IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2017-100-006

BETWEEN	**JULIE MARTIN, BELINDA MARTIN and NOEL CAVE as Trustees of the JULIE M. MARTIN TRUST and BELINDA K. MARTIN TRUST** Claimants
AND	**DAVID THOMAS HERMANN** First Respondent
AND	**GRAEME JOHN EVANS** Second Respondent
AND	**HERMANN ENTERPRISES LTD** Third Respondent
AND	**BRUCE POVEY** Fourth Respondent

PROCEDURAL ORDER 9
First and Third Respondents' Application for Removal
Dated 5 November 2018

Introduction

[1] Mr Hermann and his company, Hermann Enterprises Ltd, applied unsuccessfully to be removed from this claim. I refer to them both as "Mr Hermann" in this Procedural Order as their interests are the same in this application.

[2] It is settled that the principles upon which an application for removal for want of prosecution is determined are:

(a) the claimant has been guilty of inordinate delay;

(b) such delay is inexcusable; and

(c) the delay has seriously prejudiced the applicant.

[3] Then, the overriding consideration is whether, if these criteria are met, justice can be done despite the delay.

[4] The Tribunal at first instance held that:

(a) the claimants had been guilty of inordinate delay;

(b) that delay was inexcusable; and

(c) although not expressly saying so, the delay had seriously prejudiced Mr Hermann's ability to defend the claim.

[5] The Tribunal dismissed the removal application.

[6] Mr Hermann had the Tribunal's declinature of his removal application judicially reviewed in the High Court.

[7] The High Court considered that the Tribunal had erred in its final "standing back" consideration and that it did not fully consider the "interests of justice" or what is "fair and appropriate in all the circumstances". Instead, the Tribunal found that Mr Hermann was not

"entirely prevented from defending" or "entirely unable to defend" the claim.[1]

[8] The High Court held that it was not a question of asking whether Mr Hermann was "entirely" prevented from raising a defence, but whether – as between the parties – it was "just, or fair and appropriate", that Mr Hermann's defences were limited to the extent they were.[2]

[9] In undertaking the "standing back" assessment, the Tribunal must take into account both the claimants' and Mr Hermann's respective relevant interests.[3] The High Court directed the Tribunal to reconsider the "standing back' assessment and determine afresh whether – as between the parties – it is just, or fair and appropriate, that Mr Hermann's defences were limited to the extent they were.[4]

Approach

[10] I approach the determination of this application on the basis that Mr Hermann has established that:

(a) the claimants were guilty of inordinate delay;

(b) that such delay was inexcusable; and

(c) that the delay has seriously prejudiced Mr Hermann.

[11] This decision focuses on the broader consideration of the interests of justice, in particular, whether justice can still be done between the parties given the findings previously made and upheld on review.

[12] In so doing, I am required to undertake a balancing exercise. I am exercising a judicial discretion.

[1] *Martin v Hermann* (Procedural Order 4) [2017] NZWHT (7 November 2017) at [38](c) and (f).
[2] *Hermann v Weathertight Homes Tribunal* [2018] NZHC 1843 at [17].
[3] At [15].
[4] At [19]– [21].

[13] In *Auckland Council v Albany Stonemasons*, Brewer J described this exercise in the context of a removal application:[5]

> 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.

[14] I start by considering the parties' respective relevant interests.

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

[16] 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.

[17] The enquiry is whether, as between the parties, it is just, or fair and appropriate, that Mr Hermann's defences are limited to the extent they are claimed to be. This is a balancing act. I am required to consider the relevant interests of both the claimants and the respondent.

[18] The claimants are advancing a claim which meets the statutory requirement of eligibility. They sue, amongst others, a company and its principal who they allege were engaged to design their property, provide architectural services including conceptual work, design, preparation of documents for tendering purposes and the observation and administration of construction of the property. The adequacy of

[5] *Auckland Council v Albany Stonemasons* [2015] NZHC 415 [10 March 2015] at [8].

discharge of the observation and administration functions may well prove to be a key determinant of the failures in the claimants' home that followed.

[19] Mr Hermann may prove to be a key actor in the circumstances that led to the claimants' home being defective. He and his company were retained not only to design, but also to observe and administer the construction of the home. The claimants have a legitimate interest in pursuing a claim against Mr Hermann arising from those defects.

[20] As pleaded, the claim against Mr Hermann relates to alleged shortcomings in the professional services he provided. He was a professional with experience in the areas now complained of. He charged fees for that work. The claimants could reasonably have expected those professional services to be performed with due care and skill.

[21] Mr Hermann, self-evidently, has an interest in not being exposed to claims unnecessarily. He has 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 by the inexcusable effluxion of time.

Grounds for Removal

[22] At the heart of Mr Hermann's application are two complaints. They are that:

(a) The length of time before he was given notice of this claim resulted in the loss of his own documents which could have been used to assist in the defence of the claimants' claim.

(b) The claimants' action in remediating their home without notifying potential respondents has deprived them of the opportunity to observe the in-situ construction, the alleged defects and the remedial works undertaken.

[23] The High Court found there to have been serious prejudice occasioned by the delay. I make the following observations as to how that serious prejudice is mitigated by the availability of other documents, evidence from the other parties, Mr Hermann's own expertise and how I intend to manage the claim going forward.

Loss of Mr Hermann's own documents

[24] I accept that the destruction of documents by Mr Hermann may have the effect of making his defence of the claimants' claim that much more difficult. There is no doubt that the retention and ability to review his own diary notes, site notes or other documents made contemporaneously with the construction of the home would have been of assistance.

[25] However, I do not consider that the destruction of Mr Hermann's own documents is determinative of his ability to fairly defend the claim.

[26] There is a relatively significant amount of documentary evidence currently before the Tribunal. I have reviewed that evidence.

[27] The documentary evidence includes site meeting minutes and site instructions, Council records, letters of complaint from the owners to both the builder (copied to Mr Hermann) and to Mr Hermann directly, detailed invoices from Mr Hermann, the Assessor's reports (eligibility and follow-up), other reports and photographic evidence, and contract documents relating to the remedial works. There is also the evidence from Helfen Ltd, the claimants' expert.

[28] Taken overall, this is not a case where there is no documentary evidence of the defects complained of. There is quite an amount. The question is whether Mr Hermann is able to fairly defend himself given the disposal of his own records and any identified omissions in the documents before the Tribunal.

[29] In the claim, there is a pleading that Mr Hermann visited the property on 11 April 2011. There is a file note from Mr Hermann recording that visit and an invoice charging for that time.

[30] It is alleged that having conducted the inspection, Mr Hermann advised the claimants that the property was suffering leaks around the windows, but he did not offer any solution.

[31] Should that allegation be proven, then at that time at least Mr Hermann should have been alerted to the possibility of a building failure. In 2011, the evidence of leaking around windows in a house of this type should have rung alarm bells for a building professional.

[32] Certainly, in the context of any professional indemnity insurance cover, evidence of a failure of weathertightness around windows would likely have been sufficient for a notification to the insurers to have been required and an associated requirement to retain any relevant documents.

[33] That being the case, and irrespective of whether and to what extent Mr Hermann had insurance, it was perhaps unwise to then dispose of documents. There is also the disputed content of the telephone discussion of 20 November 2012, during which the claimants contend they put Mr Hermann on notice of a claim. Of course, I cannot resolve that dispute now. Suffice it to say, in the present case, there were sufficient grounds for Mr Hermann to have been on notice of weathertightness issues with the claimants' home and the possibility of further action.

[34] The independent evidence of the Assessor will assist in remedying any prejudice caused by the lack of Mr Hermann's own documents. The Assessor is retained by the Tribunal to independently assist the Member and the parties in the identification and discussion of defects causing the entry of water into the home.

[35] For those defects that are apparent on visual inspection, the existence of photographic evidence of the defects in situ will go a long way in explaining the defect as it existed before remediation.

[36] I accept the claimants' argument that the fact that the Assessor's report or Helfen Ltd's evidence arguably does not capture every single defect does not support an argument that Mr Hermann should be removed. In this case, there are multiple contributing defects. Some of those defects are more significant than others and there is more evidence on some defects than others.

[37] There are key defects alleged where there is significant evidence before the Tribunal. The examples outlined by the claimants show, for example, the defect in the construction of and departure from the consented plans of the heads of the joinery recess. There are also other examples.

[38] There are photographs of the heads of the joinery recess. This defect is readily observable from the photographs. This defect would also have been observable during the contract observation and administration stage of construction.

[39] Mr Hermann's lack of his own documents about that defect do not prevent him from adequately considering and responding to it. There is adequate documentary and expert evidence about that defect. There are factual disputes as to the circumstances under which this defect came to be and who is responsible for that, but I cannot determine that now.

[40] It will be an issue at the hearing as to whether, in relation to defects where there is adequate evidence, those defects are significantly serious to justify the remedial work undertaken and whether any particular respondent is liable to meet the costs of that work.

[41] That is to say, some defects may be proven and some may not. If the proven defects are serious enough that the overall remedial work was justified and a respondent was liable for that, then the absence of

proof about other defects will not provide a complete defence for that respondent. The issue is whether one or more proven defect is, to refer to the Assessor's follow-up full report, a defect that is a contributory and collective cause of water entering the house. Not all defects must be proven for the liability of a particular respondent to follow if the proven defect is sufficiently serious to justify the subsequent remedial work.

[42] Mr Hermann is a professional. He holds Bachelor degrees in Building Science and Architecture. He has been a registered architect since 1991. He has judged NZIA awards.

[43] He is, therefore, well equipped to draw on his own significant extensive experience and expertise in receiving, considering and responding to the evidence against him. This is noted by Mr Hermann's counsel at para 21(a) of their supplementary submissions. He is not in that sense prejudiced through the loss of his own documents.

Inspection of defective works

[44] Another key plank of Mr Hermann's application is his inability to have inspected the property before it was remediated.

[45] Whilst I accept that it would have been preferable for the respondents to have been given an opportunity to inspect the property before the remediation works were carried out, that factor alone does not tip the balancing exercise in favour of removal. There are two reasons for this.

[46] First, there is no common law requirement that the owner of a defective building must provide the allegedly negligent party with an opportunity to inspect the defective work before it is remediated. Rather, the issue is one of proof, the claimant bearing the onus to prove in all respects the relevant elements of the claim to justify judgment against a particular respondent(s).

[47] Secondly, Mr Hermann refers to the Chair's Directions for Standard Dwellinghouse Claims (the Chair's Directions).

[48] The directions at para 15.1 are directory and not mandatory. They provide that a claimant should allow inspection before "filing a claim with the Tribunal". That is, the period after acceptance of an eligible claim, but before an application for adjudication is filed. A claimant should, but not must, allow inspection.

[49] When a claimant files an application for adjudication with the Tribunal, the Tribunal would have no hesitation in ordering a pre-remediation inspection by any potential respondents. The Tribunal has no power to order such an inspection prior to receipt of the notice of claim for adjudication, as that is the document upon which the Tribunal's jurisdiction to do so is founded.

[50] Once a claim is filed with the Tribunal, then para 15.2 of the Chair's Directions provide that respondents have an entitlement to inspect. The Tribunal would compel access to be given to the property should that be an issue.

[51] However, in this case the remedial works were completed after the acceptance of an eligible claim (that is, in the para 15.1 period), but before the claim for adjudication was filed (that is, when para 15.2 applies). Hence, Mr Hermann should have been given an opportunity to inspect, but was not entitled to in the absence of an invitation to do so from the claimants.

[52] The High Court noted that the respondents had been denied an "entitlement" to inspect the claimants' property. However, the circumstances under which inspection is discussed in paras 15.1 and 15.2 of the Chair's Directions are different. The inspection referred to at para 15.1 is a directory but not mandatory requirement to give respondents an opportunity to view the property "prior to filing a claim with the Tribunal".

[53] By contrast, the entitlement to conduct inspections at para 15.2 of the Chair's Directions arise for the purposes of responding to the "claim". That is, in responding to a filed claim for adjudication in the Tribunal. They are two separate sets of circumstances.

[54] In carrying out the balancing exercise the Tribunal is required to undertake, I find that it is possible for the serious prejudice that Mr Hermann suffers to be ameliorated by a number of steps the Tribunal can take leading up to the hearing of this claim.

[55] They will include a requirement for the claimants to specify exactly what are the defects complained of, what were the departures from the consented plans complained of, what are the breaches of the Building Code in relation to each defect complained of and which of the respondents are alleged to be liable for those defects and why.

[56] I will also require the claimants to link all the photographs taken by their expert and the photographs in the Assessor's report to the alleged defects so that it is clear to Mr Hermann what defects the various photographs demonstrate. This may well also act as an "aide memoire" for him and assist in his recall of the property and its construction.

[57] There has already been discussion as to the provision of a defects chart and schematics. The Tribunal will insist on very detailed explanations of the defects complained of and their causes before this proceeding will proceed to a hearing.

[58] The claimants bear the onus of proving each of the defects they seek recovery for. Should they be unable to prove that any particular defect was in fact a defect and why and what party is liable for the creation or allowance of that defect, then they will fail in that part of their claim. Mr Hermann will have all the usual rights to challenge any evidence against him and to put the claimants to proof on his alleged responsibility for any of the claimed defects.

[59] Whilst the Tribunal has an investigative role, it will not go so far as to ignore the absence of proof on an issue. Nor will it allow a claimant that has proceeded to undertake remedial works to then be excused from proving each and every element required to establish their claim on each defect through an absence or inadequacy in the evidence they provide.

Conclusion

[60] To conclude, applying the balancing exercise required to determine this application, I consider that while Mr Hermann will be seriously prejudiced in his conduct of his defence, overall the interests of all parties are met by allowing the claim to proceed to hearing with him as a respondent. I consider that he is well capable of defending the allegations given his own extensive experience, the availability of a large number of documents and the evidence of others, including Helfen Ltd and the independent Assessor, his own observations of the property (including as recently as 2011) and the steps I will take to manage this case to hearing.

[61] My intended approach regarding full detail of the defects have already inferentially been accepted as necessary and appropriate by the claimants. They have referred to the provision of "defects chart" and "schematics" which will be a minimum requirement as the claim proceeds. This will be expanded on in pre-hearing directions.

[62] In the present case, the three primary criteria, if I may call them that, have been met. Namely inordinate, inexcusable delay which seriously prejudices the respondent.

[63] The High Court directed the Tribunal to reconsider its "standing back" assessment, taking into account the claimants' and the first and third respondents' respective relevant interests.

[64] In conducting the standing back exercise which forms a key part of the removal application jurisdiction, I am exercising a discretion. In so doing, I have considered the interests of both the claimants and the respondents.

[65] I have reached the conclusion that the first and third respondents will be able to meaningfully advance defences on the evidence currently before the Tribunal. The interests of justice dictate that the claimants be allowed to advance their claim against them and so the first and third respondents' application for removal is dismissed.

[66] I allocate a telephone conference to discuss the next steps in this claim on Monday, 19 November 2018 at 9:30am.

DATED this 5th day of November 2018

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P R Cogswell
Tribunal Member