IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2023-100-001

BETWEEN	**DONALD BRETT HASTIE AND LEANNE GAIL DREDGE as trustees for THE HASTIE & DREDGE FAMILY TRUST** Claimants
AND	**BARRY RONALD BARNES and PAMELA HOLMES** First Respondent
AND	**BARRY RONALD BARNES** Second Respondent
AND	**CHRISTCHURCH CITY COUNCIL** Third Respondent
AND	**GRAEME JACOBS ARCHITECT LIMITED (COMPANY NUMBER 1496058)** Fourth Respondent
AND	**DSF BUILDERS LIMITED (COMPANY NUMBER 1863635)** Fifth Respondent
AND	**CONTRACT HOLDINGS LIMITED (COMPANY NUMBER 636388)** Sixth Respondent

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PROCEDURAL ORDER 6

Removal applications by first and second respondents

Dated 5 March 2024

Introduction

[1] The first and second respondents have jointly applied to be removed from this proceeding under s 112 of the Weathertight Homes Resolution Services Act 2006 (the WHRSA).

[2] The first and second respondents seek removal upon the grounds of delay and limitation.

The claim and its background

[3] This proceeding relates to a residential property in Christchurch. The first respondents were the owners and developers of the land on which the property sits. A residential property was constructed on the land following receipt of a building consent issued on 21 November 2001. The second respondent was the builder. Building commenced in February 2002 and was complete by March 2005. A code compliance certificate was issued by the third respondent on 22 March 2005. The claimants and first respondents entered into an agreement for sale and purchase of the property. Settlement occurred on either 31 March 2005 or 4 April 2005.

[4] The claimants became aware of mould and water ingress concerns around the beginning of 2008. An application for an assessor's report was accepted on 13 June 2008. The Department of Building and Housing determined the claimants to be eligible to use the resolution process under the WHRSA.

[5] In 2009, the claimants engaged the fourth respondent as the architect and the fifth respondent as the builder to carry out remedial works on the property. At this point, it is to be noted that the fifth respondent by its counsel has notified the Tribunal that it will not be participating in this proceeding as the company has no assets and is no longer in trade. The Registrar of Companies has initiated action to remove the company from the companies register.

[6] In or around March or April 2010, the claimants fell out with the fourth and fifth respondents. They terminated their agreement with the fourth respondent and entered into a deed of settlement with the fifth respondent over unpaid payment claims. The claimants then engaged the sixth respondent as the architect. The fifth respondent continued to act as the builder for the remedial works. On 26 August 2010, the sixth respondent issued a certificate of practical completion for the remedial works.

[7] The property failed the third respondent's final inspection on 10 February 2011. A code compliance certificate has never been issued and further remedial works have not been undertaken on the property.

[8] Three addendums to the assessor's report were issued on 2 October 2014, 26 October 2018 and 5 May 2023. They point out a number of construction defects in relation to various works done on the property.

[9] On 20 February 2023, the claimants applied for adjudication and filed their particulars of claim with the Tribunal.

Criteria for removal under s 112 of the Act

[10] Section 112 of the Act provides that the Tribunal may order that a person be removed from adjudication proceedings if it considers it fair and appropriate in all the circumstances to do so.

[11] The High Court decision of *Auckland City Council v Unit Owners in Stonemason Apartment 27 Falcon Street, Parnell* determined the test for removal as:[1]

> It is generally accepted that an application for removal or strike out should only be made as a preliminary issue where a claim is so untenable in fact and law as to be unlikely to succeed.

[12] The Tribunal's approach to removals has been to consider whether the claims against a prospective party are tenable. In *Saffioti v Jim Stephenson Architect Ltd*, Katz J cautioned against removing parties at a preliminary stage in circumstances where the claims asserted against them are tenable, but weak.[2] Wylie J in *Lee v Auckland Council* supports the approach summarised by Katz J in *Saffioti*.[3]

[13] Wylie J in *Lee* acknowledged that the Tribunal has an inquisitorial role and that it may be better informed as to the relevant facts than the High Court when considering a strike out application. He also agreed with Ellis J's observation in *Yun v Waitakere City Council* that leaky home cases frequently involve many defendants because of the initial desire to spread, share or avoid liability and that therefore the Tribunal is given an extra gate keeping role to ensure that adjudication proceedings progress in an expeditious and cost

[1] *Auckland City Council v Unit Owners in Stonemason Apartment 27 Falcon Street, Parnell* HC Auckland CIV-2009-404-3118, 11 December 2009 at [21].
[2] *Saffioti v Jim Stephenson Architect Ltd* [2012] NZHC 2519 at [44].
[3] *Lee v Auckland Council* [2015] NZHC 1196.

effective way.[4] However, Wylie J in *Lee* warned that the discretion conferred by s 112 of the Act needs to be exercised with caution.

[14] Brewer J in *Auckland Council v Abraham* stated that the discretion conferred by s 112 is not unfettered and must be exercised on a principled basis and in accordance with applicable law.[5] Katz J in *Saffioti* commented that genuinely and reasonably disputed factual issues which could impact on the success or otherwise of the claim are generally not suitable for determination at the removal stage.

[15] Whether the claim is capable of succeeding based on the information provided is always an important factor in determining whether it is fair and appropriate to remove a party in the circumstances of each case. The onus is on the party seeking to be removed to show that it is fair and appropriate to remove them.

[16] It is well accepted that an application for removal should only be made as a preliminary issue where a claim is so untenable in fact and law as to be incapable of success. It is also understood that an adjudicator should not attempt to resolve genuinely disputed issues of fact unless all necessary material is before him or her.[6]

[17] It is accepted that the Tribunal's approach to removals has been to consider whether the claims against a prospective party are tenable and the High Court has cautioned against removing parties at a preliminary stage in circumstances where the claims asserted against them are tenable but weak.[7]

[18] I propose to apply these principles when determining the first and second respondents' removal application.

Delay

[19] The relevant considerations on an application for an order that a party be removed from a claim for delay are set out in *Lovie v Medical Assurance*

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[4] *Yun v Waitakere City Council* HC Auckland CIV-2010-404-5944, 15 February 2011 at [70].
[5] *Auckland Council v Abraham* [2015] NZHC 415.
[6] *Auckland City Council v Unit Owners in Stonemason Apartment 27 Falcon Street, Parnell*, above n 1.
[7] *Saffioti v Jim Stephenson Architect Ltd*, above n 2.

Society New Zealand Ltd,[8] *Auckland Council v Weathertight Homes Tribunal*,[9] *Hermann v Weathertight Homes Tribunal*,[10] and *Gwak v Sun*.[11]

[20] The High Court has held that it was not a question of asking whether a respondent was "entirely" prevented from raising a defence, but whether – as between the parties – it was "just, or fair and appropriate", that a respondent's defences were limited to the extent they were.[12]

[21] In so doing, the Tribunal is required to undertake a balancing exercise. It is exercising a judicial discretion.

[22] In *Auckland Council v Albany Stonemasons*, Brewer J described this exercise in the context of a removal application:[13]

> In my view, on the clear wording of s 112, a discretion is conferred. The use of the word "may" and the nature of the evaluation, "fair and reasonable in all the circumstances", do not establish a requirement to reach a particular decision following an objective assessment of decided facts against a defined test. Rather s 112 requires, as Collins J put it, "the careful evaluation of options". Therefore, I have to examine the Tribunal's decision to see whether it made an error of law or principle, took account of irrelevant considerations, failed to take account of a relevant consideration, or reached a decision that was plainly wrong.

[23] In undertaking this "standing back" assessment, the Tribunal must take into account the claimants' and the first and second respondents' respective relevant interests.[14]

[24] On the one hand, a claimant should not be lightly deprived of the right to sue a respondent who they allege is liable to them under an otherwise eligible claim.

[25] On the other hand, a respondent should not be required to answer a claim in circumstances where the claimant's inordinate and inexcusable delay seriously prejudices that respondent to an extent which is inequitable. The analogy of such a respondent being described as "being like a boxer with one arm tied firmly behind his back" is apposite.

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[8] *Lovie v Medical Assurance Society New Zealand Ltd* [1992] 2 NZLR 244 (HC) at 248.
[9] *Auckland Council v Weathertight Homes Tribunal* [2013] NZHC 3274.
[10] *Hermann v Weathertight Homes Tribunal* [2018] NZHC 1843.
[11] *Gwak v Sun* [2022] NZHC 2296 [*Gwak High Court decision*].
[12] *Hermann*, above n 10, at [17].
[13] *Auckland Council v Albany Stonemasons* [2015] NZHC 415 at [8].
[14] At [15].

[26] The enquiry is whether, as between the parties, it is just, or fair and appropriate that the first and second respondents' defences are limited to the extent they are claimed to be as a result of the claimants' delay. This is a balancing act.

[27] The claimants sue the first respondents for breach of vendor warranties, and the second respondent for negligence in the construction of their home. The adequacy of discharge of that work and any other function carried out by the second respondent may well prove the alleged breach of warranties and be a key cause of the failures in the claimants' home that followed.

[28] The claimants have a legitimate interest in pursuing their claims against the first and second respondents arising from those defects. Whether or not those claims will ultimately succeed is not required to be determined at this early stage.

[29] The first and second respondents, self-evidently, have an interest in not being exposed to claims unnecessarily. They have a legitimate interest in being able to defend the claims with the benefit of as much information as is available and not to have that information restricted or their defences jeopardised, by the inexcusable effluxion of time.

[30] Those interests are balanced in this Procedural Order.

Submissions for removal

[31] The first and second respondents submit there has been inordinate delay by the claimants in bringing these proceedings. They refer to several authorities that have previously found a delay of six and a half years,[15] seven years,[16] eight years,[17] and 18 years[18] to have constituted inordinate delay. They point out that after the claimants received the assessor's report on 11 October 2008, they took 14 years and four months to file this claim with the Tribunal (on 20 February 2023). The first and second respondents submit that

[15] *Snelling v Christchurch City Council* HC Christchurch, CIV-2010-109-2346, 9 August 2011 at [53].
[16] *Unit Owners at 19 Kenwyn St v Auckland Council* WHT TRI-2013-100-15 (Procedural Order 9) at [23].
[17] *Gwak v Sun* WHT TRI-2020-100-6, 25 February 2022 (Procedural Order 5) [*Gwak Tribunal decision*] at [36].
[18] *Engelbrecht v Christchurch City Council* WHT TRI-2020-100-7, 8 September 2021 (Procedural Order 5) at [88].

this period exceeds other timeframes that have been found to be inordinate, and thus there has been inordinate delay by the claimants.

[32] The first and second respondents submit that this delay is inexcusable. The first respondents retained ownership of the property neighbouring the claimants and was using it to store machinery and tools for the second respondent's building business. According to the first and second respondents, the claimants asked Mr Barnes to fix minor items on several occasions in 2005 but had never raised any issues or alleged weathertightness defects with the property.

[33] The first and second respondents submit that they have been seriously prejudiced by the delay due to:

(a) the loss of relevant documents;

(b) the substantial alterations made to the property such that the alleged defects no longer exist;

(c) the inability to identify and join other parties that may be liable for the alleged defects; and

(d) the chain of causation having been broken by the defective remedial works carried out by the fourth, fifth and sixth respondents.

[34] The first and second respondents submit they have disposed of documents that would enable them to understand the details of the build of the property and identify the roles of the subcontractors that performed the allegedly defective works. They claim that this is through no fault of their own as they had retained the documents up until last year in line with "IRD and business practices". It is also submitted that the subcontractors that carried out many parts of the build that caused alleged defects either no longer exist, have ceased trading or have moved overseas.

[35] The first and second respondents further submit that the property has now been altered (via the remedial works) in such a way that the alleged defects that existed in 2008 no longer exist. The first and second respondents engaged Paul Belcher, a licensed builder and registered quantity surveyor, to review the assessor's reports and visit the property. Mr Belcher outlined that none of the issues identified in the assessor's 2008 report currently remain. In

particular, the roof that was complained of as leaking has been replaced, the handrail fixings have been removed, the deck has been overlayed with tiles, and all of the exterior windows have been replaced.

[36] Furthermore, the first and second respondents submit the assessor will not likely be able to revisit the property to refresh his memory ahead of a hearing as the property has now undergone substantial alterations. Experts will also be unable to examine the alleged defects as they no longer exist. The first and second respondents submit they are prejudiced as they must rely on the 2008 report to analyse the alleged defects in the original construction and have not had the opportunity to verify the validity of the conclusions made by the assessor. They submit that these circumstances are quasi analogous to *Gwak v Sun* where the High Court held there was significant prejudice as the property had been demolished and the alleged defects could not be inspected.[19]

[37] The first and second respondents also claim that they are prejudiced as the chain of causation has been broken such that their liability is unclear. The claimants had engaged the fourth, fifth and sixth respondents to carry out the remedial works to the property. It is submitted that the actions taken to remedy the alleged defects, the substantial renovations made and the settlement agreement between the claimants and the fifth respondent mean there was a clear and unequivocal break in the chain of causation.

[38] For these reasons, the first and respondents submit that it is unlikely justice can be done despite the delay.

Submissions opposing removal

[39] The claimants accept that the delay in bringing this proceeding has been inordinate. However, the claimants submit that the delay is excusable due to the events referred to in Mr Hastie's affidavit having had a significant impact on the claimants. Those events include, among others:

(a) the local authority failing the final inspection for the remedial works;

(b) the Canterbury earthquakes causing further damage to the property;

[19] *Gwak High Court decision*, above n 11, at [60].

(c) the claimants attempting to obtain amended building consents and a code compliance certificate from the local authority;

(d) the claimants corresponding with the Ministry of Business, Innovation and Employment and seeking its assistance in resolving their claim with the Earthquake Commission;

(e) the claimants engaging experts to prepare reports to determine the extent of the earthquake damage; and

(f) the Tribunal rejecting the claimants' claim in 2017 due to errors in its application.

[40] In respect of the loss of documentation, the claimants submit that sufficient documentation still exists to determine the role of each respondent and provide assistance to their defence. Although there have been repairs undertaken on the property since the second respondent's work, the claimants distinguish their case from *Gwak* as it has not been demolished and rebuilt. The claimants submit that there is still sufficient evidence of the second respondent's defective work, such as the 2008 assessor's report and the third respondent's file for the remedial work.

[41] The claimants also submit that the first and second respondents are not prejudiced by their inability to join other respondents responsible for the alleged defects as they have not provided specific evidence of such parties.

[42] In relation to the *novus actus interveniens* argument, the claimants submit that the remedial works and settlement with the fifth respondent do not constitute intervening acts that break the chain of causation. It is submitted that had the original work not been defective, the repairs would not have been undertaken and additional losses would not have been incurred. The claimants rely on *Johnson v Watson*, where the Court of Appeal held that it is enough to establish that the original work remained a substantial and material cause of the damage.[20]

[43] The claimants submit that all parties have been prejudiced by the loss of documentation caused by the earthquakes. As such, the claimants say they cannot be criticised for matters outside their control and that a prejudice shared

[20] *Johnson v Watson* [2003] 1 NZLR 626 (CA) at [18].

by all cannot provide sufficient grounds to justify the removal of any of the respondents.

[44] According to the claimants, a relevant factor is the assessor's report stating there is an eligible claim against the first and second respondents.[21]

[45] Furthermore, the claimants say that the removal of the first and second respondents would be to the prejudice of the remaining respondents who will lose the ability to claim contribution from the first and second respondents.

[46] The claimants conclude that it is in the interests of justice and is fair and appropriate for the first and second respondents to remain parties to the claim. The claimants say their delay was inordinate but excusable and did not result in significant prejudice to the first and second respondents.

[47] Even if the Tribunal finds the claimants' delay to be inexcusable and has caused serious prejudice, the claimants submit that the interests of justice still require the parties to remain in the claim. The claimants rely on *Martin v Hermann*,[22] where the Tribunal held that, relevantly:

(a) the destruction of a party's own documents is not determinative of its ability to defend the claim if there is a significant amount of documentary evidence before the Tribunal;[23]

(b) the independent evidence of the assessor will assist in remedying any prejudice caused by the lack of the documents;[24]

(c) the inability to inspect the property prior to remediation does not, on its own, tip the balancing exercise in favour of removal;[25] and

(d) any serious prejudice suffered by the respondent can be ameliorated by directions from the Tribunal.[26]

[48] The third respondent similarly submits that although the claimants' delay was inordinate, the delay has not sufficiently prejudiced the first and second respondents. It submits that the first and second respondents owed to the claimants a duty of care to ensure the construction of the property was

[21] The claimants cite the determination of removal application by this Tribunal in *Thwaite v Auckland Council* WHT TRI-2017-100-17, 19 November 2018 (Procedural Order 3) at [80].
[22] *Martin v Hermann* WHT TRI-2017-100-6, 5 November 2018 (Procedural Order 9).
[23] At [24]–[26].
[24] At [34].
[25] At [45].
[26] At [54].

completed in accordance with the building consent and the Building Code, and there is a tenable claim in negligence against them.

[49] In response to the first and second respondents' inability to join potential co-respondents, the third respondent cites *Auckland Council v Weathertight Homes Tribunal*, where the High Court upheld the Tribunal's decision to decline an application seeking removal on the basis of inability to seek contribution from other parties involved with the defective works.[27]

Is the delay inordinate?

[50] As the claimants in their submissions opposing the removal of the first and second respondents accept that the delay is inordinate, the first limb of the test for delay is made out.

Is the delay inexcusable?

[51] The claimants became aware of defects in the original construction of the home when they noticed mould and water ingress in early 2008. These concerns were confirmed when the original assessor issued his report on 11 October 2008. The claimants applied for adjudication of this claim in February 2023. That is a delay of around 14 years.

[52] When the claimants first noticed weathertightness issues with the property in 2008, they took appropriate steps in promptly applying for the resolution process under the WHRSA and engaging the fourth and fifth (and later the sixth) respondents for the subsequent repair work. However, when those repair works had failed and the first addendum report had been issued in 2014 highlighting defects in the work, around nine years had passed since the first and second respondents' involvement with the property. By that point, issues regarding the reliability of witnesses and the ability to locate documentary evidence were likely to arise. It would have been critical for the claimants to at least notify the first and second respondents of their intent to commence proceedings in order to allow the respondents to prepare and preserve what documents they still possessed.

[53] The reasons for the delay put forth by the claimants do not make it excusable. It is unfortunate the claimants have met setbacks caused by the Canterbury earthquakes, and they were understandably occupied with their

[27] *Auckland Council v Weathertight Homes Tribunal*, above n 9, at [14].

claim with the Earthquake Commission and quantifying the extent of repairs required on their home. However, any challenges that arose as a result should not have significantly affected their ability to file these proceedings by the time the second addendum to the assessor's report was issued. The claimants say they sought advice from the Ministry of Business, Innovation and Employment in resolving the claim, but the Ministry is not a proper forum from which to seek advice. The claimants have not provided any reasonable excuse as to why they could not file their application for adjudication before this Tribunal at the same time they were progressing with their claim with the Earthquake Commission.

[54] The claimants also refer to personal health and finance concerns which necessarily would have occupied their energy. Whilst the Tribunal has sympathy for the health concerns of Ms Dredge, it is not a sufficient excuse for delay.[28] The claimants' financial concerns are not persuasive either, especially when considering the claimants were self-represented up until only recently. Financial concerns would have had little impact on the claimants' ability to file their claim.

[55] The Tribunal notes that the claimants own the property in their capacity as trustees of the family trust. The claimants therefore have obligations to the beneficiaries of the trust. If they had difficulty in advancing the claim for the trust, it was open to them to appoint new or additional trustees that could have progressed the claim in a timely manner.

[56] Having regard to the circumstances and the reasons for the delay given by the claimants, I determine that the delay from October 2014 (when the first addendum report was issued) in commencing this claim is inexcusable. While the emotional impact the discovery of weathertightness defects can have on owners is acknowledged, I am required to consider and balance the interests not only of owners but also respondents.

[57] The Tribunal determines that the claimants' delay from 2008 to 2014 is excusable as they took appropriate steps to address the defects in their property. However, the subsequent delay from October 2014 to February 2023 is inexcusable. Waiting around eight years since the first addendum report was issued to commence this claim is not excused by the pressures of business, health, finance, remedial works and claims with the Earthquake Commission. It is simply too long a period to take no action. To cite from *Snelling*, it was a

[28] *Gwak Tribunal decision*, above n 17, at [56].

period that was materially longer than the time usually regarded by the Courts and the profession as an acceptable period of time to act.[29]

Has the delay seriously prejudiced the first and second respondents?

[58] The first and second respondents claim they are prejudiced as the property has undergone substantial remediation which has made it difficult to inspect any allegedly defective work by the second respondent. Furthermore, they submit that the only documents currently available that address defects in the original construction of the property are the assessor's report and the third respondent's file on the remedial works.

[59] However, other sources of evidence of the second respondent's work are still available. The claimants have provided a report from IBIS 2000 Ltd (issued following an inspection on 22 May 2008) which describes defects found in the original construction of the property. In addition to the 2008 assessor's report, the IBIS report constitutes an independent expert's assessment of the second respondent's work. Furthermore, a number of other people have inspected the original construction and can be called as witnesses to give evidence of any defective work. The assessor who issued the 2008 report may give evidence of the defects he identified when he inspected the property. The fourth and fifth respondents may also give evidence of the defects they identified and the work they did to rectify those defects.

[60] The first and second respondents raise the issue of the assessor (and potentially the fourth and fifth respondents) being unable to inspect the property to refresh their memory ahead of the hearing. As recognised in *Gwak v Sun*, this is a factor that will cause some prejudice to the second respondent's defence in particular.[30]

[61] However, I do not consider that this factor alone causes serious prejudice to the first and second respondents. The circumstances of this claim are distinguishable from those in *Gwak*, where there was no documentary evidence nor witnesses who could give evidence of the respondent's role in the building work.[31] Furthermore, to cite from *Martin v Hermann*, the inability to inspect the property prior to remediation does not, on its own, tip the balancing exercise in favour of removal.[32] In this claim, there exists sufficient

[29] *Snelling*, above n 15, at [43].
[30] *Gwak Tribunal decision*, above n 17, at [73] and [115].
[31] *Gwak High Court decision*, above n 11, at [55]–[57].
[32] *Martin v Hermann*, above n 22, at [45].

documentation and witnesses that can provide evidence of the second respondent's work on the property and its alleged defects.

[62] Although the available evidence of the second respondent's work is limited to those described above, it is also important to highlight that the claimants bear the onus of proving each of the defects or breaches of duty/contract they seek recovery for. Should they be unable to prove any particular defect or breach and why the first and second respondents are liable for the defect or breach, then they will fail in that part of their claim. The first and second respondents will have all the usual rights to challenge any evidence against them and to put the claimants to proof on their alleged responsibility for any of the claimed defects or breaches.

[63] Any prejudice to the first and second respondents by way of the loss of evidence will have to be addressed as best as can be with the assistance of the contemporaneous evidence and the recollection of the witnesses. Such prejudice as exists will have to be addressed at hearing. The Tribunal can adopt various strategies to deal with such issues, such as requiring the claimants to provide very detailed explanations of the defects complained of and their causes before the proceeding progresses to a hearing.

[64] Therefore, I do not accept the first and second respondents' submission that they are seriously prejudiced by the lack of documentary evidence and the inability to inspect the original construction work of the property.

[65] The first and second respondents also cite a loss of their ability to join potential co-respondents who may be responsible for the allegedly defective works. In their reply submissions, they rely on *Auckland Council v Weathertight Homes Tribunal* where the High Court commented that there may be prejudice if a respondent identifies other entities whose liability could clearly be established but can no longer be pursued as, due to the delay, they either ceased to exist or became insolvent.[33] They identify a number of persons and entities that could have been joined to this claim.

[66] That argument has some force in circumstances where, as it was in *Auckland Council v Weathertight Homes Tribunal*, there is only one respondent who is unable to join other parties and cannot reduce some of their liability via claims for contribution. Here, the third and sixth respondents are still part of

[33] *Auckland Council v Weathertight Homes Tribunal*, above n 27, at [31].

the claim and are solvent. The first and second respondents may seek contribution from each of them should they be found liable. The loss of ability to join further parties and claim contribution from them does not constitute significant prejudice to the first and second respondents.

[67] In terms of the *novus actus interveniens* defence, this has previously been addressed by the Tribunal in *O'Sullivan v Deane Fluit Builder Ltd*.[34] In order to establish a break in the chain of causation, the repair work must become the real cause of the damage and remove all causal potency from the defective original work.[35] The Tribunal in *O'Sullivan* held that both the original construction and subsequent repairs of a property materially contributed to the damage of the home.[36]

[68] This issue is one that will ultimately require an assessment of the second respondent's work and of the remedial work done by the fourth, fifth and sixth respondents. The Tribunal will need to make factual determinations of what defects exist in the property, who caused what defects, and whether those defects constitute substantial and material causes of the damage to the property. Therefore, this is a genuine factual dispute between the parties that can only be resolved at a hearing. As already mentioned, the High Court has emphasised that it is not appropriate for the Tribunal to determine genuinely and reasonably disputed factual issues in a removal application.[37]

[69] The Tribunal is satisfied that there are available sufficient evidence and witnesses to assess the second respondent's work and for the first and second respondents to mount a defence to the claim. Therefore, the Tribunal determines that the claimants' delay in bringing this claim has not seriously prejudiced the first and second respondents.

Overall interests of justice considerations

[70] Jagose J in *Hermann v Weathertight Homes Tribunal* reinforced that the question was not whether the respondents are "entirely" prevented from defending themselves but whether as between the parties it was "just, or fair, or appropriate", that their defences are limited to the extent they are.[38]

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[34] *O'Sullivan v Deane Fluit Builder Ltd* [2023] NZWHT Auckland 1.
[35] At [194], citing *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 at [83].
[36] At [196].
[37] *Saffioti*, above n 2; and *Queenstown Lakes District Council v Concept Builders Queenstown Ltd* [2022] NZHC 1742.
[38] *Hermann*, above n 10.

[71] For the reasons set down above, I do not consider that it is fair or appropriate that I remove the first and second respondents from this claim. They are not unfairly prevented from defending themselves, as they have a wide range of information available and are not seriously prejudiced by the delay.

[72] Applying the "standing back" consideration, weighing the rights and interests of both parties, the Tribunal finds that the overall justice of the case does not favour the first and second respondents' application that they should be removed from this claim for delay.

Limitation

[73] Section 2A of the Limitation Act 1950 (the LA) provides that the Act will apply to claims based on acts or omissions before 1 January 2011. The acts or omissions of the first and second respondents occurred between 2002 and 2005. The application and oppositions therefore rely on the LA.

[74] Section 4(1)(a) of the LA provides that an action founded on simple contract or tort may not be brought after the expiration of six years from the date on which the cause of action accrued.

[75] There are also limitation provisions in the WHRSA:

> *Weathertight Homes Resolution Services Act 2006*
>
> **32 Application for assessor's report**
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> (1) An owner of a dwellinghouse who wishes to bring a claim in respect of it may apply to the chief executive—
>
> (a) to have an assessor's report prepared in respect of it; or
>
> …
>
> **37 Application of Limitation Act 2010 to applications for assessor's report, etc**
>
> (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.
>
> …

[76] The first and second respondents submit that the claim against them is time-barred. According to them, the LA and the WHRSA mean that the claim should have been brought within six years of the 2008 assessor's report.

[77] As the claimants and third respondent correctly point out in their oppositions, this is not the correct application of those Acts. The Supreme Court has made it clear that s 37(1) of the WHRSA will stop time running for limitation purposes when a claimant applies for an assessor's report under s 32(1).[39] Therefore, the relevant period to consider is between the date of the respondents' last act or omission and the date the claimants applied for an assessor's report. It is not, as the first and second respondents submit, between the date of the assessor's report and the date the claimants filed their claim with the Tribunal.

[78] By virtue of s 37(1) of the WHRSA, the claimants are deemed to have filed this proceeding when they applied for an assessor's report on 13 June 2008. That is a little over three years since March 2005, around when the first and second respondents were last involved with the property. Therefore, the claimants have applied within the six-year limitation period of the LA. Accordingly, the claim is not time-barred, and this part of the first and second respondents' removal application fails.

Conclusion

[79] Overall, I do not consider the first and second respondents have established that it will be fair or appropriate for either of them to be removed from this claim. Although they have raised a valid complaint about the claimants' delay in commencing this claim, that delay has not seriously prejudiced their ability to defend against the claim. There are also genuine factual disputes that cannot be resolved in this removal application and must be determined at a hearing.

[80] The claim is not otherwise time-barred by the LA or the WHRSA.

[81] Accordingly, the first and second respondents' application to be removed from this claim is denied.

Case management conference

[82] A case management conference will be convened by telephone on Tuesday 26 March 2024 commencing at 12:00 pm NZT. The conference will

[39] *Osborne v Auckland Council* [2014] NZSC 67, [2014] 1 NZLR 766 at [6(g)] and [14]; and *Lee v Whangarei District Council* [2016] NZSC 173 at [45].

discuss, among other matters, the following proposed timetable towards resolution of this claim:

(a) The respondents are to file and serve their pre-mediation responses to the claim by 4:00 pm on Friday 12 April 2024.

(b) Mediation will commence in Christchurch on Wednesday 24 April 2024 (that date, if suitable to all parties, is when the WHRS assessor is available). Otherwise, mediation will commence on an agreed date during the week commencing Monday 6 May 2024. Mr Hastie will need to be present in person.

(c) In the event that mediation is unsuccessful in achieving a settlement, a post-mediation case conference will be held at 12:00 pm on Wednesday 15 May 2024 to set down a hearing in Christchurch on some agreed date in September or October 2024.

DATED this 5th day of March 2024

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K D Kilgour
Tribunal Member