IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2020-100-006

BETWEEN	**JUNG SOOK GWAK & JOSEPHINE YEON JU KIM** Claimants
AND	**YAN SUN** First Respondent (Removed)
AND	**ALASTAIR COUPER** Second Respondent
AND	**AUCKLAND COUNCIL** Third Respondent (Removed)
AND	**LAI FOOK CHOY** Fourth Respondent

PROCEDURAL ORDER 5
(Application for removal by first respondent)
Dated: 25 February 2022

Introduction

[1] The claimants owned a leaky home at 9 Philadelphia Avenue, Albany Heights, Auckland. They applied to MBIE for an assessor's report. That eligibility report obtained by them concluded that they had an eligible claim. That report and subsequent assessors' reports identified serious defects and damage in their home.

[2] Eventually, they demolished the existing home and built a new one, deciding that that option was the least risk option, given advice they had about costs on remediating leaky homes.

[3] They then commenced this claim in 2020.

[4] Following receipt of the claim, the first respondent made an application for removal based on an argument that it was Sun International Trade Limited, a company that he was a director of, that built the home and that he had no direct dealings with any of the construction. The first respondent stated that his only role was in ensuring that construction works were completed and on time and that he was not always on site as he was managing a number of builds at the same time.

[5] Based on the evidence then before the Tribunal, Procedural Order 2 declined the first respondent's application, finding that there was tenable evidence that the first respondent may have either carried out work that would render him personally liable to the claimants as a tortfeasor, or that he took actions that, as a matter of law, impose a legal responsibility to the claimants on him[1].

[6] The first respondent then engaged counsel and sought and was granted leave to make a second application for removal[2].

[1] Procedural Order 2, dated 7 May 2021
[2] Procedural Order 4, dated 1 September 2021

[7] The Tribunal held that the interests of justice required the first respondent to have an opportunity to raise a new ground of removal, not raised in the initial application.

[8] The first respondent's application seeks removal on the basis of delay. He submits that there has been inordinate and inexcusable delay in the prosecution of this claim and that that delay has caused him serious prejudice.

[9] This Procedural Order determines that application.

Criteria for removal under s 112 of the Weathertight Homes Resolution Services Act 2006

[10] Section 112 of the Weathertight Homes Resolution Services Act 2006 (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] In the present case, the first respondent raises delay as the single ground for removal.

[12] The principles upon which an application for removal for want of prosecution are determined are:

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

(b) such delay is inexcusable; and

(c) the delay has seriously prejudiced the applicant.

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

[14] 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 Society*

New Zealand Limited[3]*, Auckland Council v Weathertight Homes Tribunal*[4] and *Hermann v Weathertight Homes Tribunal*[5]*.*

[15] 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.[6]

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

[17] In *Auckland Council v Albany Stonemasons*, Brewer J described this exercise in the context of a removal application:[7]

> 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.

[18] In undertaking this "standing back" assessment, the Tribunal must take into account both the claimants' and the first respondent's respective relevant interests.[8]

[19] 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.

[20] 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

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[3] [1992] 2 NZLR 244 (HC) at 248
[4] [2013] NZHC 3274
[5] [2018] NZHC 1843
[6] *Hermann v Weathertight Homes Tribunal* [2018] NZHC 1843 at [17].
[7] *Auckland Council v Albany Stonemasons* [2015] NZHC 415 [10 March 2015] at [8].
[8] At [15].

a respondent being described as “being like a boxer with one arm tied firmly behind his back” is apposite.

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

[22] The claimants are advancing a claim that meets the statutory requirement of eligibility. They sue the first respondent for negligent building work which he was responsible for. The adequacy of discharge of that work and any other function carried out by the first respondent may well prove to be a key determinant of the failures in the claimants’ home that followed.

[23] The first respondent may prove to be a key actor in the circumstances that led to the claimants’ home being defective. His company was seemingly the company in control of the construction project. The claimants have a legitimate interest in pursuing a claim against the first respondent arising from those defects. Whether or not that claim will ultimately succeed is not required to be determined at this early stage.

[24] The first respondent, 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.

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

Chronology

[26] The relevant chronology is:

(a) A building consent was issued for the construction on 5 June 2002;

(b) The built date for the property was 24 April 2003;

(c) A Code Compliance Certificate issued on 26 May 2003;

(d) The claimants became registered proprietors of the property on 12 August 2003;

(e) The claimants made a claim to MBIE seeking an assessor's report on 18 June 2012;

(f) Assessor's eligibility report issued on 31 July 2012 authored by David Firth;

(g) Assessor's follow-up full report issued on 8 October 2012 authored by Ray Howarth;

(h) Assessor's addendum report issued on 18 November 2016 authored by David Firth;

(i) The claimants obtained a building consent for demolition and rebuild on 13 June 2019;

(j) The claimants then demolished the existing house and rebuilt a new home, that new home being completed by June 2020. A Code Compliance Certificate issued for the new house on 4 June 2020. The claimants did not advise any of the respondents of this;

(k) The claimants entered into a FAP agreement under which the Crown agreed to pay 25 per cent of the agreed repair costs. The FAP payments were settled on 4 June 2020;

(l) The claimants then commenced this claim on 6 September 2020, over 8 years after the WHRS report was obtained.

[27] The first respondent's evidence is that he knew nothing of this claim from the date the home was built in April 2003 until the date he was served with the claim in October 2020.

Has there been inordinate delay by the claimants?

Discussion

[28] Whether or not there has been inordinate delay by the claimants is an objective test. Considerations about the reasons for that delay and whether it is excusable form the second limb of the test.

[29] On the first limb, reference is made to *Snelling v Christchurch City Council*[9], which is authority for the proposition that "inordinate delay" has been defined as a period of time which has elapsed which is materially longer than the time usually regarded by the Courts and the profession as an acceptable period of time.

[30] The Court in *Snelling* put it this way:

> *"The authorities draw a distinction between the delay before issue of proceeding (pre-issue) and delay after the issue of proceedings (post-issue).*
>
> - *By itself, delay prior to the issue of proceedings cannot constitute inordinate and inexcusable delay for the purposes of a strike out application.*
> - *If such delay has occurred, further delay after issue of proceedings will be looked at more critically by the Court and will be regarded more readily as inordinate and inexcusable than if the proceeding had been commenced earlier.*
> - *The defendant must show prejudice caused by the post-issue delay. If, however, the defendant has suffered prejudice as a result of pre-issue delay, he will need to show only something more than minimal additional prejudice to justify striking out the proceeding.*
> - *If is the cumulative effect of delay that must be considered."*

[31] The Tribunal will take into account both periods of delay and, if there is significant pre-issue delay, will look at any further post-issue delay more critically.

[32] Further, if the applicant is able to show prejudice arising in the pre-issue period, then the applicant will only need to show something more than minimal

[9] HC Christchurch, CIV 2010-109-2346, 9 August 2011 at [46]

additional prejudice to justify removal[10]. It is the cumulative effect of the delay that the Tribunal will consider.

[33] In this claim, the relevant periods are:

(a) Pre-issue[11] period – 12 August 2003 to 18 June 2012 – approximately 9 years;

(b) Post-issue period – 18 June 2012 to 6 September 2020 – 8 years, 2 months and 19 days.

[34] As the first respondent submits, a period of 6 and ½ years delay was considered inordinate in *Snelling.* The Tribunal has also held a period of 7 years was inordinate delay[12].

Decision on first limb

[35] On the first limb, the Tribunal considers that the period of post-issue delay is inordinate. The claimants had evidence available to them from at least 18 June 2012 that their home had water ingress issues and damage and that their claim was deemed eligible by MBIE.

[36] They obtained a follow-up full report on 8 October 2012. They had the right to commence an adjudication from that point onwards[13]. The delay between that date and the commencement of this adjudication of over eight years is inordinate.

[37] This is particularly so in the context of the pre-issue delay of almost 9 years which preceded the claimants' application to MBIE for an assessor's report.

[38] On the first limb, the Tribunal considers that the delay is inordinate.

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[10] Snelling (supra)
[11] Noting that "issue" date in this context is the date when the claimants first sought an assessor's report
[12] Unit Owners at 19 Kenwyn St v Auckland Council (WHT, TRI 2013-100-15), PO 9 9/10/13
[13] Section 60(8) Weathertight Homes Resolution Services Act 2006

Is the delay excusable?

Discussion

[39] In this part of the test, consideration is given as to why the claimants delayed the commencement of their claim in the Tribunal and whether that excuses the delay.

[40] The first respondent's position is that the claimants stood by and waited from 2012 until 2019 before they took any steps to deal with their leaky home.

[41] The chronology above shows that by 2019 they had engaged an architect and a builder and obtained a building consent to demolish and rebuild their home. They had obtained three assessor's reports thoroughly setting out the defects in their home. None of these steps were made known to the respondents.

[42] The first respondent also says that the claimants knew the estimated repair costs were around $171,000 in 2012 and had risen to around $465,000 by 2016, yet they took no action to either remedy the defects until 2019 or commence their claim in the Tribunal until 2020.

[43] For the claimants, they raise several arguments against a finding that their delay was inexcusable. They address both the pre-issue and post-issue periods.

[44] During the pre-issue period they make two points. One, they had no evidence of leaks in their home before they sought an assessor's report. Secondly, they only thought to make an application to MBIE for an assessor's report following media coverage about leaky homes.

[45] On the post-issue period, they make several points. The post-issue period is the more relevant period for consideration of whether the delay is excusable.

[46] The claimants' evidence is that their post-issue delay was caused by a number of factors:

(a) Personal medical issues suffered by Ms Kim;

(b) Difficulties in locating builders;

(c) A fire occurring at the home and delays related to resolving insurance issues;

(d) Contact they had with MBIE about their claim;

(e) The need to obtain legal advice;

(f) A lack of funds to progress the claim;

(g) The impact of COVID-19 on their ability to commence the claim.

[47] In response, the first respondent makes the following points regarding the delay and the claimants' explanation for it.

[48] On pre-issue delay the first respondent notes that the claimants were aware of leaks in 2004-2005 yet did nothing about them until 2012 when they sought an assessor's report[14].

[49] On post-issue delay, the first respondent takes issue with:

(a) A lack of evidence provided to demonstrate that steps were taken by the claimants to contact builders;

(b) A lack of explanation about why Ms Kim's health prevented the advancement of the claim;

(c) The role of and advice given by MBIE about the need to progress the claim;

(d) What legal advice was received by the claimants and why the delay in doing so was so great given that Ms Kim is a practicing lawyer; and

(e) What impact COVID-19 had on the ability to file a claim.

[14] Eligibility Report, p.8

Decision on second limb

[50] The Tribunal finds that the delay in commencing this claim was inexcusable.

[51] The pre-issue delay may perhaps have been excused if the claimants were unaware of leaks until shortly before they sought an assessor's report. However, the eligibility report directly contradicts that statement, as it records that the claimants experienced leaks "7 or 8 years" before the report was sought.

[52] By 2012, the claimants knew that they had a leaky home and knew that their claim had been found eligible. The eligibility report was a thorough analysis of the house and its defects. It was sufficiently detailed to have required action based on its findings.

[53] But the position was further clarified for the claimants when they obtained a follow-up full report in October 2012. That report was very detailed and outlined the defects, their likely causes and the potentially responsible parties.

[54] To have then waited over a further 8 years was not a responsible or reasonable step to take. To cite from *Snelling,* it was a period that was materially longer than the time usually regarded by the Courts and the profession as an acceptable period of time [to act].

[55] The claimants submit that when they became concerned about potential defects in their home they registered with the Weathertight Homes Resolution Service and "obtained three reports from that service". What they do not say is that there was more than a four year period between the eligibility report and the addendum report.

[56] Whilst the Tribunal has sympathy for the health concerns suffered by Ms Kim, the existence of the assessor's reports and the assistance available from MBIE's specialist claims advisors means that the claimants should have advanced their claims more promptly than they did.

[57] The claimed inability to locate builders to price the required remedial works does not excuse the delay either. The claimants could have proceeded in the Tribunal on the basis of the costings in the assessor's reports. They could

have updated any costings in the course of the claim. The delay in obtaining firm pricing is not a reason why the claim could not have been commenced.

[58] The delay in resolving the fire damage claim also did not and should have prevented the claimants from advancing their WHRS claim. The fire damage was largely internal. Their WHRS claim could have proceeded without the fire damage having been resolved and should have been.

[59] I am not prepared to take account of what MBIE may well have told the claimants about the need to progress their claim, as that advice is not in evidence. The advice to obtain an addendum report does not affect the consideration, as addendum reports are often obtained to update on claims. The follow-up full assessor's report of October 2012 gave all the necessary details to the claimants to commence a claim. The decision to seek an addendum report is not a reason to delay commencing the claim.

[60] Experience tells the Tribunal that the claims advisors at MBIE are well aware of the potential effect of delay on a claimants' claim. The Tribunal does not accept that anything that MBIE told the claimants excuses or justifies the post-issue delay.

[61] The claimants' evidence about the need to obtain legal advice also does not excuse the delay. The claimants say that they sought legal advice around July 2019. There is no evidence about why that advice was not sought earlier or why no step was taken to file their claim until September 2020, more than a year later.

[62] I do not comment on whether or not the claimants' claimed impecuniosity prevented them from filing their claim other than to note that Ms Kim is a lawyer and has carried the conduct of this claim to date.

[63] The Act provides the ability for owners of leaky homes to sue for repairs yet to be undertaken and claims often proceed on that basis, as owners cannot afford to carry out the identified remedial works. It was not a requirement to proceed that the works be completed, only that a full assessor's report be obtained, or the work complete. There is the option of proceeding before the work is done.

[64] Finally, the impact of COVID-19, whilst having an impact on the Tribunal's ability to conduct in person hearings, did not affect the parties' ability to file documents. Moreover, COVID-19 was not a potential factor until March 2020. It does not excuse the delay before that. In any event, the Tribunal could have accepted the claimants' application for adjudication during the COVID-19 period.

[65] The claimants' argument that the inordinate delay is excusable is not accepted.

[66] The Tribunal finds that the delay was inexcusable.

Has the delay seriously prejudiced the first respondent?

Discussion

[67] The Tribunal now turns to consider the effect of the inexcusable delay on the first respondent.

[68] The first respondent says that he has been seriously prejudiced by the delay and relies on a number of factors to demonstrate that.

[69] Those factors are:

(a) Inability to access company records;

(b) Inability to locate parties who carried out work or could be witnesses;

(c) Inability to inspect the house.

Inability to access company records

[70] Sun International Trade Limited went into liquidation on 9 May 2012. This was around the time that the claimants sought an assessor's report.

[71] Had the claimants notified the potential respondents of a potential claim against them, the first respondent could have taken steps to preserve documents relating to the construction of the claimants' home. They did not do that.

[72] The consequence was that the documents have been lost or destroyed. Had he known about the claim, Mr Sun could have preserved those documents, which could have included contractual documents, site inspection records, identification of sub-trades working on the site, any variations to the plans, invoices, timesheets, producer statements and so on. As it was any such documents held by the company have gone.

[73] This means that Mr Sun is unable to refresh his memory about the construction and his role in it based on documents held by his previous company.

[74] It is important to note that Mr Sun is not sued as the builder, as Sun International Trade Limited was the builder. Mr Sun's role and the route to any liability he could face is as the director of that company, governing and controlling its activities. This could possibly include carrying out building work himself. It could possibly include supervising and inspecting work by others. It could possibly include directing and supervising sub-trades. The need to identify the activities Mr Sun actually undertook in construction is critical to determining any claim against him.

[75] After such a lengthy period of time, the existence of relevant documents could be of significant assistance to Mr Sun in determining those issues.

[76] Mr Sun is now unable to demonstrate, with reference to documentary evidence held by his company what exactly his role in construction was. In the absence of that information, the Tribunal considers that he would be impeded in his ability to defend the role he says he took in construction by reference to documentary evidence.

[77] It is critical to his role definition defence that Mr Sun can show precisely what his role was and therefore what work he had involvement with. The claimants have deprived him of the ability to do so by their inordinate and inexcusable delay.

Inability to locate parties who carried out work or could be witnesses

[78] It follows that from the company's records, the contractual matrix of parties is unavailable. We do not know who the "builder" under the head contract was or who the sub-contractors were.

[79] Mr Sun has only been able to locate two potential parties who worked on the house. He has located a Kim Pang, who may have been the project manager or builder, but who has likely left the country. We do not know the role of Kim Pang, whether he was the project manager or whether his role was lesser, perhaps a labour only contractor.

[80] The other party is the fourth respondent who has taken no steps to date in this claim.

[81] The first respondent may have been able to identify other relevant construction parties who could have confirmed Mr Sun's role in the build. He cannot now identify other participants in construction beyond those already identified in this claim.

[82] Mr Sun has also provided the Tribunal with expert evidence from a building consultant, Darryl August. In addition to giving his opinion on the areas where the assessor's report does not address now-claimed defects, Mr August also explains why the lack of documentation means that Mr Sun cannot:

(a) Determine the roles of those who worked on the site; and

(b) Determine the responsibility of parties other than the cladding installer for the defects.

[83] These are valid concerns that impact on Mr Sun's ability to defend himself.

Inability to inspect the house

[84] Of the factors put forward in support of his argument that he has been seriously prejudiced by the claimants' inordinate delay, the Tribunal finds that this ground is the most persuasive.

[85] Having had an assessor's eligibility report from 2012 that found the claim eligible and the follow-up full report having identified potentially liable parties, including the first respondent, the claimants then proceeded to demolish the home and rebuild it.

[86] By 2019, the claimants had had the assessor's eligibility report for 7 years. They obtained a building consent in July 2019 to demolish and rebuild their home. They did not advise the respondents of any of this.

[87] The effect of this is that, now, the only evidence that the Tribunal has about the defects and damage suffered by the home is that of the assessors. The original house and defects in situ is no longer available for any party, or the Tribunal, to view.

[88] The first respondent is not able to instruct an expert himself to investigate the house. He must necessarily rely on the recollection of the assessors. The period of time that has elapsed from when the assessors gave their reports must have an impact on their ability to recall the minute details of defects, their location and cause.

[89] The claimants should have allowed the respondents and their experts the opportunity to inspect the house before it was demolished.

[90] Mr Sun has provided the Tribunal with evidence from Mr August, a building consultant. His evidence is that the state of evidence before the Tribunal, including the assessor's report, is of no assistance in determining the existence and location of the following defects, the responsibility for creation of defects and other issues:

(a) Whether the head flashing is a cause of damage, if so, who is responsible for it;

(b) What was the cause of the cracking at the wall saddle junction;

(c) What was the cause of the damage to the timber bottom frame plate;

(d) Who is responsible for creating window and door flashing deficiencies;

(e) Who was responsible for creating inadequate clearances between claddings and ground surfaces and when that occurred;

(f) Who was responsible for creating apron flashing termination defects;

(g) Who was responsible for creating cladding (parapet, penetrations and general) deficiencies;

(h) What damage occurred due to internal leaks;

(i) What damage occurred to fascias embedded within the cladding;

(j) Whether there was a lack of maintenance;

(k) Advice on increases in repair costs.

[91] All of these are matters that, in addition to evidence as to his role in construction, would be important matters to be determined at any hearing. It will be necessary for the Tribunal to consider, not only what the defects are, but whether the first respondent has any legal responsibility to the claimants for them.

[92] The claimants dispute that the first respondent faces serious prejudice in the defence of their claim.

[93] They contend that neither the loss of the company's documents, the ability to locate other parties or the opportunity to inspect the house before demolition are matters that seriously prejudice Mr Sun or favour his removal from the claim. They argue that he is still able to defend himself.

[94] The claimants go on to argue against Mr Sun's position that he has been deprived the ability to locate other potential parties by saying that there is no evidence that other parties would substantially contribute to any liability and that in 2012 the location of those other parties was not known.

[95] That is not accepted because Mr Sun could have, had he known of the claim, preserved and referred to the company's records and this could have then led to the identification of those other parties. It is not possible to say.

[96] The claimants also contend that it will only be sufficient for the Tribunal to find that the first respondent is liable for the creation of a serious proven defect for liability to follow even if all defects cannot be proven.

[97] This submission overlooks the fact that a key part of Mr Sun's defence is a role definition argument. The documentary trail to establish what exactly he did, when, who controlled the build and so on is important for Mr Sun's defence.

Decision on third limb

[98] The consequence of the claimants' delay is that the first respondent has been seriously prejudiced by:

(a) The loss of any documents that may have been held by him in relation to the construction that may have assisted in his defence. Such documents could have assisted him in disproving the claims against him;

(b) The loss of the ability to identify other relevant construction parties, losing the benefit of potential claims for indemnity or contribution;

(c) The loss of the ability to identify who was responsible for any proven weathertight defects;

(d) The loss of his ability to obtain expert evidence identifying weathertight defects, the extent of damage and who is responsible for them as the original construction has now been completely demolished. The original defects are gone. He is forced to rely on the assessors' reports.

[99] Having considered the parties' submissions, evidence and the assessors' reports, I consider that the delay is inexcusable and has seriously prejudiced the first respondent.

[100] There is no valid explanation from the claimants as to why they never contacted the respondents until completion of the remedial works, more than 8 years after they obtained the WHRS report and following the demolition of the original house. The Court in *Hermann*[15] considered this a relevant factor.

[101] The delay deprived the first respondent of any opportunity to observe and challenge the claimed defects and his alleged responsibility for them. That delay is inexcusable and has caused actual prejudice to the first respondent.

[102] I note that in this context, "serious" and "significant" only means "material" (*Hermann* at [12(b)]). There is material prejudice to the first respondent, for the reasons I set out above.

Overall justice considerations

Discussion

[103] I then finally consider the overall interests of justice for both parties.

[104] Jagose J in *Hermann v Weathertight Homes Tribunal*[16] reinforced that the question was not whether the first respondent was "entirely" prevented from defending himself but whether as between the parties it was "just, or fair, or appropriate", that his defences are limited to the extent they are.

[105] I consider that it is fair and appropriate that I remove the first respondent from this claim. He is not entirely prevented from defending himself, but he is seriously prejudiced in not one but three discrete areas from doing so. Those areas are:

(a) His loss of relevant documents;

(b) His inability to locate other potential witnesses or parties;

(c) The loss of any opportunity to inspect the house before demolition and obtain expert advice to assist him in defence of the claims.

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[15] At [15]
[16] Hermann v Weathertight Homes Tribunal [2018] NZHC 1843

[106] The first respondent's identified position opposing the claimants' claim is that he did not carry out the construction work himself, but rather engaged contractors and so cannot be liable for any defects caused by a project manager, subcontractors or through failure to inspect the works by Compass.

[107] His is a role definition argument. He has stated that his role was limited to ensuring that the construction was completed and on time. He says that he was not always present on site as he was managing a number of sites at the time this house was built.

[108] He says that he was not the developer and that this can be shown by reference to the title to the property that shows his mother was the owner at the relevant time.

[109] His company records are no longer available to consider the construction and the defects and damage occasioned to the claimants' home and to respond to the claims against him. The assessors' reports do not assist in that inquiry. No other party's documents do either.

[110] I have not overlooked that the affidavit of Stephen Hubbick for the third respondent identified and appended a number documents held by Auckland Council on its file. I have reviewed those documents.

[111] My view on seriously prejudicial effect of the loss of Mr Sun's company's documents is unchanged following that review. The documents referred to by Mr Hubbick will not assist Mr Sun in his defence.

[112] The claimants demolished the house without advising any of the respondents and with the knowledge that they held eligible claims against them.

[113] Mr Sun has been deprived the opportunity to inspect the house before it was demolished.

[114] The various assessor's reports are thorough, accompanied by photographic evidence and detailed narration about the defects, their causes and location and the damage arising from those defects. The reports also identify relevant construction parties (although it is accepted that there may be others). They also include detailed costings.

[115] But, as set out above, the assessors' will themselves be hampered in assisting the Tribunal and the first respondent by the lapse of time since their reports were prepared and loss of memory. They cannot, as is common, revisit the house to refresh their memory ahead of the hearing.

[116] For these reasons, the first respondent will struggle to examine the assessors in any detail about his role at any hearing, a key part of his defence.

Decision on overall justice considerations

[117] Applying the "standing back" consideration, weighing the rights and interests of both parties, the Tribunal finds that the overall justice of the case favours the first respondent's application that he should be removed from this claim.

[118] The Tribunal finds that as between the parties it is not "just, or fair, or appropriate", that Mr Sun's defences are limited to the extent they are as a result of the claimants' inordinate and inexcusable delay and the demonstrated serious prejudice arising from that delay.

Outcome of Removal Application

[119] Accordingly, the first respondent's application to be removed from this claim is granted.

[120] The case manager is directed to convene a telephone conference of the parties to progress this claim to resolution.

DATED this 25th day of February 2022

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P R Cogswell

Tribunal Member