In the February 2015 edition of this Bulletin [1], the writer contributed an article discussing the circumstances in which a producer statement supplied in the course of construction may be actionable?

The writer opined that if a producer statement related to pre-construction design, then it may be actionable by home owners (current or subsequent) in negligence simpliciter. But where the statement is issued post-construction it may only be actionable by a home owner in negligent mis-statement and then only if the owner showed actual reliance on the statement.

The High Court in *Kwak v Park*[2] (per Woolford J), on an appeal from the Weathertight Homes Tribunal (the WHT), has held that producer statements are actionable whether or not they are supplied pre or post-construction. This article explores the rationale for the ruling.

In *Kwak*:

- Mr Park and his wife bought bare land in 1998.
- Mr Park, who had never built a house before, built a home on the land.
- After the home was completed in 2000, the Parks moved in.
- The Parks decided to sell the home in July 2001. This required them to obtain a Code Compliance Certificate (CCC).
- To obtain the CCC, Mr Park 'as builder' signed and supplied to the private certifier several producer statements.
- The Parks sold the home and the purchaser later on-sold it to the Kwaks.
- The Kwaks discovered leaks and applied for an Assessor's report in January 2011 pursuant to the Weathertight Homes Resolution Services Act 2006 (the WHRS Act).
- In the Weathertight Homes Tribunal (the WHT) decision[3], the adjudicator stated:

> *On 17 January 2011, the Kwaks applied for an assessor's report. This means that any action in respect of building work carried out prior to 17 January 2001 is limitation barred (footnote 1). There is no evidence of any relevant building work being carried out after 17 January 2001. The only events that are not limitation barred are therefore the inspections carried out by [A1 Building Certifiers Limited] after 17 January 2001, the issue of producer statements by Mr Park and the issue of the CCC [Code Compliance Certificate].*
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> *Footnote 1 : Weathertight Homes Resolution Services Act 2006, s.37.*

Section 37 of the WHRS Act provides:

> *(1) For the purposes of the Limitation Act 2010 (and any other enactment that imposes a limitation period), the making of an application under section 32(1) has effect as if it were the filing of proceedings in a court.*

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[1] BCB Issue 9, February 2015:134-137

[2] [2016] NZHC 530, dated 24 March 2016

[3] [2015] NZWHT Auckland 3 - TRI-2013-100-000038/DBH 6549

(2) This section is subject to sections 54, 133, 141, 146, 152, and 155.)

What is commonly referred to as the 'long-stop' limitation period is set out in section 393(2) of the Building Act 2006[4]. It provides that:

> *… no relief may be granted in respect of civil proceedings relating to building work if those proceedings are brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based.*

It is called the 'long-stop' limitation period because it operates independently of the Limitation Act and acts as a final bar against action rather than merely offering a limitation defence.

Because the learned adjudicator was referring to the 10 year 'long-stop' limitation, perhaps she intended her footnote to refer to s.393 of the Building Act 2006 rather than s.37 of the WHRS Act.

In any event, the Tribunal held that Mr Park's producer statements related to 'building' actions (i.e. the application of waterproofing membranes) that were themselves limitation barred having occurred 10 years prior to the claim being brought. Because the producer statements were negligent mis-statements rather than 'building work', no claim could lie against Mr Park as there was no evidence of actual reliance by the Kwaks on those statements.

On appeal, the High Court posed the question: "*Can the producer statements drafted and/or signed by Mr Park amount to building work so Mr and Mr Kwak's claim is not time-barred?*"[5].

The Court stated that the question arises because:

> *… of statutory criteria set out in the WHRS Act and the Building Act 2004. To be an eligible claim under the WHRS Act, s 14 sets out several criteria for affected dwelling houses. The first is that it must have been 'built' before 1 January 2012 and within the period of 10 years immediately before the day on which the claim is brought.(footnote 5)*
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> Footnote 5: WHRSA, s 14(a).

The writer observes that while the Kwaks' claim must be 'eligible' to proceed in the WHT, the eligibility regime in s.14(a) does not confer substantive rights[6].

The Court then referred to the Supreme Court's determination as to the meaning of 'built' in *Osborne v Auckland Council*[7].

In *Osborne*, the Supreme Court held that it was Parliament's intention to align the eligibility criteria in s.14(a) WHRS Act with the limitation provisions in s393 of the Building Act 2004. It determined therefore that the word 'built' in s.14(a) must therefore be construed by reference to the expression 'building work' in s393[8].

The 'work' or 'functions' caught by s.393(1) is defined as follows:

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[4] Expressed in similar terms in the preceding Building Act 1991, s.91

[5] Judgment [44]

[6] *Osborne* at *v Auckland Council* [2014] NZSC 67 at para [24](c)

[7] *Osborne v Auckland Council* [2014] NZSC 67, [2014] 1 NZLR 766

[8] *Osborne* at [26]–[27]

(a) building work associated with the design, construction, alteration, demolition, or removal of any building; or

(b) the performance of a function under this Act or a previous enactment relating to the construction, alteration, demolition, or removal of the building.

The writer suggests that *Osborne* does not transform Council inspections or the act of issuing a CCC into 'building work' for all purposes and in all instances. Instead, the *Osborne* Judgment simply aligns or cures an anomaly whereby a leaky home claim might be ineligible under section 14(a), because that section only refers to when a home is 'built', whereas s.393 more expansively refers to and anticipates claims for 'building work' and claims relating to the Council's Building Act functions.

The Supreme Court stated[9]:

> *We construe the expression "it was built" in s.14(a) as a clumsy but understandable attempt at a précis of the language which we have emphasised. The apparent omission in relation to certification is, however, remedied once it is realised that the word "built" must have been intended to be construed by reference to the expression "building work" in s.393 of the Building Act, which does encompass certification.*

The Court later added[10]:

> *… The decision that a claim is eligible is not determinative of any rights. A respondent with a limitation defence is not prejudiced by such a determination.*

In other words, a claim may be eligible and, consequently, not be debarred by the 'long-stop' limitation period, but that does not otherwise affect the claimant's claim or respondent's defence.

It does not follow that because 'built' in s.14(a) has been held to encompass both "building work" in s.393(1)(a) and the statutory functions of Council detailed in s.393(1)(b), that the Council actions or omissions are now, as a matter of fact and more generally, deemed to be 'building work'.

The writer suggests that a council is not liable for its actions because they constitute 'building work' (as defined in s393(1)(a)), but because it is liable to perform the statutory functions imposed on it under the Building Act relating to the construction, alteration, demolition, or removal of the building (as defined in s393(1)(b)). As explained by the Supreme Court in *Body Corporate No. 207624 v North Shore City Council*[11] - in their inspection role councils owe a duty of care to owners, both original and subsequent, of premises designed to be used as homes and or commercial buildings.

Returning to *Kwak*, the Court referred to the definition in s.7 of the Building Act 2006 which provides that 'building work':

(a) means work—

(i) for, or in connection with, the construction, alteration, demolition, or removal of a building; and

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[9] at [27]
[10] at [30]
[11] [2012] NZSC 83

(ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and

(b) includes sitework; and

(c) includes design work (relating to building work) that is design work of a kind declared by the Governor-General by Order in Council to be restricted building work for the purposes of this Act; and

(d) in Part 4, and the definition in this section of supervise, also includes design work (relating to building work) of a kind declared by the Governor-General by Order in Council to be building work for the purposes of Part 4

At para [49], His Honour states that the essential question therefore is: was the completion of the producer statements by Mr Park "work for, or in connection with, the construction of a building"?

If this is the 'essential question', then perhaps the Supreme Court's treatment of 'built' in the WHRSA becomes questionable.

In any event, His Honour answered his question by stating that:[12]

- First, the completion of producer statements is work, which can be defined as exertion or effort directed to produce or accomplish something. Adding, there is no logical reason why the ordinary meaning of work should not apply or the definition be restricted to physical work.

- Secondly, the work of completing a producer statement is in connection with the construction of a building, just as much as the physical work of applying a waterproof membrane.

The first point is relatively uncontentious. It is suggested however that the issue is not whether 'work' takes a physical form or not, but what function the 'work' had, or in this case, whether or not the producer statements were created and supplied "*in connection with, the construction, alteration, demolition, or removal of a building*".

Plus in terms of being 'work', what did the producer statements in this case actually "produce or accomplish"? They had no effect on how the home was constructed and consequently the weathertightness of the home – the home was already completely finished. The sole product or accomplishment was that it prompted the CCC to be issued.

The second point is perhaps more problematic. The problem arises from the fact that a producer statement performs two alternative and mutually exclusive functions.

It will be recalled that s2 of the Building Act 1991[13] defined a producer statement as:

> *… any statement supplied by or on behalf of an applicant for a building consent or by or on behalf of a person who has been granted a building consent that certain work <u>will be or has been</u> carried out in accordance with certain technical specifications:*
>
> (the writer's emphasis)

So a producer statement has two temporally and substantively different functions:

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[12] Judgment para 50

[13] There is no definition in the Building Act 2006

- It either ante-dates the physical work, and so, performs a design or assurance of design function;

  or alternatively

- It post-dates the physical work, and so, performs a confirmation of executed design or of work that has previously been performed/completed.

It goes without saying that both functions are 'connected' with the construction work, but one is forward-looking and the other backward-looking. The forward-looking producer statement is effectively incorporated into the building work. If it does not provide design it provides assurance of design before the home is built. Whereas, the backward-looking simply opines on work that has previously been done, so cannot be incorporated into or contribute to the work in any way.

His Honour equated completion of a producer statement with application of the waterproof membrane on the home. That makes sense when the producer statement is forward-looking and contributes to the finished building as part of the design or assurance of design. There is no commonality however with the work involved in building the home i.e. by applying the membrane, when the producer statement does no more than opine on the soundness of the finished building or aspects of the workmanship that took place.

The Court's Judgment that a producer statement gives rise to liability simply because it is given 'in connection with the construction of a building' (a connection that will always be present) renders irrelevant the distinction between the two types of producer statements. By dint of this Judgment a producer statement whenever it is given will always be 'building work' as much as the design and construction work.

To underscore the point, His Honour pointed out that 'design work' is now 'building work' under the Building Act[14], but as his Honour noted design work (i.e. the work of the architect) has always given rise to a liability in negligence simpliciter. This was made clear by the Court of Appeal in *Bowen v Paramount Builders* that:

> *… those involved in building work in New Zealand such as builders, architects, roofing contractors and so on do owe duties of care to future owners of the property on or in relation to which they carry out their work[15]*.

The writer observes that the 'building work' referred to in *Bowen* is all pre and during construction work, including the architectural design work.

Returning to *Kwak*, His Honour develops his analysis by stating[16]:

> *So we now have both design and certification falling within the statutory definition of building work. It would be anomalous if the definition of building work was interpreted to exclude the completion of producer statements, which, in my view, are just as much building work as design and certification.*

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[14] at para [51]

[15] at para. [64] citing *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA), by way of example at 406. *Bowen* is extensively referred to and affirmed by the Supreme Court in *Body Corporate No 207624 v North Shore City Council* [2013] 2 NZLR 297 and *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2011] 2 NZLR 289.

[16] Judgment para [53]

This conclusion is puzzling. First, the writer does not accept that certification is 'building work'. S.393(1)(b) of the Building Act categorises certification separately. And as discussed earlier, s.37 of the WHRS Act was construed in an expansive way so that 'built' extended to ensure all the work and functions referred to in s.393(1)(a) and (b) were captured.

Secondly, because design is inherently and invariably forward-looking and therefore incorporated into a building, whereas the producer statements in *Kwak* were backward-looking and so could not form part of the building, there is no obvious anomaly in treating them as distinct from design.

A producer statement which verifies that certain work will be carried out in accordance with certain technical specifications, arguably gives rise to an identical duty to that of the designer – since it serves the same function. A producer statement that opines that certain work has been carried out in accordance with certain technical specifications has no element of design in it, and so there is no analogy with the designer. Such a backward-looking producer statement has a closer analogy with a pre-purchase inspection report. No-one would suggest such a report was 'building work'.

At Judgment para [54], His Honour acknowledges that producer statements are 'indeed statements'. In the writer's view, the fact they are statements is not determinative of whether or not they are actionable as negligence simpliciter or as negligent mis-statements. It is suggested that it is the function they perform in connection with the building work that is critical.

The categorisation of a claim as negligence simpliciter or negligent mis-statement is important because, of course, an essential component in an action based on negligent mis-statement is that there must be actual reliance by the plaintiff.

Having determined that producer statements are 'building work', His Honour moves on to discuss proximity. Reference is made to an earlier High Court judgment in *Pacific Independent Insurance Limited v Webber*[17]. In *Webber*, the plaintiff's claim rested on establishing actual reliance on the producer statement when making the decision to purchase the property[18]. Because there was no actual reliance, there was no causal connection between the allegedly negligent statements and any loss suffered, hence the plaintiff's claim was dismissed[19].

His Honour in *Kwak* distinguishes *Webber* on the basis that:

- The person who signed the producer statement in *Webber* did not undertake the work; and

- A code compliance certificate was never issued for the building in *Webber*.

In the writer's view, these distinctions do not address the function and purpose of the producer statement which, in turn, relates to the timing of its creation. The Court's basis of distinction gives rise to incongruities, for instance:

- Is a producer statement issued by a party other than the builder not actionable?
- If a producer statement is 'building work' as much as, say, applying membrane to a house, then why is it not always actionable?

[17] Unreported HC Auckland CIV-2004-404-4168, 24 November 2010 per Lang J
[18] Judgment para. [47]
[19] Judgment para. [51]

- Does any statement by a builder that a house is well built or Building Code compliant constitute 'building work'?

The relevance of whether or not a CCC has been issued is unclear. The liability of a builder, designer or council is not contingent on the issuance of a CCC. These parties are liable for their acts or omissions if and when they breach their respective duties of care and cause loss notwithstanding the fact that the CCC may not have been issued[20].

His Honour noted that the plaintiff's lack of reliance was determinative in *Webber*, but pointed out that reliance has only a limited role to play in the tort of negligence. In support of this, His Honour referred to the statement of Chambers J in *Spencer on Byron* case[21] that:

> *[199] We also consider the linkage between alleged vulnerability and reliance to be misplaced. Reliance has only a limited role to play in the tort of negligence, as opposed to the tort of negligent misstatement, where (specific) reliance is an essential feature in the chain of causation … Some have since interpreted Hamlin as if, in some vague way, it introduced an element of reliance into the tort. It did not.*

In the writer's view, this statement is only apposite after it is determined whether or not the producer statements given in *Kwak* constitute negligence simpliciter or negligent mis-statements. As stated reliance is an essential element in the cause of action for negligent mis-statement.

His Honour finds 'negligence simpliciter' by holding that the hidden or latent defects were able to remain hidden or latent because of the producer statements[22]. His Honour held that this circumstance gave rise to a sufficient causal connection between the Kwaks' loss and the provision of the producer statements[23]. By this approach, no reliance is required.

In the writer's view, there is a fundamental difference between an act or omission that creates a defect during construction of a building and a post-construction statement that negligently (or deceitfully) conceals that defect's existence. In the writer's view, the first is obviously negligence simpliciter which does not require reliance; the latter is a statement which does not give rise to a legal right unless it is relied on by the plaintiff who received the statement.

His Honour cautions "*I intend no rule of general application*"[24], but as the final appeal court from the Weathertight Homes Tribunal[25], the Judgment, effectively, does lay down a rule of general application.

The outcome in *Kwak* seems fair and reasonable. It makes sense that Mr Park should be responsible for the cost of repairing the defects in the Kwaks' house. It is suggested however, that in achieving fairness, the doctrinal foundation for the Judgment may give rise to confusion and problems in other cases.

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[20] See Court of Appeal Judgment in 'Byron Avenue' O'Hagan v BC 189855 & ors [2010] NZCA 65, para [55] onwards discusses the council's liability for its inspections even where a CCC has not been issued [30] CA CA506/2008 22 March 2010

[21] Body Corporate No 207624 v North Shore City Council [Spencer on Byron] [2012] NZSC 83, [2013] 2 NZLR 297 at [199].

[22] Judgment para [64]

[23] Judgment para [65]

[24] Judgment [68]

[25] S.95(2)(b)

In any event, it seems the door is now open for leaky home owners to claim directly against the suppliers of post-construction producer statements. Given that such statements are often supplied many months after the construction work has been completed, this new avenue of claim is likely to be a popular one.

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