become Mr Yau's home, it is very surprising that he and Mr Yau did not speak about this. By the time of the construction of Middlefield Drive, Mr Yau and Mr O'Leary were friends and had worked together on a number of projects.

j) The evidence given by Mr Gilbert Yau and Mr Stephen Leong, both of whom supported Mr Yau's claim that he and his wife intended Middlefield Drive to be the family home, was not persuasive. Neither witness was or is independent (one being the son, the other his friend and former employer). In my view Mr Gilbert Yau exaggerated the extent to which he and his wife made decisions about the construction of the house at Navan Place and sought to downplay the role of his father, Mr Yau. Mr Leong claimed that he recalls Mr Yau and his wife wanting to sell Maldon Court because they wanted to downsize, after the children had left home. However, I note that Middlefield Drive is a substantial two storey house with a gross floor area of 330 square metres and Mr Yau and his wife still live at Maldon Court today, long after the children have left home. Furthermore, no documentary evidence was provided in support of the claim that Maldon Court had been on the market for sale in 2001-2002. Shuet Mui Foo also gave evidence. She too claimed that the house at Middlefield Drive was constructed for the purposes of living in it as the family home. However for reasons given above, I find that evidence not to be plausible.

k) The Council made enquiries in an attempt to obtain copies of the bank accounts of Mr Peter Yau and Shuet Mui Foo. A letter was sent to Mr Yau's solicitors on 12 June 2003. Mr Yau's solicitors responded by letter dated 14 June 2013 advising that getting the accounts would be costly. The Council's solicitors sent a reply email on the same day and a further email on 8 August 2013. The Council's solicitors noted that they would recommend that the Council pay for the cost of obtaining the bank records. However, there was no reply to the emails sent on 14 June and 8 August 2013. I accept the submissions of the Council that the bank account records might

> have shed some light on the issue of the financial position of Mr Yau and his wife and what happened to the proceeds of the sale of Middlefield Drive. In the circumstances the Council submits an adverse inference can be drawn that Mr Yau did not want the records to be disclosed because they might assist the Council in proving its case against him. While this is not in itself a decisive factor or deserving of any particular weight, it is nevertheless one of the matters to be added into the assessment of whether the Council has discharged the burden of proof of establishing that Mr Yau is a developer.

[39] In concluding that Mr Yau was a developer because he was sitting at the centre of and directing the project for his own financial benefit, it does not matter, in my view, that he was not the registered proprietor of the property. Mr Yau and his wife have been married for more than 25 years. Shuet Mui Foo speaks very little English and for the whole of her married life has not worked outside of the home. Mr Yau has been the sole breadwinner. Mr Yau was a pivotal figure in bringing about the construction of the house, and in the circumstances, it would be artificial to conclude that he had no financial interest in it, including any element of profit. Even if the funds used to purchase the section and finance the construction of the house had come from Mr Yau's father in-law (as he claimed) and his wife had a separate bank account, Mr Yau and his wife were an inseparable unit, and both must have had a substantial and direct financial interest in the property and the construction project.[9]

[40] To treat them separately in this case, would lead to the absurd result that there was no developer; Shuet Mui Foo would not be a developer because she played no role at all in the project and Mr Yau would not be a developer because he was not a registered proprietor and the monies used for the development came from his wife's father. In any event, as I have concluded above, the decision to have the title held in the name of Shuet Mui Foo only, was essentially a device used to make is easier for Mr Yau to be the real estate agent in selling the property.

[9] Shuet Mui Foo was originally named as the respondent in the proceedings. The claim against her was discontinued after the settlement by the Council, and pursuant to its rights of subrogation.

[41] In *Spargo v Franklin,*[10] the High Court held that the element of "ownership of the property" as a key element in the definition of developer[11] does not necessarily equate with being the registered proprietor of the property. However, on the facts, Potter J held that the Spargos were not co-developers together with the company Mayfair Court Limited, because at no time did they have any interest in the property. The Spargos never had "ownership" of the property "as contemplated by the definition of developer in *Leuschke*".

[42] In *Body Corporate 185960 v North Shore City Council*[12] the High Court rejected the contention that the limited liability company Kilham Mews Limited, as the registered proprietor, was the sole developer. As a bare trustee under the terms of the joint venture, the company had a very limited role in the development. Mr Gailer, a director of the company, was, in his personal capacity one of the developers. He was an active participant in a joint venture which had as its purpose, the development of the building at Kilham Mews.

[43] In my view, the facts in this case are quite different from *Spargo* and more akin to the situation in *Body Corporate 185960 v North Shore City Council*. (Although I accept that the finding of a "bare trustee" is not directly on point and was a finding which turned on an analysis of the terms of the joint venture agreement). Here Mr Yau undertook responsibility and control for key aspects of the development. This was done with the express consent of the registered proprietor, his wife Shuet Mui Foo, who was in no position herself to have carried out any these roles. The imposition of liability on Mr Yau as a developer in these circumstances is in my view entirely consistent with the policy rationale for imposing a duty of care in the terms that it is imposed.[13]

The Liability of Mr Yau as a Developer

[44] I conclude that Mr Yau was the developer, and as such owed Mr and Mrs Kim a non-delegable duty of care. I also conclude that he is liable for the negligence of the builder, Mr O'Leary and the other sub contractors,

[10] *Spargo v Franklin* HC Tauranga, CIV-2010-470-91, 9 November 2011.
[11] See n 2 above.
[12] *Body Corporate 185960 v North Shore City Council* HC Auckland, CIV-2006-004-3535, 22 December 2008.
[13] See n 5 above.

in the creation of the weathertight defects described at paragraph [14] above. The undisputed evidence of Mr Paykel and the assessor provide a sound basis to concluding that those other parties were negligent, as contended, and that their negligence was causative of Mr and Mrs Kim's loss.

[45] It follows from this finding and evidence of Mr Paykel and the assessor, that Mr Yau is liable for the full extent of the proven quantum. The issue of quantum is addressed below.

ISSUE TWO – IS MR YAU LIABLE AS A PROJECT MANAGER?

[46] While it is not strictly necessary for me to make a finding on whether Mr Yau is liable as a project manager, it may be helpful if I do so at this juncture.

[47] In addressing this issue, it is important not to focus too much on the label "project manager" but rather to enquire into the particular responsibilities attached to Mr Yau's role in construction, the acts and omissions he personally carried out and whether these were causative of any damage/loss. The liability the law imposes on a contractor, architect or engineer is not the same as the liability imposed on developers who owe non-delegable duties of care. In *Leuschke*,[14] Harrison J identified the cornerstone of liability as being the assumption of a degree of personal responsibility for an item of work which has subsequently proved to be defective and causative of damage. Someone who takes on the role of project manager of a residential construction project assumes a degree of responsibility for ensuring the work is performed with reasonable skill and care.[15]

[48] I have already found that Mr Yau was very reliant on the expertise of Mr O'Leary and the other sub contractors that he engaged. At the time of the construction of Middlefield Drive (which occurred after Navan Place and Maldon Court, also built by Mr O'Leary for and on behalf of Mr Yau) Mr Yau would have gained an increased understanding of the construction process but he still did not have, nor did he apply, any particular building knowledge

[14] See n 2 above.
[15] See n 12 above.

or expertise. I accept that he participated in decisions about aspects of construction (for example to have decorative bands) but this would always have been in consultation with the experts upon whom he remained reliant throughout construction.

[49] I find that at no stage did Mr Yau assume responsibility or control for any competence or quality in the design and/or building work carried out by others. His role was more one of administration and organisation rather than overseeing the quality of construction. As noted above, this was a pivotal role in terms of the overall development but it did not extend to overseeing competence or quality. Mr Yau was not in a position to check the work of others in any but a superficial sense.

[50] I accept that Mr Yau may have been involved in decisions with Mr O'Leary about the coordination of sub contractors on site but again it was likely he was reliant on Mr O'Leary's expertise. There is similarly no evidence to suggest that any of the contractors, including Mr O'Leary, were expecting or relying upon Mr Yau to control, supervise or check their work for compliance with the regulatory requirements.

[51] Against that background, I now turn to consider the allegations the Council makes in support of its contention that Mr Yau has liability as a project manager. The Council alleges that Mr Yau was negligent as a project manager because he:

a) Engaged and instructed the contractors.
b) Was responsible for dealing with the Council.
c) Was on-site daily or almost daily.
d) Provided incorrect design details or design instructions during construction.
e) Was in control on-site and gave incorrect instructions.
f) Was responsible for the ordering of materials and there was a lack of materials supplied to trades during construction.
g) Was responsible for the sequencing of the contractors.
h) Gave instructions to contractors to plaster an inadequate substrate.

i) Gave instructions to contractors in conflict with the plans; and

j) Gave inadequate instructions to contractors at the final stages of construction.

[52] Factors (b) and (c) above do not give rise to a duty of care and provide no basis for imposing liability on Mr Yau as a project manager. As to factor (a), I accept that Mr Yau selected, and engaged and paid the sub-contractors but apart from providing them with the plans, did not instruct or direct their work in any material way. The subcontractors worked quite independently with no real oversight or control by Mr Yau who was very much reliant on their expertise.

[53] As to (d), (f) and (i), I accept that the 6mm overhang requirement (i.e. the overhang to the framing that extends beyond the concrete slab all the way around its perimeter) was not detailed on the plans, not installed and was a special requirement in the Hardibacker technical literature, that should have been followed. However, Mr Yau did not undertake any active responsibility or control for ensuring compliance with these types of requirements. He ordered the pre-cut framing (which should have had the 6mm overhang) and provided Mr Moore with a basic sketch of his general requirements, but in my view he very much relied on Mr Moore and Smith Timber Limited (for whom Mr Moore worked) for technical guidance and expertise.

[54] I also accept that the cladding was installed down to the ground[16] and that this was more than likely the work of the plasterer who Mr Yau engaged. A capillary gap should have been created in accordance with the Hardibacker technical literature, but was not. Again, however, I do not accept that Mr Yau undertook any active responsibility for this work, whether by way of specific instruction to the plasterer or supervising or checking on his work. The evidence falls short of establishing the necessary element of responsibility or control to support the finding of a duty of care.

[55] The Council has submitted that the circumstances surrounding the failure to install a L flashing, which would have set the level of the Hardibacker sheet, are an example of how Mr Yau, as project manager, had

[16] The defect referred to at paragraph [14](b) above.

overall control of the site. In his evidence, Mr O'Leary said that he had recommended to Mr Yau that a L flashing be installed but that Mr Yau had ignored this advice and decided that such a flashing was not required. Mr Yau disputed the evidence of Mr O'Leary and was emphatic that Mr O'Leary had never made any such suggestion to him.

[56] I find that the evidence on the issue of the L flashing is too equivocal and remote in time (the events are now more than ten years ago) for me to reach any reliable finding as to exactly what occurred and whether Mr Yau rejected an express recommendation from Mr O'Leary. There was no documentary record in relation to this issue. I did not find the evidence of either witness on this issue to be reliable and in my view the Council has not proven Mr Yau had responsibility for the decision not to use a L flashing.

[57] In its closing submissions the Council has sought to link Mr Yau "specifically" with virtually all of the defects referred to at paragraph [14] above. It argues for example, that he failed to order jamb flashings, horizontal control joints and was responsible for a change in the design to install decorative plaster bands around the windows on one elevation. However, I conclude that in each case the Council has failed to prove that Mr Yau had a sufficient degree of responsibility for and/or control over these matters to establish that he either owed a duty of care and/or that his breach of such duty was causative of loss. The extent of Mr Yau's involvement in each of the specific items the Council relies upon, was peripheral as Mr Yau was at all times reliant on the expertise of others. His role was far more one of overall organisation and administration.

[58] I likewise reject the contention (factor (g) at paragraph [51] above) that Mr Yau was responsible for the sequencing of the contractors and that incorrect sequencing gave rise to defects in construction. Again, in my view Mr Yau never undertook any responsibility for or control of sequencing. He was reliant on Mr O'Leary and when Mr O'Leary left the site, he trusted the other subcontractors, such as the plasterer and drainlayer. He may have been a go-between to some extent but the reality is that sequencing became an issue because no one was in overall charge. In this regard, it may be that the most relevant fault that can be attributed to Mr Yau was his failure to engage a project manager to ensure that there was an appropriate degree of quality control, including sequencing. However, the Council never sought to

argue its case on that basis and at no stage during the testing of the evidence did the Council put its case in that way to Mr Yau for him to respond. In response to a question from myself, Mr Yau said that he had never been advised by anyone to employ a project manager but beyond that, no relevant evidence was given on any omission by Mr Yau to engage a project manager.

[59] The claim that Mr Yau owed and breached duties of care as a project manager is dismissed. That claim is not proven.

ISSUE THREE – THE LIABILITY OF MR O'LEARY – The effect of his bankruptcy

[60] There has been no serious challenge by Mr O'Leary to the contention that his negligence has given rise to the need for a full reclad to Mr and Mrs Kim's house. Mr O'Leary was a labour-only builder but he has, correctly, in my view, not sought to argue that such factor means that he cannot be liable to Mr and Mrs Kim.

[61] Having regard to the evidence of Mr Paykel and the assessor, I am satisfied that Mr O'Leary is responsible for defects (c), (d), (f) and (h) (i.e. no vertical control joints) referred to at paragraph [14] above. In his evidence, Mr O'Leary accepted that he did not install jamb flashings. Mr Paykel was of the view that joinery flashing defects have given rise to the need to reclad all four elevations. The cause of action in negligence against Mr O'Leary is made out.

[62] The critical issue, so Mr O'Leary argues, is the effect of his bankruptcy.

[63] Mr O'Leary was bankrupt between May 2002 and May 2005. The key question is whether that bankruptcy had the effect of extinguishing liability he might have because any liability was a provable debt that was known or had accrued at the date of bankruptcy. Sections 87 and 114 of the Insolvency Act 1967 (which applied at the time) operate to release a bankrupt from any liability for debts provable in the bankruptcy. Provable debts are defined under s 87 as follows:

> ... all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the time of his adjudication, or to which he becomes subject before his discharge by reason of any obligation incurred before the time of his adjudication, shall be debts provable in bankruptcy.

[64] In *Chapman v Weathertight Homes Tribunal*[17] the High Court held that there are two relevant policy factors that inform the interpretation of s 87(1):

a) The need to discharge a bankrupt from existing debts in order for him or her to make a fresh start to economic life and;

b) A creditor must have sufficient knowledge that facts exist which could justify the issue of proceedings. The Court held that if a claim has not accrued at the time of adjudication (or before discharge, if based on a pre-adjudication obligation); there is no debt or liability for which the putative creditor can prove under s 87(1). In those circumstances ss 87 and 114 do not operate to release the bankrupt from liability.

[65] *Chapman* was a leaky home case. Although the relevant negligent work was carried out by Mr Chapman in 1998, the cause of action against him had not accrued by the time he was discharged from bankruptcy. In addressing the issue of the timing of the accrual of the cause of action the Court referred to seminal decision *Invercargill City Council v Hamlin*[18] which held that the cause of action accrues when the cracks become so bad, or the defects so obvious, that any reasonable homeowner would call in an expert.

[66] Because, on the claimants' pleading, the cracks in the cladding of the building were not discovered until 2005, after Mr Chapman was discharged from bankruptcy, the Court upheld the Tribunal's decision refusing to release him from the proceedings because of the application of the Insolvency Act 1967.

[17] *Chapman v Weathertight Homes Tribunal* [2012] NZHC 1377.
[18] *Invercargill City Council v Hamlin* [1996] 1 NZLR 513(PC).

[67] In their affidavits, Mr and Mrs Kim, said that they discovered some cracks in their home in 2007. At that time they engaged a builder to repair the cracks. This is consistent with what they told the assessor when he visited the property in 2011 for the purposes of preparing his eligibility report. There was no challenge at the hearing to the evidence of Mr and Mrs Kim either from Mr O'Leary or any other party.

[68] On the basis of the Kims' evidence, I conclude that the Kims' cause of action did not accrue until after Mr O'Leary was discharged from bankruptcy in May 2005. As at May 2005 the defects were not so bad or so obvious that any reasonable homeowner would have called in an expert. The Kims' evidence suggests that they were careful and responsible homeowners. When they discovered the cracks they sought to repair them. There is no basis for concluding that the cause of action accrued before 2007.

[69] It follows from these findings that ss 87 and 114 of the Insolvency Act 1967 do not operate to release Mr O'Leary from liability in this case. His liability was not a provable debt in his bankruptcy and accordingly he has no defence.

[70] Therefore I conclude that Mr O'Leary is liable in negligence to the claimants for the full extent of the proven quantum.

ISSUE FOUR - QUANTUM

[71] The Council, suing on the basis of subrogated claims, seeks a total sum of $290,089 from Mr O'Leary and Mr Yau.

[72] In reliance on the evidence of Mr Hanlon, quantity surveyor, it contends that the estimated remedial quantum is $407,100. Mr Hanlon, who was originally the expert witness for the claimants, was called by the Council to give evidence at the hearing. In his evidence, Mr Hanlon recognised that a sum of $69,000 should be allowed for betterment, thus reducing the remedial quantum to $320,000. The figure of $290,089 is calculated as follows:

Estimated remedial quantum	$320,000.00
Consequential losses	$20,089.00
General damages	$25,000.00
Sub-total	$365,089.00
***Less* $75,000 for side agreement**	
TOTAL	**$290,089.00**

[73] In addition to Mr Hanlon, the assessor, Mr Young, gave evidence on the issue of quantum. The assessor is also a qualified quantity surveyor. Mr Young's estimated cost of repairs was $295,365.04 calculated as follows:

Current damage (incl GST)	$260,680.91
Remedial costs for works already undertaken	$28,000.00
Remedial costs for likely future damage	$6,684.13
TOTAL estimated cost of repairs (incl GST)	**$295,365.04**

[74] The Council's evidence on the issue of quantum was not satisfactory. The Council originally instructed Mr James White, as its expert quantity surveyor. Mr White assisted the Council at the mediation that led to the settlement with the claimants. Mr White did not give evidence before me; instead, and presumably as part of the settlement agreement, Mr Hanlon did. At no stage was a brief of evidence from Mr White ever provided to Mr Yau although at some stage it may have been served, together with other documents, on counsel for Mr O'Leary. The issue of non-disclosure of this evidence was raised by Mr Wilson at the hearing on behalf of Mr Yau, but Mr Wilson ultimately did not seek a ruling from the Tribunal on this issue. Mr Wilson's position is the Tribunal should proceed on the basis that a quantum of $245,000 has been established (i.e. the figure paid by the Council to the claimants).

[75] Mr Hanlon's evidence was that the estimated remedial costs were $407,000 but in order to negotiate a settlement, certain items were conceded to reach a lower figure. Mr Hanlon accepted that there was a substantial difference between his estimate and that of the assessor. He indicated as a result of post-mediation discussions with Mr White, the range between him and Mr White had been reduced from $338,767 at the high end

and $305,761 at the low end. Mr McLean on behalf of the Council advised that the quantum figure sought of $320,000 is in the middle of this range.

[76] In the circumstances, and in particular, given the lack of information about the calculation of the quantum figure that Mr White favours, I prefer the evidence of the assessor, the independent Tribunal witness, Mr Young. He is both a building surveyor and a quantity surveyor. The evidence of Mr Hanlon on the issue of the significant discrepancy between his figure and that of the assessor, was not persuasive. I thus find that the estimated cost of repairs is $295,365.04 being the quantum figure contended for by Mr Young.

[77] The claimants have also proven the consequential losses claimed and established a basis for an award of general damages. I find that they should be awarded $25,000 general damages for the stress and inconvenience associated with having a leaky home. The claimants have thus proven a total quantum figure of $265,454.04 calculated as follows:

Total estimated cost of repairs	$295,365.04
Consequential losses	$20,089.00
General damages	$25,000.00
Sub total	$340,454.04
Subtract for side agreement	*$75,000.00*
TOTAL	**$265,454.04**

ISSUE FIVE - WHAT CONTRIBUTION SHOULD EACH OF THE LIABLE PARTIES PAY?

[78] Section 72(2) of the Weathertight Homes Resolution Services Act 2006 provides that the Tribunal can determine any liability to any other respondent and remedies in relation to any liability determined. In addition, section 90(1) enables the Tribunal to make any order that a court of competent jurisdiction could make in relation to a claim in accordance with the law.

[79] Under section 17 of the Law Reform Act 1936 any tortfeasor is entitled to claim a contribution from any other tortfeasor in respect of the amount to which it would otherwise be liable.

[80] Section 17(2) of the Law Reform Act 1936 sets out the approach to be taken. In *Findlay v Auckland City Council*[19] Ellis J held that apportionment is not a mathematical exercise but a matter of judgement, proportion and balance. Having regard to the respective roles of respondents, and the nature of the defects, I set the contributions for the total quantum figure of $265,454.04 as follows:

a) The Auckland Council, the first respondent – 20 per cent
b) Mr Stephen O'Leary, the fourth respondent – 30 per cent
c) Mr Peter Yau, the developer, the fifth respondent – 50 per cent

[81] Mr Yau developed the house for the primary purpose of sale and profit. He was in the business of risk. He engaged a labour-only builder and not a project manager. A lack of overall quality control was a major factor in the weathertight defects found in this dwellinghouse. In my view, Mr Yau should bear a substantial proportion of responsibility for the overall quantum claimed.

[82] Mr O'Leary was a labour-only builder and not responsible for all of the defects. I accept, however, that the defects for which he is responsible, did cause the need for a full reclad. His contribution should be less of that of Mr Yau but greater than that of the Council.

[83] As to the Council, a contribution of 20 per cent is consistent with the High Court decisions *Dicks v Hobson Swan Construction Limited*[20] and *Body Corporate 160361 v Auckland City Council.*[21]

CONCLUSION AND ORDERS

[84] The claim by Mr and Mrs Kim, the claimants, is proven to the extent of $265,454.04. This is calculated as follows:

[19] *Findlay v Auckland City Council* HC Auckland, CIV-2009-404-6497, 16 September 2010 at [87].
[20] *Dicks v Hobson Swan Construction Limited (In Liq)* HC Auckland, CIV-2004-404-1065, 22 December 2006.
[21] *Body Corporate 160361 v Auckland City Council* HC Auckand, CIV-2003-404-6306, 25 June 2007.

Total estimated cost of repairs	$295,365.04
Consequential losses	$20,089.00
General damages	$25,000.00
Sub total	$340,454.04
Subtract for side agreement	*$75,000.00*
TOTAL	**$265,454.04**

[85] For the reasons set out in this determination I make the following orders:

a) The Auckland Council, the first respondent, is ordered to pay Mr and Mrs Kim the sum of $290,089 forthwith.[22] The Auckland Council is entitled to recover a contribution of up to $212,363.24 from the other liable respondents for any amount paid in excess of $53,090.80.

b) Mr Stephen O'Leary, the fourth respondent, is ordered to pay Mr and Mrs Kim the sum of $265,454.04 forthwith. Mr O'Leary is entitled to recover a contribution of up to $185,817.82 from the other liable respondents for any amount paid in excess of $79,636.20.

c) Mr Peter Yau, the fifth respondent, is ordered to pay Mr and Mrs Kim the sum of $265,454.04 forthwith. Mr Yau is entitled to recover a contribution of up to $132,727.00 from the other liable respondents for any amount paid in excess of $132,727.00.

[86] To summarise the decision, if the liable respondent parties meet their obligations to pay the quantum established in this determination, this will result in the following payments being made by the liable respondents to this claim.

[22] The figure of $290,089 is the judgment amount to which the Auckland Council has consented.

Liable Respondent	Total Payment of Liable Respondents
Auckland Council, first respondent	$53,090.80
Mr Stephen O'Leary, fourth respondent	$79,636.20
Mr Peter Yau, fifth respondent	$132,727.00

[87] If any of the parties listed above fail to pay their apportionment, this determination may be enforced against any of them up to the total amount they are ordered to pay in paragraph [85] above.

DATED this 27th day of November 2013

P J Andrew
Tribunal Member