High-rise blues

The lawyers who acted for the body corporate and most unit owners in settling the Spencer on Byron's leaky building claim have been successfully sued by the body corporate in *Body Corporate 207624 v Grimshaw & Co* [2023] NZHC 979. The body corporate successfully argued that the time taken to resolve the division of settlement proceeds delayed the start of remedial works. Damages of $3,268,201.14 (with interest) have been awarded against the law firm.

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Background

The Spencer on Byron is a 23-storey building in Byron Avenue, Takapuna, built in 2000–2001. It is a leaky building. It comprises units used commercially as a managed hotel and some units for residential use.

The Body Corporate 207624 (**Body Corporate**) sued its former solicitors for breach of its contract of retainer and negligence in relation to the distribution of settlement funds to repair damage to the building. The former firm, Grimshaw and Co (**Grimshaws**), acted for the Body Corporate in extracting a $20,050,000 settlement from Multiplex and the Auckland Council[1] (**original claim**) in proceedings which lasted from 2007 to 2013 and went to the Supreme Court[2] and back.

The settlement was governed by:[3]

> … a conduct and distribution agreement between the Body Corporate and second plaintiff unit owners (the CDA). The CDA was drafted by Grimshaws in 2010 and Grimshaws subsequently advised the Body Corporate to approve the CDA in 2013. It had not

1 *Body Corporate 207624 v Grimshaw & Co* [2023] NZHC 979 at [85].
2 *Body Corporate No 207624 v North Shore City Council [Spencer on Byron]* [2012] NZSC 83, [2013] 2 NZLR 297.
3 Above, n 1, at [4]–[5].

been signed on behalf of the Body Corporate.[4]

[5] The CDA provided that any settlement proceeds were to be used to repair the Building and then credit would be allocated, on a unit entitlement basis, to the second plaintiff unit owners. Some unit owners did not join the claim so would not be allocated any credit to apply against repair costs. There was no distribution to the Body Corporate.

When the claim began in 2007 (Grimshaws took over in February 2008),[5] the Unit Titles Act 1972 was still in force. By the time the original claim settled in 2013, the Unit Titles Act 2010 (**UTA 2010**) had been in force for two years. Grimshaws' advice did not change with regard to the CDA. A key difference between the statutes is the handling of the ownership of common property, which accounted for 80% of Spencer on Byron. After the UTA 2010 came into force, the Body Corporate owned the common property[6] and had a duty to maintain and repair the premises.[7] Previously the unit owners owned the common property as tenants in common.

When Grimshaws took over acting for the Body Corporate, it added the second plaintiffs (more than 200 unit owners) to ensure the costs of repairing units could be claimed. As noted, in 2010 Grimshaws prepared a CDA for the distribution of settlement proceeds.[8]

The Body Corporate claims Grimshaws breached its duty of care to the Body Corporate in failing to advise it after the UTA10 came into force that the CDA was invalid and/or ineffective because:

a. the CDA deprived all current unit owners who were not second plaintiffs (non-plaintiff owners) of the benefit of a share in the settlement; and
b. second plaintiffs who had sold their units had changed the damages claimed from estimated repair costs to loss of value on sale of their units and the CDA provided for distribution on a unit entitlement basis.

Differences arose between the owners who had signed up as parties to the CDA and to the litigation and those who had not, or had sold their units. The non-plaintiff owners (who had not signed up) still claimed a share in the remediation settlement proceeds by virtue of their share in the Body Corporate. Given the dispute, Grimshaws did not distribute the funds; it filed an interpleader.[9] An interpleader proceeding (application to determine the right to the funds

4 It later was accepted by resolution: Above at [79].
5 Above, at [18].
6 Unit Titles Act 2010, section 54.
7 Unit Titles Act 2010, section 138.
8 Above, at [8].
9 Above, at [110]–[122]

held in Grimshaws' trust account) was argued in court through independent lawyers, and incurred substantial cost, further delaying use of the funds for remediation. The interpleader was resolved in April 2016.

Conduct and distribution agreement and developments

The CDA established a settlement committee to deal with the lawyers and settle the original claim. The net settlement proceeds were to be held by the Body Corporate for the unit owners, to be allocated amongst them according to their unit entitlements.

If Grimshaws had advised the Body Corporate properly, a new CDA would have been prepared and entered into by the Body Corporate and the owner plaintiffs in the proceeding, and the settlement proceeds would have been distributed in accordance with that new agreement in February or March 2014. That would have avoided the delays caused by the flaws in the original CDA.

The law firm had negligently failed to advise the Body Corporate to amend the CDA to reflect the UTA 2010. Grimshaws had instead positively advised the Body Corporate that the CDA was a proper basis for distribution. Grimshaws' negligence delayed the Body Corporate's ability to apply the settlement proceeds to the remediation of the building.

Delays

The High Court found that the remediation should have started in July 2014, when in actual fact the remedial work started in May 2018. The Court found that Grimshaws was responsible for an 18 month delay from June 2016 until December 2017. The total amount claimed was approximately $10.4 million.[10]

In 2013 the Body Corporate had obtained a building consent, but due to the delay had to contend with later, stricter requirements by the Auckland Council (which took over from the North Shore City Council after super-city council amalgamation). This added to the delays caused by the inability to access settlement funds.

The Court posed several questions, which were (broadly speaking):

a. Did Grimshaws owe the duty of care as alleged?[11]
b. What was the scope of the duty?[12]
c. Did Grimshaws breach the duty?[13]
d. Were the damages claimed consequences of the breach?[14]
e. Is there a sufficient connection between each head of damage claimed and Grimshaws' duty?[15]
f. Is there any reason at law or in fact that the damages cannot be claimed?[16]
g. Were any of Grimshaws' defences valid?

Existence, scope and breach of a duty of care

As to the first question, the Court found that Grimshaws owed the Body Corporate a duty of care to review the terms of the CDA when the UTA 2010 came into force. The Court then turned its analysis to the scope of this duty before answering the damages questions.

Justice Tahana found:[17]

> The scope of Grimshaws' duty of care was to review the CDA after the UTA10 came into force and to advise the Body Corporate of any legal risks to it if it approved and then implemented the CDA. The duty included advising as to how those

10 Above, at [12].
11 Above, at [181].
12 Above, at [211]–[214].
13 Above, at [286]–[289].
14 "Factual causation question" – Above, at [290]. The two categories are costs arising from the interpleader proceedings and delays in commencing remedial works.
15 "Duty nexus question" – Above, at [389]–[392].
16 This includes remoteness of damage and a failure to mitigate or a different cause of the delay or failure to avoid loss it could reasonably have been expected to avoid – Above, at [162](f).
17 Above, at [569].

> risks could be eliminated or mitigated so that the Body Corporate could achieve its commercial objective of having settlement funds available so that remedial works could commence without delay.

Grimshaws failed to advise the Body Corporate as to the legal risks of approving and implementing the CDA and how to eliminate or mitigate those risks by amending or replacing the CDA, and how to do so.[18]

Grimshaws was under an ongoing duty to advise the Body Corporate about the CDA and about confirming it, and was liable for the consequences of its negligence in not giving advice that it should have.

Grimshaws was found liable to pay damages to the Body Corporate for its breaches of the duty of care in contract and negligence.

Damages

The Court answered the damages questions (d)-(g) above in favour of the Body Corporate and accepted most of their heads of damages. The key issue was the *escalation of costs*[19] and how to quantify it.

Justice Tahana ruled that:[20]

> The costs of the interpleader proceedings[21] and the increased repair costs due to the 18 month delay are the consequence of Grimshaws' breach of its duty of care to the Body Corporate.

Later the Judge said:[22]

> Increased repair costs are a consequence of the unavailability of settlement funds due to the interpleader proceedings.

The Court found Grimshaws responsible for the costs applicable during the delay period of June 2016 to December 2017. Notably, only cost escalation was recoverable during that period.[23]

A further contentious issue was the inflation factor methodology to use for the cost escalation. The Rider Levett Bucknall tender price index was used:[24]

> This index more closely reflects actual construction cost increases in Auckland and is likely to be closer to actual increases in construction costs, thereby reflecting the likely June 2016 contract price.

This resulted in the $2,803,110.90 quantum of damages. The next biggest heads of damages were the costs of the interpleader ($306,985.58) and the increased costs of the cladding ($380,903.00). Other amounts related to increased consultancy, consent and insurance costs.

Interest on the damages was directed from specific dates set out in the decision.[25]

Grimshaws' Limitation Act, estoppel, betterment, and various other defences were rejected in a comprehensive judgment.

Conclusion

As litigation slows with body corporates and moisture ingress issues,[26] this case was very fact specific. It shows the need for care in dealing with body coporates in terms of instructing lawyers, lawyers giving advice (or failing to), and crafting and implementing settlement deeds or CDAs. This includes taking account of changes in the law and adjusting the advice accordingly.

Arbitration or mediation might have been viable alternatives to litigation due to the long drawn-out nature of the dispute and the ability to keep matters confidential.

18 Above, at [570].
19 $2,803,110.90 as per above, at [3](c).
20 Above, at [574].
21 $306,985.58 as per above, at [404] and [591](a).
22 Above, at [576].
23 Above, at [444].
24 Above, at [460], [461].
25 Above, at [586]–[590] and [591](d).
26 But still see *SRG Global Remediation Services (NZ) Ltd v Body Corporate 197281* [2022] NZCA 518 for example.