IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA287/2023
CA773/2023
[2025] NZCA 392

BETWEEN	GRIMSHAW & CO Appellant
AND	BODY CORPORATE 207624 Respondent

Hearing:	10–13 March 2025
Court:	Mallon, Cooke and Woolford JJ
Counsel:	L J Taylor KC, J B Orpin-Dowell and P J L Hunt for Appellant D R Bigio KC, S F Pearson and S G Colson for Respondent
Judgment:	7 August 2025 at 3.30 pm

JUDGMENT OF THE COURT

A **The appeal is allowed and the judgment of the High Court is set aside.**

B **The cross-appeal and the costs appeal are dismissed.**

C **The respondent must pay the appellant costs for a complex appeal on a band B basis together with usual disbursements. We certify for second counsel. There is no separate award of costs on the cross-appeal or the costs appeal.**

D **The order of costs in the High Court is set aside and costs in the High Court are to be reconsidered in light of this judgment.**

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REASONS OF THE COURT

(Given by Cooke J)

[1] Grimshaw & Co appeals from a decision of the High Court upholding a claim in negligence against it in favour of its former client, Body Corporate 207624 (the Body Corporate) in the amount of $3,268,201.14 plus interest.[1] The final amount of

[1] *Body Corporate 207624 v Grimshaw & Co* [2023] NZHC 979 [judgment under appeal].

the damages award was settled by subsequent judgment.[2] The Body Corporate cross-appeals the level of the award of damages. There is also a further appeal by Grimshaw & Co in relation to the costs awarded against it.[3]

[2] Tahana J found that Grimshaw & Co had been negligent in the advice that it had provided to the Body Corporate in relation to the Body Corporate's claims arising from building defects in its building, known as Spencer on Byron. The building defects litigation was successfully settled in 2013, with $20.05 million received. But the members of the Body Corporate were initially unable to agree on the allocation of the settlement sum between them. This caused a delay in the undertaking of the repairs to the building. Once that disagreement was resolved, the remedial work was undertaken. Tahana J held that the delay in undertaking the repairs increased the cost of those repairs, and that this delay was caused by Grimshaw & Co's negligent advice.[4] The increased cost of the repairs formed the basis of the damages award.[5]

[3] In essence, Grimshaw & Co challenges the High Court's findings on both negligence and causation. For its part, the Body Corporate challenges aspects of the High Court's findings on causation, contending that the award should have been higher than it was.

Background

[4] The Spencer on Byron building opened in 2001 to operate as a hotel and apartment complex. On the two-level podium there was a lobby and hotel facilities. The second floor had a pool, tennis courts and a gym. The second to nineteenth floors had 249 apartment units, and on the top two floors were six penthouse units. Almost all of these units were initially part of the hotel operation but then became primarily residential. It was established as a unit title property under the Unit Titles Act 1972 (the 1972 Act), with individual owners purchasing units.

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2 *Body Corporate 207624 v Grimshaw & Co* [2023] NZHC 1155 [damages decision].
3 *Body Corporate 207624 v Grimshaw & Co* [2023] NZHC 3381 [costs decision].
4 Judgment under appeal, above n 1, at [574] and [576].
5 See damages decision, above n 2, at [3].

[5] Defects with the building were identified by 2006, with solicitors first instructed in 2007. Proceedings were commenced against the building company (Multiplex) and the North Shore City Council (which subsequently merged into Auckland Council). When proceedings were originally commenced the Body Corporate was the sole plaintiff.

[6] The Body Corporate subsequently decided to change lawyers and instructed Grimshaw & Co in 2008. In March 2008 Grimshaw & Co advised that unit owners should join the Body Corporate as second plaintiffs. In June the Body Corporate wrote to all unit owners referring to Grimshaw & Co's advice that they join as plaintiffs in the proceedings and, by July 2008, 148 owners had so joined.

[7] Between 2009 and 2012 progress in the proceeding slowed because of a preliminary issue addressed to whether the Council owed a duty of care to commercial plaintiffs such as the owners of the hotel, as well as the owners of the residential units. The majority of the Supreme Court ultimately held that it did.[6]

[8] In the meantime, steps had been taken to further organise the claims and the claim against Multiplex was able to be progressed. By November 2009 the number of unit owners who had joined had risen to 172. By letter dated 15 December, Grimshaw & Co again wrote to the Body Corporate. The letter was intended to be distributed to those Body Corporate unit owners who had not joined as plaintiffs and provided advice on why they should join. This advice recognised the difference between damage to the common property owned by all the unit owners collectively (which claim the Body Corporate could advance on behalf of the unit owners under s 13(2) of the 1972 Act), and damage to individual units (which claim each unit owner individually advanced). The letter said:

> As the law currently stands, individual owners claim for damage to unit property, whereas the body corporate claims for damage to the common property. The absence of an individual owner does not necessarily prejudice the body corporate's right to sue for damage to the common property. However, if a unit owner is missing from the proceedings, then any damage suffered by … the individual unit property of that owner will not form part of the claim. Spencer on Byron has a large percentage of common property.

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6 *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297.

[9] The letter also explained that each unit owner was obliged to provide discovery, and that a failure to do so could compromise their portion of the common property claim. It also pointed out that non-participating unit owners were contributing to paying for the litigation in any event.

[10] This letter raised the issues concerning the distribution of the proceeds of the litigation that is central to this proceeding, particularly in relation to claims concerning the common property.

[11] On 17 March 2010 Mr Matt Josephson, a partner of Grimshaw & Co, attended a meeting of the Body Corporate Owners' Committee. He advised that the Body Corporate and the individual unit owners should enter an agreement concerning the conduct of the litigation and the distribution of proceeds recovered by the litigation. The minutes recorded: "Matt Josephson suggests everyone gets 'nailed down' to the agreement as it solves problems with distribution [of] funds later."

[12] At that stage mediation of the claim against Multiplex was contemplated and Mr Josephson also advised that prior to any mediation, there should be 100 per cent agreement on the remedial solution to the property. At this meeting the Body Corporate instructed Grimshaw & Co to draft an agreement ahead of the proposed mediation with Multiplex. The claim against the Council was still subject to the preliminary issue that was under appeal.

[13] On 13 April 2010 Grimshaw & Co emailed a draft Conduct and Distribution Agreement (CDA) to Mr Wayne Powell, the Chair of the Body Corporate. This first draft of the CDA can no longer be found, but it appears to have contemplated that any amounts received by way of settlement were to be divided by way of unit entitlement, presumably on a pro-rata basis. This further raised the essential issue that is at the heart of this proceeding.

[14] Mr Powell responded on 13 April 2010 by asking whether the appropriate course was to have the court approve a scheme for distributing any settlement sums under s 48 of the 1972 Act. Mr Josephson replied the same day stating:

> What the Court would conclude in terms of recovery and how it is split up on settlement are not necessarily the same thing. Common property division does not necessarily have to be taken into account. There can be agreement on how to divide up the spoils as between body corp and individual owners and provided everyone including body corp [agrees] then that should be OK. BUT, having said that, for somewhere like Spencer where a fair few of the owners aren't part of the action then maybe a section 48 is a good idea. If Court decrees a divvy up [then it's] pretty hard to say that any money recovered should be divided in any other proportions.
>
> Section 48 could take time. For the purposes of settlement negotiations if these are imminent, then maybe you are better to do the deal and then agree to the divvy up later (by way of section 48 Court order or some other formula). Anything else may be unworkable given all the circumstances.
>
> Remember for the purposes of doing the deal you only have to agree on how much to accept, not on how to divide it amongst the claimants. I hope this helps a bit.

[15] The Body Corporate accepted this advice, and no s 48 scheme was progressed at this stage.[7]

[16] Around this time, on 19 April 2010, the new Unit Titles Act 2010 was passed (the 2010 Act). But the 2010 Act did not come into force at this point in time, and did not do so until June 2011.[8] The enactment of the 2010 Act is central to the Body Corporate's case against Grimshaw & Co. The Body Corporate alleges it made a significant change in relation to the common property claims. Whether this is so will be addressed below. But in any event the 2010 Act was enacted while the CDA was being drafted.

[17] On 17 May 2010 Mr Josephson emailed a further draft CDA to Mr Powell. It had clauses regulating how settlement proceeds would be dealt with. On 28 May Mr Powell responded to Mr Josephson identifying changes that were required to be made to the draft, including the Body Corporate's redrafting of the clause dealing with the distribution (cl 4.5).

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7 An application for a scheme under s 74 of the Unit Titles Act 2010 was filed in the High Court on 18 November 2011. But that scheme did not address the distribution issues that arise in this proceeding. The scheme was approved by the High Court on 26 September 2012. Grimshaw & Co did not act on this application.

8 Unit Titles Act 2010 Commencement Order 2011, cl 2.

[18] Efforts to ensure as many unit owners as possible were involved as plaintiffs continued. For example, on 20 May Grimshaw & Co contacted the solicitors for the entity owning the units associated with the hotel based in the podium, Mocles Holdings Ltd (Mocles), inviting it to become involved.

[19] On 8 June 2010 the final form of the CDA was provided by Grimshaw & Co, together with a standard form letter to go to each unit owner. That letter referred to the intended mediation with Multiplex. This correspondence was sent out to unit owners the following day.

[20] The CDA was then executed and returned by individual unit owners. It regulated the distribution of any monies received in settlement of the proceeding and established a Settlement Committee with authority to settle the claims. The CDA materially provided:

> 4.3 Any monies/levies (including penalties and interest) due and owing from any Proprietor and/or plaintiff to the Body Corporate shall be deducted from that Proprietor's contribution towards the cost of repairs as per the apportionment procedure in clause 4.5, and prior to any distribution in clause 4.6.
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> 4.4 All outstanding reasonable legal and experts' costs incurred in the conduct and settlement of the Proceeding will be paid from the settlement proceeds.
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> 4.5 After appropriate deductions, as set out in clauses 4.1, 4.3 and 4.4 above, the Net Settlement Proceeds plus any accrued interest will be apportioned amongst the Proprietors according to the unit entitlements as set out in Deposited Plan 207624 and put towards each Proprietor's contribution towards the cost of repairs to Spencer on Byron.
>
> 4.6 In the event that the Net Settlement Proceeds are less than the amount required to repair the development, the balance required to pay for the repairs will be met by the raising of levies by the Body Corporate in accordance with the unit entitlements as set out in Deposited Plan 207624.
>
> 4.7 In the event that the Net Settlement Proceeds are greater than the amount required to repair the development, the balance remaining after payment of the cost of repairs is to be distributed to the Proprietors in accordance with the unit entitlements as set out in Deposited Plan 207624.

[21] The terms of cl 4.5 were in the form that had been redrafted by the Body Corporate Owners' Committee.

[22] Between 9 June and 20 July 2010, 202 CDAs were signed and returned. Sixteen unit-owner plaintiffs had not signed by the time of the mediation with Multiplex on 20 July. No settlement was reached at that time, however.

[23] A further mediation with Multiplex was scheduled for late November 2011. On 6 September 2011 Grimshaw & Co wrote to the Body Corporate saying the remaining second plaintiffs needed to sign the CDA. Then on 15 November Mr Gareth Lewis, a partner of Grimshaw & Co, emailed Mr Powell noting that it had come to Grimshaw & Co's attention that the Body Corporate had not authorised the Settlement Committee to settle the Body Corporate's claim for costs to repair the common property, and that it needed to do so. He went on to say:

> Another point is that any settlement with Multiplex will be on the basis that the body corporate settles all claims that could be brought in respect of common property. The body corporate sues for the cost to repair the common property as agent for the owners, including that part of the common property owned by the 30 non-second plaintiffs, so the body corporate will be putting an end to any common property claim by the non-participants. It is not clear whether any of the non-participants have good common property claims and we do not imagine that the non-participants are expecting to recover from the settlement, but we thought we should bring this to your attention.

[24] When Mr Powell replied later that day he said:

> Gareth all owners [were] advised numerous times about the impact of not joining as second plaintiffs and the committee hasn't been advised by any non-second plaintiff of plans to recover from the settlement.

[25] This exchange also foreshadowed the problem that later emerged.

[26] The mediation proceeded on 21 November but no settlement was reached.

[27] A few days later, on 25 November, a solicitor at Grimshaw & Co emailed Mr Powell advising that he had received a phone call from a representative of the hotel which occupied the podium. The relevant owner of the unit was the entity associated with the hotel, Mocles. The solicitor reported he had advised the representative that because the hotel was not a plaintiff, it could not recover claims for lost revenue and

that it "cannot successfully bring a claim as it would now be out of time, aside from the body corporate claim for common property". The solicitor reported that the representative appeared to consider that there was a claim for lost revenue because of membership of the body corporate. Mr Powell replied saying that he had met with representatives of the hotel and suggested they should become a second plaintiff more than a year previously. Grimshaw & Co had also done so by email dated 20 May 2010 to the hotel's solicitors. These further exchanges relating to the position of Mocles also foreshadow the issues that subsequently arose when Mocles claimed an interest in the settlement sums later received, notwithstanding that it never joined as a second plaintiff.

[28] Over the following period inquiries were made by other unit owners who were not second plaintiffs. Although there is some inconsistency in some of the responses, Grimshaw & Co tended to advise those owners that their own claims in relation to their unit would likely now be time barred as a result of the ten-year limitation period in the Building Act 2004, but that the Body Corporate had advanced the claim for all common property, including the proportionate share of the common property of such unit owners. It advised others, including purchasers who had acquired units, that they would not be able to join the claim as second plaintiffs as they had purchased with knowledge of the building defects. But their share of the common property claim might still be able to be advanced by the Body Corporate. This identified another relevant complication. When unit owners sold their unit they would retain their cause of action, which was personal to them and did not run with the land, unless they agreed to the contrary in the sale and purchase agreement. This was so in relation to the claim relating to damage to their unit and also their share of the common property claim advanced on their behalf by the Body Corporate.

[29] The 2010 Act came into force in June 2011. As a consequence, Grimshaw & Co considered the content of the statement of claim and whether it needed to be amended. An amended statement of claim dated 30 November 2012 was ultimately filed and served. The amendment included an allegation that the common property was owned by the Body Corporate pursuant to s 54 of the 2010 Act. This reflects a key aspect of the Body Corporate's claim subsequently advanced against Grimshaw & Co — that the change to the ownership status of the common property under the

2010 Act was significant for the purposes of any portion of the common property claim that could be claimed by non-second plaintiff unit owners. The amended claim also included claims of former second plaintiff owners for the loss of value on the sale of units.

[30] Beginning in approximately October 2012, other issues began emerging, particularly in relation to unit owners who discontinued their claims and the impact of their withdrawal on the size of the claim still proceeding.

[31] The division of the fruits of the litigation between the unit owners, including non-plaintiff unit owners, and the impact of the 2010 Act was subject to further consideration. In an email of 9 October 2012 Mr Lewis reported on matters that had been raised in discussions. He said:

> The division of cost between the owners.
>
> The way the courts have historically dealt with claims in a body corporate is to treat them as individual claims brought by each of the owners, even in respect of common property for which the body corporate is treated as claiming on behalf of the individual owners (ie not in its own right). In the two body corporate claims that proceeded to trial (Sunset/Byron) the owners indicated an intention to repair in accordance with unit entitlement (called "ownership interest" under the new Act), so the Court divided the damages between the owners in accordance with unit entitlement. Could you please confirm whether the Spencer on Byron body corporate has resolved to divide the repair cost between the owners in any particular fashion?
>
> This is relevant to the way in which the claim will be framed, but also has relevance to the claims by owners who have instructed us to discontinue. Before agreeing to a discontinuance on a no costs basis the defendants want to know how much comes off the claim when any particular owner discontinues. If the repairs are to be divided in accordance with ownership interest, then logically it is the discontinuing unit's ownership interest share of the total cost that is deducted. However, as this results in a reduction in the claim brought by the body corporate (in respect of common property), the body corporate needs to consent to this deduction. There is an argument that under the new Act, whereby the body corporate owns common property, the body corporate claims in its own right for common property rather than claiming on behalf of individual owners. On the basis of this argument, you could say the body corporate claim should not reduce when an owner discontinuances. However, in practical terms this would make it difficult for anyone to discontinue on a no costs basis, as the defendants would not agree to this if there was no deduction of the common property share, and in addition we think it more likely that the Court will still treat the body corporate common property claims as being brought on behalf of the individual owners anyway. So, could you please confirm that we may advise the defendants that

> upon the discontinuances, the owner's share of both unit and common property comes off the claim?
>
> If the body corporate has not done so already, it would be of benefit to have a scheme for the repairs sanctioned by the High Court under [s 74] of the Unit Titles Act. The new Act does not necessarily authorise repairs to the parts of the exterior that are within unit property. A [s 74] scheme authorises all of the works, so that they cannot be held up by any owner, clarifies the division of cost to avoid disputes during the works, and includes other provisions which enable the works to proceed smoothly such as obligations on owners to vacate their units as necessary. The body corporate can show the [s 74] scheme to contractors and consultants, as evidence that it has authority to engage and instruct them in respect of all aspects of the remedial works. I can provide a copy of a draft scheme we have used for other body corporates and a cost estimate for making the application to the High Court for the scheme if you wish.

[32] In the new year Mr Robert Khoo took over from Mr Powell. One of the associated issues then raised with Grimshaw & Co was that all the unit owners were being levied to pay for the costs of the litigation, and not just unit owners who were plaintiffs. Questions were raised about this. Grimshaw & Co was asked for its views and by email dated 31 January 2013, Mr Lewis told Mr Ken Weatherburn and Mr Khoo of the Body Corporate that, in his view, only the current owners who were second plaintiffs should be levied. Mr Lewis went on to address the distribution of the fruits of the litigation. He explained that distribution would depend on whether it was as a result of settlement, which would be governed by the CDA, or judgment of the court, saying:

> It is correct that only the second plaintiffs are entitled to the proceeds of a settlement and that the distribution following settlement is in accordance with unit entitlement, as per the distribution agreement.
>
> If the matter proceeded to trial, the Court would likely order that a sum of money be paid to the body corporate (for repairs to common property) and separate amounts to the second plaintiffs (for repairs to unit property, consequential losses, general damages and loss on sale). It would be up to the body corporate as to how it distributed its share, but if the Court adopted the position that the body corporate claim is made on behalf of its members, then it would make sense for the distribution to be made to the current owners who the Court considered had good claims.

[33] In his reply dated 31 January Mr Weatherburn said to Mr Lewis that there could be "huge problems" when a settlement occurs and owners who were not second plaintiffs were required to pay for the repairs when thought they would share in the proceeds of the claim because they had been paying for legal costs.

[34] Grimshaw & Co's view was reiterated in an email from Mr Lewis and Mr Josephson to Mr Powell of 19 February. The 19 February email also expressed the view that the Body Corporate's common property claim would generally be seen as being advanced on behalf of owners who had advanced their own claims.

[35] Grimshaw & Co firmed up its advice in relation to the entitlement to settlement proceeds in subsequent communications. By email dated 27 February 2013, Mr Lewis advised Mr Khoo that the settlement money would be for the second plaintiff owners, with former second plaintiff owners paid in cash and current second plaintiff owners receiving their entitlement by way of credit on their Body Corporate account. This view is consistent with the terms of the CDA.

[36] In March Grimshaw & Co prepared a further amended statement of claim. Mr Lewis provided the amended statement of claim to Mr Khoo, advising that approximately $4.5 million of the claim in relation to the common property related to non-second plaintiff unit owners whose portions of the claim would likely not be allowed by the court. In an email of 16 April 2013 he recorded:

> This claim assumes that the body corporate is entitled to claim for all common property costs. The Court will probably decide only those owners in the proceeding may claim their share of common property costs, in which case $4,282,667 would be deducted.

[37] In a subsequent question and answer session where unit holders asked Mr Lewis to advise on specific questions they had, Mr Lewis advised that unit owners who were not second plaintiffs would receive no benefit from a settlement and that their contributions to legal fees should be refunded, at least in the first instance.

[38] At that time Mr Lewis also advised that the Body Corporate needed to pass a resolution agreeing to be bound by the CDA before a planned mediation. No formal resolution to this effect had been passed. That was subsequently done, although we note that it is likely that the Body Corporate was already bound by the CDA notwithstanding the lack of such a resolution.

[39] On or about 26 September 2013 a settlement was reached in relation to the claim against Multiplex for a lump sum payment.

[40] The claim against Auckland Council then continued. In October 2013 Grimshaw & Co advised the Body Corporate that the plaintiffs were likely to recover $20 million if the claim went to trial. This was broken down into recovery of $13 million for repairs, $3 million for second plaintiff loss on sale claims and $4 million for second plaintiff consequential and general damages. Grimshaw & Co recommended that the Body Corporate accept a settlement offer in the range of $15–20 million from Auckland Council.

[41] A further amended statement of claim was filed and served, as were the Body Corporate's opening submissions. The start of the trial was then delayed to allow settlement discussions to continue, and on 20 October 2013 the Body Corporate signed a settlement agreement with Auckland Council for a lump sum. The total settlement amount involving both defendants was $20,050,000. Some owners were informed of the settlement on 22 October 2013.

[42] Almost immediately afterwards unit owners who were not second plaintiffs questioned why they were not benefiting from the settlement, including a Mr Toby Cooper. Mr Cooper and Mocles subsequently became the two leading claimants who were unit owners who were not plaintiffs.

[43] The matter was to be discussed in an upcoming annual general meeting of the Body Corporate, with Mr Lewis advising that the Body Corporate should adopt the position that it was premature to discuss distribution.

[44] The bulk of the settlement funds were received by Grimshaw & Co on 31 January 2014, with the residual payment made on 14 February 2014. On 19 February 2014 Grimshaw & Co advised that the distribution of this fund would be subject to the CDA. Distribution was then delayed while the distribution issues were considered.

[45] On 4 March 2014 the solicitors for Mocles claimed an interest in the settlement fund on Mocles' behalf. Mr Lewis gave advice to Mr Khoo in response that Mocles did not have an entitlement. On 10 March Grimshaw & Co then recommended that the Body Corporate instruct another firm of solicitors, Gilbert Walker, to seek a

declaration to confirm the correct method of distribution, and Gilbert Walker was subsequently instructed.

[46] During March 2014 Grimshaw & Co advised several of the second plaintiffs for whom it acted that there may be some merit in the claim that Mocles had advanced. For example, on 18 March a senior associate advised in relation to non-second plaintiff unit owner claims:

> This position has legal merit due to the unusual nature of ownership of property in a Body Corporate. The non-party owners clearly have no claim to any share of the settlement in respect of their private property but they may well have a claim to the settlement funds based on their ownership of their share of the common property. On the other hand, these owners were not parties to the litigation so it is arguable they should not receive any of the settlement funds.
>
> Given the money at stake it is likely that the Court will have to determine the issue.

[47] The Body Corporate then instructed Grimshaw & Co to distribute the funds to it, but on 22 May 2014 Mr Lewis responded that the claims made on the fund by the unit owners who were not plaintiffs meant that transferring out the funds could result in claims arising from that distribution, and the appropriate course was to make an application to the High Court.

[48] Attempts were then made to settle the dispute between the unit owners. No settlement was achieved, however, with the parties finding it necessary to first know what the cost of the repair work would be. As part of these attempts, on 3 June 2014 the Body Corporate sent a proposal to all unit owners and second plaintiffs proposing that the proceeds be distributed so that 49.35 per cent of the proceeds would be allocated to the Body Corporate for the benefit of all unit owners, and 50.65 per cent would be allocated to second plaintiffs. This was based on the ratio of damage to common property and units that had been advanced in the litigation. This resolution was not accepted. On 30 July 2014 the Body Corporate instructed Grimshaw & Co to file interpleader proceedings to deal with the distribution issues, which duly occurred in September 2014.

[49] On 3 September 2015 a scope of works was provided by a quantity surveyor which estimated that the cost of repairs to the building would be approximately $18,720,000, with repairs to common property comprising approximately 85 per cent of the estimated cost.

[50] A mediation between the parties claiming an interest in the fund then took place on 14 December 2015. Following that mediation a settlement was reached under which 80 per cent of the net settlement would be allocated to the Body Corporate to benefit all unit owners to address the common property repairs, with the remaining 20 per cent allocated to the second plaintiffs to go towards their claims for loss on sale or the remediation of their units. This meant that the distribution mechanism in the CDA excluding non-plaintiffs would not be applied.

[51] On 21 March 2016 the High Court ratified this distribution of the fund and a final distribution order was made on 18 April 2016.

Issues on appeal

[52] Whilst the parties have identified a number of issues that they say need to be determined to address the appeal and the cross-appeal, we consider that the following key issues arise:

(a) Was Grimshaw & Co negligent in failing to recommend to the Body Corporate that the CDA should be amended to address the risk that its distribution terms were ineffective as a consequence of the 2010 Act?

(b) If so, would an amended CDA likely have been agreed between the unit owners in a manner avoiding the delays arising from the disputes?

(c) If so, was the High Court correct in its findings in relation to the period of delay caused and the financial implications of that delay?

First issue: was the High Court correct to find Grimshaw & Co breached a duty of care?

[53] We deal first with Grimshaw & Co's challenge to the High Court Judge's conclusion that Grimshaw & Co was liable in negligence.

High Court Judge's findings

[54] The High Court Judge upheld the Body Corporate's claims of negligence based on the change arising from the 2010 Act. The central finding is that the 2010 Act involved a significant change in law, and Grimshaw & Co was negligent in failing to address the implications of that change. Tahana J said:[9]

> [224] Under the UTA10 the Body Corporate owned the common property and unit owners held a beneficial interest in the common property proportionate to their respective units. This was a change from the UTA72 where common property was owned by the unit owners as tenants in common in accordance with unit entitlements. The observations in *Byron Ave* regarding the effect of s 13 of the UTA72, therefore no longer applied. There was no [s 13] equivalent in the UTA10. The legal ownership of common property had been vested in the Body Corporate.

[55] The reference to "*Byron Ave*" is a reference to the observations of the High Court, upheld by the Supreme Court in *North Shore City Council v Body Corporate 188529*,[10] that under the 1972 Act the Body Corporate was able to sue on behalf of unit owners in relation to the unit owners' causes of action associated with damage to the common property.[11]

[56] The Judge held that Mr Lewis was aware of the changes that the 2010 Act had implemented, and that the CDA could easily have been amended to allocate the settlement fund relating to the common property to the Body Corporate.[12] She held that the CDA was not consistent with the 2010 Act, finding:

> [232] Clause 4.5 gave rise to a risk that the Body Corporate as legal owner of the common property, as first plaintiff in the proceeding, and as a party to the CDA, would be deprived of a share of the settlement funds to which it was

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9 Judgment under appeal, above n 1 (footnotes omitted).

10 *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 at [58].

11 *Body Corporate No 189855 v North Shore City Council* HC Auckland CIV-2005-404-5561, 25 July 2008 at [61] and [66].

12 Judgment under appeal, above n 1, at [229]–[233].

> entitled. Clause 4.5 also gave rise to a risk that there would be less funds available than the Body Corporate was entitled to receive to put towards its repair obligations under s 138 of the UTA10.

[57] The Judge then addressed, and dismissed, three arguments advanced by Grimshaw & Co to contest this finding of negligence:[13]

(a) that this allegation had not been pleaded;

(b) that the Body Corporate did not have a cause of action resulting from the 2010 Act as it had knowledge of the building defects; and

(c) that there was no substantive change, as the Body Corporate still acted as the unit owners' agent under the 2010 Act.

Arguments

[58] Mr Taylor KC argued for Grimshaw & Co that the High Court erred in finding that the CDA was rendered invalid or ineffective by the 2010 Act such that Grimshaw & Co needed to advise the Body Corporate to amend it.

[59] The allegation could only be that there was a risk of invalidity that needed to be addressed by amendment, and this was neither pleaded nor proved. It was true that a solicitor could be under a duty to identify obvious risks, but here there was no such risk.[14] The CDA was entered into when the 1972 Act applied and it was common ground that it provided a reasonable way of distributing the fruits of litigation. The change to the ownership of the common property arising from the 2010 Act did not retrospectively appropriate the accrued rights in relation to the common property of the second plaintiffs. It was a clear principle, reflected in s 12 of the Legislation Act 2019, that legislation did not have such retrospective effect.

[60] Moreover, the "look through principle" — that the Body Corporate advanced claims in relation to the common property on behalf of the unit owners — still applied after the passage of the 2010 Act. Mr Taylor referred to a series of High Court

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13 At [234]–[242].

14 Citing *Boyce v Rendells* [1983] 2 EGLR 146 (EWCA Civ).

decisions where, at the very least, there was uncertainty about the relevant principles, which demonstrated there was no obvious risk that Grimshaw & Co had to advise the Body Corporate about.[15] Grimshaw & Co needed to make professional judgments. Negligence is only established if such judgment was not one a reasonably competent solicitor could make.[16] That was not the case here.

[61] The fact that Grimshaw & Co amended the pleadings after the 2010 Act came into effect did not show negligence in failing to recommend that the CDA also be amended. The pleadings were amended simply to preserve an argument. Grimshaw & Co consistently advised the Body Corporate that there was an issue arising from a potential claim to the common property fund by non-second plaintiffs whilst advising that, in its view, such claims would not succeed.

[62] Nor was there any negligence arising from a failure to recognise an alleged breach of the duty of even-handedness as between members of the Body Corporate arising from the CDA. The only duty was to act fairly as between beneficiaries, not a duty to treat them equally. The Body Corporate discharged its duty of even-handedness by giving all non-plaintiff owners an opportunity to join as plaintiffs. So no negligence arose from Grimshaw & Co failing to advise the Body Corporate to amend the CDA to treat all unit owners equally.

[63] Mr Bigio KC supported the conclusions of the High Court Judge. Grimshaw & Co had recognised from the outset there was a need in the CDA to get everyone "nailed down" to avoid distribution difficulties which would cause delay. The receipt of the settlement funds was not an end in itself but a means to an end. So the very risk that Grimshaw & Co was instructed to protect the Body Corporate from arose as a result of Grimshaw & Co's negligence.

[64] Grimshaw & Co had failed to recognise the obvious flaw in the CDA terms arising from the effect of the 2010 Act. The 2010 Act vested the common property in

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15 Citing *Body Corporate 406198 v Argon Construction Ltd* [2023] NZHC 3034; *Body Corporate 366567 v Auckland Council* [2024] NZHC 32; and *Body Corporate 455529 v Auckland Council* [2023] NZHC 3047.

16 Citing *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 (HL) at 221; *Simperingham v Martin* CA5/95, 2 June 1995 at 13; and *Antons Trawling Ltd v Dawson & Associates Ltd* [2016] NZHC 982 at [186]–[187].

the Body Corporate. Grimshaw & Co had failed to recognise this. When claims to the proceeds of litigation were later made, solicitors at Grimshaw & Co instantly recognised that they had obvious legal merit. The Body Corporate effectively plunged into chaos as a consequence.

[65] It was plainly within Grimshaw & Co's duty of care to address the distribution issues, and indeed Grimshaw & Co had amended the statement of claim in the building defects litigation reflecting the ownership by the Body Corporate of the common property arising under s 54 of the 2010 Act and the Body Corporate's responsibilities to effect repairs to the common property arising under s 138 of the 2010 Act.

[66] Grimshaw & Co repeatedly and wrongly assumed that the validity and effectiveness of the CDA continued notwithstanding the new legislation. For example, it confirmed that non-plaintiff owners were not entitled to the funds, without addressing the effect of the 2010 Act, in its email of 19 February 2014. The effect of the 2010 Act was simple — the common property was vested in the Body Corporate and the Body Corporate had the statutory duty to repair.

[67] Furthermore, and as the High Court held, Grimshaw & Co was negligent because of a failure to appreciate and advise upon the effect of the duty of even-handedness. That was because the CDA allowed for some owners to benefit from settlement and not others. The litigation had been advanced by the Body Corporate on behalf of all unit owners, and there was no proper basis to conclude that those who were not second plaintiffs had invalid claims.

[68] Moreover, even if the look-through principle continued to apply, the CDA wrongly allocated proceeds without regard to the strength of any individual proprietor's claim. Grimshaw & Co also wrongly assumed that a unit owner's common property claim was impaired without instructions or consideration, and notwithstanding the Body Corporate included such claims in the litigation advanced.

[69] Whilst Grimshaw & Co had raised the potential of challenge by such non-parties, the High Court Judge was right to conclude that this advice was

confusing.[17] Amending the CDA was in the shared interests of the Body Corporate and the second plaintiffs (including loss of sale plaintiffs) to avoid delay in the distribution of the settlement funds, so that repairs could be started.[18] This should clearly have been done, as the High Court Judge held.

Scope of duty

[70] The first question is whether Grimshaw & Co owed a duty of care associated with the distribution of the proceeds of the litigation.

[71] We consider that it is beyond question that Grimshaw & Co owed a duty of care to the Body Corporate to advise on the validity and effectiveness of the method for distributing a global settlement sum, and that this duty would include advice on whether any change in the law arising from the 2010 Act significantly affected the validity and effectiveness of the scheme and distribution Grimshaw & Co had recommended in the CDA.

[72] Grimshaw & Co was expressly asked to advise on and draft the CDA, including a distribution scheme, and was then instructed to act on the proceedings contemplated by the CDA. It was also asked questions related to distribution as the proceedings progressed. It was a firm of solicitors who had a degree of expertise in this particular type of claim. Grimshaw & Co could reasonably be expected to address the validity and effectiveness of the scheme it had recommended, and to advise on the impact of any significant law changes if they affected that scheme.

[73] We also accept that if Grimshaw & Co was in breach of this duty of care, that any increased costs to the Body Corporate as a consequence of delay occasioned by a need to resolve any issues about the validity and effectiveness of that scheme were within the scope of that duty of care.[19] In particular, if the cost of the necessary repairs increased because of delays caused by a negligent breach of this duty, these losses would be within the scope of the duty. We accordingly do not accept the submissions

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17 Judgment under appeal, above n 1, at [280].
18 At [298]–[299].
19 *Routhan v PGG Wrightson Real Estate Ltd* [2025] NZSC 68 at [146] per Glazebrook and Miller JJ and [328] per Winkelmann CJ and Ellen France J.

of Grimshaw & Co based on scope of duty, remoteness of damage, causation and reasonable foreseeability of loss. These conclusions are subject to one proviso which we address briefly below.[20]

[74] On these two issues, therefore, we agree with the analysis undertaken by the High Court Judge, and with Mr Bigio's submissions.

[75] But, for the reasons explained below, we disagree with the Judge's findings in relation to breach, which we need to address in greater detail.

Alleged breach relates to effect of 2010 Act

[76] It is first important to recognise that it was not alleged that Grimshaw & Co breached any duty of care in relation to the initial formulation of the distribution terms of the CDA. Nor was there any finding to this effect by the Judge. Rather, it is alleged the 2010 Act introduced a significant change to the law, and that Grimshaw & Co was negligent in failing to advise the Body Corporate that it needed to amend the CDA as a consequence as it terms were no longer effective.

[77] We note that any allegation that Grimshaw & Co was negligent in originally devising and advising upon the distribution scheme in the CDA would have been time-barred by the time proceedings were commenced. But it is also apparent that the case advanced by the Body Corporate involved an acceptance that the original distribution scheme was not negligently recommended by Grimshaw & Co. For example, the Body Corporate's expert witness in body corporate law, Mr Thomas Gibbons, was asked in cross-examination whether the distribution scheme in the CDA was reasonable at inception. He responded that he could see it as being "an efficient way of dealing with things", although he added it did not "quite reflect perfection", particularly with respect to entitlements associated with the sale of units.[21] This evidence recognises that the Body Corporate's case was focused on the change in law arising from the 2010 Act rather than the distribution scheme as originally devised.

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[20] See below at [153]–[155].
[21] See below at [148]–[149] .

[78] We do not accept Mr Taylor's argument that the Judge's findings of negligence were not adequately pleaded by the Body Corporate. The statement of claim squarely alleged that the 2010 Act rendered the CDA distribution terms invalid and ineffective because of the effect on the common property claims and that Grimshaw & Co negligently failed to consider or advise the Body Corporate of this.

2010 Act did not vest the causes of action in the Body Corporate

[79] We consider that the Judge erred in the finding of breach, however. In particular, we do not agree that the 2010 Act had the effect the High Court found.

[80] It is true that the 2010 Act changed the ownership of the common property.[22] But it did not make any change to the accrued causes of action that each of the unit owners had, and which were being pursued in the litigation, or to the accrued rights of the defendants to that litigation. The vesting of the common property in the Body Corporate did not also vest the causes of action held by the unit owners relating to the earlier damage to the common property arising from the defendants' earlier negligence. The causes of action held by each unit owner in relation to their unit and their proportionate share of the common property damage claim were accrued rights to advance against the defendants in the proceedings. They were in personam claims that did not run with the land. The defendants to the claims also had accrued rights by way of defences to the common property claims.

[81] At the time the 2010 Act came into force repealing the 1972 Act, the relevant provision regulating accrued litigation rights was the Interpretation Act 1999.[23] It provided:[24]

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22 The exact nature of this change is subject to argument: see below at [141]–[147].

23 The 1972 Act was repealed by s 218 of the 2010 Act.

24 A similar provision exists in s 33 of the Legislation Act 2019. See *Foodstuffs (Auckland) Ltd v Commerce Commission* [2002] 1 NZLR 353 (CA) for the effect of s 18 of the Interpretation Act 1999.

> **18 Effect of repeal on enforcement of existing rights**
>
> (1) The repeal of an enactment does not affect the completion of a matter or thing or the bringing or completion of proceedings that relate to an existing right, interest, title, immunity, or duty.
>
> (2) A repealed enactment continues to have effect as if it had not been repealed for the purpose of completing the matter or thing or bringing or completing the proceedings that relate to the existing right, interest, title, immunity, or duty.

[82] We also note the 2010 Act itself has a transitional provision which provided:

> **227 Transitional provision for proceedings under former Act**
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> (1) Except as provided in subsection (2), any proceedings that were commenced, but not completed, before the date of commencement of this section must be continued and completed in all respects under the Unit Titles Act 1972 as if this Act had not been passed.
>
> (2) If both parties agree, the proceedings may be transferred to the appropriate decision-maker.
>
> …

Section 227(2) had no relevance to these proceedings. We need not determine the scope of s 227(1), which was not subject to argument before us. That is because s 18 of the Interpretation Act, and the general principle of non-retrospectivity, apply in any event.

[83] This meant that the accrued causes of action of the unit owners, and the Body Corporate's ability to continue to advance the cause of action on behalf of the unit owners under s 13 of the 1972 Act, and the defendants' defences to those claims, remained unaffected by the repeal of the 1972 Act by the 2010 Act. The relevant causes of action in the building defects litigation accrued when damage was caused to the building as a consequence of the alleged negligence of the defendants, well before the 2010 Act came into effect. This conclusion is further supported by the other general principles relied upon by Mr Taylor, including that legislation generally does not have retrospective effect.[25]

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[25] Reliance was placed on s 12 of the Legislation Act. Equivalent provisions exist in ss 7, 17 and 18 of the Interpretation Act.

[84] What mattered was the ownership of the causes of action, not ownership of the common property. The ownership of the common property at the time the causes of action accrued was with the unit owners and not the Body Corporate. The Body Corporate was authorised to sue as agent of the unit owners for those accrued causes of action under s 13 of the 1972 Act. We consider the Judge erred in finding otherwise, including by finding that the observations upheld by the Supreme Court in *Byron Ave* "no longer applied".[26] In accordance with the principle reflected in s 18 of the Interpretation Act, the Body Corporate continued to exercise this right. For that reason, we consider that Grimshaw & Co was not negligent in failing to recommend that the CDA be amended to address the changes arising from of the 2010 Act. Indeed, it would have been an error to give that advice. The litigation continued, and the CDA remained valid and effective and reflected the principles of the 1972 Act.

[85] We consider that this point operates as a complete answer to the Body Corporate's claims.

[86] The fact that there were accrued litigation rights at the time the 2010 Act came into force was not addressed by the High Court Judge. That may be because it may not have been squarely raised in submissions before her. It is also significant that it does not appear to have been recognised at the time. It was not referred to either in Grimshaw & Co's advice or the advice of any other lawyers at the time that we have identified. Nor was this principle referred to in the expert evidence at trial. Rather, the focus of the experts was on the argument that the "look through principle" continued to apply under the 2010 Act. The lack of recognition of the non-retrospectivity principle is a notable feature of this case.

[87] The closest the High Court Judge came to addressing this issue was in response to Grimshaw & Co's submission that a new cause of action was not vested in the Body Corporate as a consequence of the 2010 Act, and that it could not do so given that the Body Corporate had knowledge of the building defects at that time. There was no reference to accrued causes of action nor the effect of the provision of the Interpretation Act when this argument was addressed, however. The Judge's reasons

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[26] Judgment under appeal, above n 1, at [224].

for rejecting this submission were concise. But they included a finding that the change in ownership of common property was relevant "to the capacity in which the Body Corporate was acting in bringing the claim".[27] We do not consider that conclusion is correct. The Body Corporate continued to exercise the right to bring the proceedings in accordance with s 13 of the 1972 Act, and the underlying unit owners' causes of action (and any limits upon those causes of action able to be raised by the defendants) continued unaffected by the 2010 Act. That was the effect of s 18 of the Interpretation Act, and the principle of non-retrospectivity generally.

[88] We accept that the 2010 Act might be relevant if its provisions affected the Body Corporate's obligations when it received the settlement funds. But we do not consider that the 2010 Act had an impact on the Body Corporate's responsibilities. The Body Corporate's obligations in respect of the settlement fund were set out in the CDA which it had earlier entered with each of the second plaintiffs. The CDA was binding on the Body Corporate, and none of its terms were in conflict with the 2010 Act. The CDA also generally reflected the underlying litigation rights of the second plaintiffs. The fact that the Body Corporate owned, and had a responsibility to repair the common property did not override these rights.

[89] We do not accept Mr Bigio's argument that the terms of the CDA were inconsistent with the 2010 Act because it was invalid not to include non-plaintiffs in the common property claim division as a matter of law. That was because the CDA reflected the fact that the relevant causes of action, including those relating to the common property, were vested in the unit owners and not the Body Corporate. Under the 1972 Act the Body Corporate was authorised to bring the claim on behalf of the unit owners in relation to the common property under s 13, but that did not give the Body Corporate a beneficial interest in the fruits of the litigation. Section 18(2) of the Interpretation Act preserved the Body Corporate's right to advance the claims under the 1972 Act.

[90] We also do not accept Mr Bigio's argument based on *Jewett Investments Ltd v Body Corporate 204096*.[28] Jewett Investments Ltd (Jewett) was one of the defendants

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27 At [240].

28 *Jewett Investments Ltd v Body Corporate 204096* [2011] NZCA 232.

to the proceedings in that case but also a member of the body corporate. Jewett argued that a sum received by the body corporate in accordance with litigation against it was an asset of the body corporate. Jewett sought to claim an interest in the fund notwithstanding it was not a party to the relevant litigation conduct and distribution agreement. This Court upheld the High Court in disagreeing with this argument. The majority of the Court said:[29]

> [50] The settlement sum held in trust by the body corporate's solicitors, $9.8 million, was not an asset of the body corporate. It was the fruit of the claim brought by the claimant owners (all the owners except Jewett) to pursue their economic losses, the levies for remedial work, past and anticipated, the loss of value to their units as a result of stigma, and consequential costs. It was not a claim that the body corporate brought, or needed to bring, to recover the past and future costs of repair. It was entitled to, and had, passed those costs immediately to the owners by levy. It was only a party to the claim because, to recover their economic losses, the claimant owners had first to establish the costs to the body corporate from which their levies derived.

[91] Here the Body Corporate advanced a claim for damage to the common property on behalf of unit owners under s 13 of the 1972 Act, and the Body Corporate was a party to the litigation for this reason. But, equally, the terms of the CDA made it plain that the fruits of the litigation did not belong beneficially to the Body Corporate but needed to be distributed in accordance with its terms. That clause reflected the accrued rights of the unit owners.

[92] The Court in *Jewett* also addressed the duty of even-handedness that the body corporate had. The Court did not uphold the claim in that respect, finding that the power of a body corporate to join a claim, and the obligations arising under related contracts, were identified as a matter of conventional interpretation.[30]

[93] Here the duty to be even-handed did not require the Body Corporate to divide the fruits of the litigation equally. All unit owners, including those who decided not to join the litigation (such as Mocles), were given a fair and equal opportunity to join the proceedings and were made aware of the terms of the CDA. Their entitlements under the claims brought in the proceedings varied. Some, such as Mocles, had impaired claims for the reasons we elaborate upon below. Indeed, treating all members

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29 Per Keane and Stevens JJ.

30 At [15] per Keane and Stevens JJ.

equally would itself have involved a breach of the Body Corporate's obligations. We see no breach of the duty of even-handedness in those circumstances.

[94] We also do not accept Mr Bigio's argument that the CDA was invalid because it did not distinguish between the strength of the claims of individual claimants. It would have been impracticable for an agreement to do so. The whole point of such an agreement was to set out a reasonable basis to distribute a global sum, and to avoid individual argument of this kind. Moreover, this is not an issue arising from the alleged effect of the 2010 Act.

[95] We accept that there were three complications arising from the way the litigation was progressed that were relevant to the claims by non-plaintiff unit owners. But these did not arise from the 2010 Act, and there are other factors associated with these complications that we address below.

Complications

[96] Three ways in which the litigation was conducted can be said to have complicated the rights of unit owners who had elected not to be plaintiffs. It is appropriate to address these complications, although none of them affect the conclusion we have already reached.

Impaired claims

[97] First, the claim advanced by the Body Corporate included claims in relation to all of the common property, and not just the share of the common property of the second plaintiffs. So parties such as Mocles could say that the Body Corporate was advancing their common property causes of action.

[98] But Grimshaw & Co advised that the Body Corporate's ability to advance those claims was compromised by the fact the relevant unit owners had not joined the claim. The courts had recognised that bodies corporate could advance claims in respect of non-participating unit owners but their claims would be impaired and, if no discovery was given on behalf of those unit owners, that part of the claim could be dismissed as a consequence. The practical issues surrounding this were addressed in *Body*

Corporate 164399 v Auckland City Council, where Associate Judge Abbott said:[31]

> [36] This approach also answers the practical concern raised by counsel for the plaintiffs as to what would follow if the unit owners did not provide the documents. In that event, the Body Corporate would be justified in withdrawing the claim for that owner's share of the common property repair costs, failing which the defendant would be entitled to have that part of the claim struck out. This will have the logical effect that the Body Corporate will be able to maintain a claim in respect of common property only to the extent that it has the support of individual unit owners. As I have already said, the unit owners' underlying liability for repair costs will not be affected.

[99] The impaired nature of these claims had been explained to the unit owners from the outset when they were invited to sign up to the litigation. Those unit owners were advised that, whilst a claim could be advanced for their share of the common property, there were qualifications. The letter of 15 December 2009 from Grimshaw & Co said:

> 6. In order to claim the cost of repairing all common property all unit owners, whether they are plaintiffs or not, are required to provide discovery. Should they fail to comply with this requirement their portion of the common property claim will be deducted from the claim. As owners already have an obligation to provide documents, we advise joining the proceedings. In simple terms, the higher percentage of unit owners that are plaintiffs, the higher percentage of the total repair cost is likely [to] be recovered, and the more likely the owners will be able to raise the necessary funds to repair the building.

[100] That advice corresponded with the approach of the courts and was also sound from a practical point of view. Everyone knew that these claims were compromised by non-participation.

[101] Unsurprisingly, defences were pleaded in relation to the share of the common property claim of unit owners that were not plaintiffs. In the period leading up to the mediation with Auckland Council, Grimshaw & Co then advised that approximately $4.5 million of the claim was attributable to common property damage of non-unit owners that would not likely succeed.[32] It is also apparent that that element of the claim was recognised as impaired in the settlement discussions.

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[31] *Body Corporate 164399 v Auckland City Council* HC Auckland CIV-2004-404-2395, 20 April 2009. See also *Body Corporate 189855 v North Shore City Council*, above n 11, at [369].

[32] See above at [36].

[102] The High Court Judge observed that Grimshaw & Co did not explain in the advice why the $4.5 million was unlikely to be recoverable if the claims went to court.[33] We consider that observation to be a continuation of the misunderstanding about the impact of the 2010 Act. The impaired nature of the claims worth $4.5 million was apparent from the authorities on this point and Grimshaw & Co's earlier advice that we have described above.

[103] The fact that the full amount of the common property claim was included in the claim notwithstanding that not all unit owners had joined as plaintiffs is understandable for the reasons set out in Grimshaw & Co's letter of 15 December. The larger the claim, the better it was for the Body Corporate as a whole. We do not consider there can be any criticism for including all of the common property damage in the amount claimed for that reason. Nor was such criticism advanced as part of the alleged negligence.

[104] More significantly, we do not think there is anything in the distribution terms of the CDA, which excluded non-plaintiffs, that was unfair or inappropriate since the non-plaintiffs had impaired claims and because of the clear advice given to all unit owners.

Costs of litigation

[105] The second related issue arises from the fact that all unit owners were levied for the cost of the litigation, and not just the unit owners that were second plaintiffs. This subsequently became a significant issue, as anticipated, as many unit owners objected to the proposition that they were not entitled to the fruits of the litigation that they had helped to pay for.

[106] But this was also a feature of the conduct of the litigation throughout. This was recognised by Grimshaw & Co. The letter of 15 December 2009 said:

> 7. We understand that all unit owners are being levied the cost of legal fees regardless of whether or not they are plaintiffs. Any money that the body corporate and the unit owners recover pursuant to a settlement is usually split amongst those who are plaintiffs. As all

[33] Judgment under appeal, above n 1, at [71] and [73].

> owners are paying for the costs of the litigation, they might as well share in any spoils of litigation.

[107] Again, we consider this to be a fair description of the position for the unit owners. There is also no suggestion that Grimshaw & Co was negligent in failing to advise the Body Corporate not to levy the unit owners who were not second plaintiffs. Moreover, that approach would likely have been contrary to the Body Corporate's best interests as it may well have been perceived as a disincentive to join in the proceeding. That is because advice that only those who joined the proceeding would be levied for the cost of the proceeding would have disincentivised participation.

[108] When this issue was subsequently raised with Grimshaw & Co, their advice was that only the second plaintiffs should pay for the litigation, and the contribution by non-second plaintiff unit owners to the legal costs should be refunded to them. Again, we do not consider there could be any criticism of that advice, and none is advanced as part of the claimed negligence.

Unit purchases

[109] The third complication arose from the fact that as the litigation progressed, unit owners sold their units to new parties. For example, Mr Cooper's company, Quarry Road Estate Ltd, was a purchaser of multiple units.

[110] As we have indicated, the cause of action for the damage caused by the negligence of Multiplex and Auckland Council's predecessor was owned by the unit owner — both for their unit and their proportionate share of the common property. Unless the unit owner as vendor assigned the cause of action as part of the sale and purchase agreement, the litigation rights remained with the vendor. Such an assignment could be made part of the special terms and conditions of the sale. In the case of Mr Cooper's company, there were terms in its sale and purchase agreements assigning the right to proceeds attributable to property damage.

[111] We accept that there was potentially an issue about whether the litigation rights would remain with the vendors absent such special conditions after the enactment of

the 2010 Act, but as we say, the relevant causes of action here were all accrued and were held by the unit owners long before the 2010 Act came into force.

[112] It follows that purchasers had no entitlement to the fruits of the litigation absent special conditions. We consider that that is what the court would have found had the matter required court determination. But the division of the settlement fund was settled before the court was asked to determine such questions.

[113] There were two difficulties here arising from these implications of the sale of units.

(a) First, the share of the settlement sum of a unit owner who had sold the unit and retained the rights to the proceeds of litigation would not be available for repairs. These portions would be "cashed out" for their share, and their purchaser would be levied for any contribution to the required repairs. That can be seen to be adverse to the overall plan to repair the damage to the building, although the purchasers would be liable to be levied for the cost of these repairs.

(b) The related point is that the CDA did not deal with this complication. As we have said, the Body Corporate's expert, Mr Gibbons, was critical of this, albeit gently, when identifying why the original scheme was imperfect.[34] But it is not suggested that this imperfection involved negligence of Grimshaw & Co, and attempting to deal with such complications may have detracted from the incentive to get as many unit owners to join the claim as possible.

[114] As it happened, the terms of the CDA were effectively treated as amended in relation to this issue in any event, with it being understood that unit owners who had sold would be cashed out for their share of the settlement sum. Moreover the CDA was never applied given the mediation outcome.

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[34] See above at [77].

[115] The final point in relation to these three complications is that they do not arise as a consequence of the 2010 Act, or any failure to amend the CDA after the 2010 Act came into force. They were inherent complications that arose from the outset. For that reason they have no relevance to the claim of negligence that has been advanced.

Purpose of the CDA

[116] Although it is only indirectly relevant to the Body Corporate's claims given the focus on the effect of the 2010 Act, we consider there is a further reason why Grimshaw & Co cannot be said to have been negligent in relation to the terms of the CDA or any lack of advice to amend it.

[117] As Mr Taylor submitted, Grimshaw & Co made it apparent when they initially provided advice on the CDA that it did not address all the issues that could arise in relation to distribution, which would need to be resolved by other processes if they emerged. When Grimshaw & Co sent the Body Corporate the draft CDA in 2010, the Body Corporate expressly asked about the mechanism for dealing with distribution issues. In his email of 13 April 2010 Mr Powell asked a solicitor at Grimshaw & Co:

> With regard to [cl] 4.5 my understanding is that a unit entitlement [won't] work as there are areas [affected] which are not common property. There has been some discussion regarding a section 48 as being the most appropriate way to achieve a formula for the division of settlement funds.
>
> Can you suggest an alternative to a section 48 or is this the most appropriate path to take?

[118] Mr Josephson's answer explained that application to the court may be a good idea because of such uncertainties but that this would take some time and that for the purposes of the settlement negotiation "maybe you are better to do the deal and then agree to the divvy up later". That was because any other approach "may be unworkable given all the circumstances".

[119] We do not consider that there was anything negligent in Grimshaw & Co advising that the division issues would need to be agreed later, through a scheme approved by the court or otherwise, because anything else would be unworkable. Apart from anything else, unit owners who had not signed up to any such agreement would not be bound by the agreement, so there was always a risk that there would

either be court action or a need for a subsequent agreement. That is exactly what subsequently transpired when Mocles and Mr Cooper emerged and made claims. But the CDA was nevertheless beneficial as it put in place a regime that maximised the advancement of the building defects litigation.

[120] We agree that the distribution provisions of the CDA were always vulnerable to challenge by a unit owner who had not agreed to its terms. That risk reflected the reality that distribution issues might need to be reconsidered if the litigation succeeded. But that did not mean the CDA was not a sensible way to proceed. As Grimshaw & Co's body corporate expert, Mr Timothy Allan, said in evidence, disputes between members of a body corporate after settlement of leaky building claims were not uncommon.[35] Moreover, any criticism of the CDA in this respect does not arise from the effect of the 2010 Act.

[121] The approach of the High Court Judge was that, after the 2010 Act came into effect, the CDA should and would have been amended so that all unit owners, including those who had not agreed to be plaintiffs, shared in the fruits of the claim relating to the common property damage.[36] But that would have involved the Body Corporate unit owners accepting that parties such as Mocles should be treated in the same way even if they had not joined the litigation and their portion of the claim was impaired as a consequence. It would also mean that buyers of units who did not have special conditions of the kind Mr Cooper had negotiated would also enjoy those benefits, notwithstanding that their vendor may also have enjoyed a pro-rata benefit (thus double counting the share attributable to a particular unit) unless a more complicated clause were devised.

[122] There are other complications, including the fact that any global settlement sum may not distinguish between the amount attributable to the common property damage and the amount attributable to the damage to the units. Reaching agreement on all those issues, particularly in advance of any settlement sum being recovered, was correctly identified by Grimshaw & Co as potentially unworkable. As matters

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35 Referring to *Body Corporate 183930 v Chua* [2015] NZHC 2122; and *Small v Body Corporate 324525* [2018] NZHC 19.

36 Judgment under appeal, above n 1, at [287].

transpired, after a settlement sum was recovered, an application to the court for directions and subsequent mediation were necessary, and the mediation was only attempted once further advice had been received on the cost of repairs as between the common property and the individual units.

[123] For these reasons we do not consider there can be any criticism of Grimshaw & Co's advice. Indeed, even if the 2010 Act had the impact that the Body Corporate alleged, we have difficulty in accepting that a revised agreement could easily have been reached as the High Court Judge found. We address that matter further below.

Second issue: would an amended CDA have been agreed in a manner avoiding the delays?

[124] The second issue is whether the High Court Judge was right to conclude that, had Grimshaw & Co advised the Body Corporate that an amended CDA was appropriate, this would have been agreed and would have avoided the delays that were occasioned by the distribution disputes following settlement of the leaky building litigation. The Judge found:

> [302] … In the interpleader proceedings, a distribution mechanism was agreed within 13 months. That agreement was reached in the context of litigation and in circumstances where the unit owners were in dispute with one another. If competent advice had been provided, it is likely that an amended CDA would have been agreed faster, especially if the [extraordinary general meeting] process was adopted.
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> [303] Even if it took 13 months for an amended CDA to be agreed, if Grimshaws had provided competent advice when the UTA10 came into force, or at least by the end of 2011, there was sufficient time (two years) before the eventual settlement of the claim at the end of 2013.
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> [304] Within about a month of the original CDA being circulated, and without the benefit of any advice on its terms, or the [extraordinary general meeting] process, over 200 owners (all but 16) returned signed CDAs. The mediation in 2011 proceeded even without those signatures or a resolution of the Body Corporate.
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> …
>
> [311] I consider that if Grimshaws had provided competent advice to amend the CDA, it is more likely than not that an amended CDA would have been agreed and interpleader proceedings avoided prior to any settlement in 2013.

[125] In addressing this issue, we proceed on the basis that the Judge's conclusion meant that the resolution ultimately agreed between the members of the Body Corporate in late 2015 would have been able to have been agreed, or more precisely, that the terms of the CDA would have been amended and agreed by the end of 2011 in a way that would have determined this outcome without the need for further agreement. The 2015 resolution allocated 80 per cent of the settlement sum to the Body Corporate for the common property repairs (to be allocated for the benefit of all members of the Body Corporate whether they were second plaintiffs or not) and allocated 20 per cent to the unit owners who were second plaintiffs.

Arguments

[126] Mr Taylor argued for Grimshaw & Co that these findings were in error given the underlying complexities relating to distribution, which would not have been able to have been resolved by the parties easily, and not without the kind of processes that were eventually required once the settlement proceeds were received.

[127] It would also have been imprudent and unwise to recommend amending the CDA, and to seek to obtain 100 per cent agreement of the Body Corporate and approximately 223 second plaintiffs, unless the matter was absolutely clear-cut. That was particularly so given the need to bind non-parties. A reasonable solicitor would not have given such advice. It would have been highly disruptive to the prospects of settlement, and would likely have been futile.

[128] Mr Taylor also argued that there was no basis to conclude that the Body Corporate and the second plaintiffs would have agreed to the 80/20 per cent share reached following mediation, and that this division had not been advised when the Body Corporate had obtained independent advice from Gilbert Walker.

[129] It was also necessary for the rescoping works of the necessary repairs to be undertaken and then apportioned between common property and unit title damage before any agreement could realistically be reached.

[130] Mr Bigio contended that this was not the case, and that the Judge's conclusions on this issue were sound. It was clear that the Body Corporate and the second plaintiffs

would have followed advice to amend the CDA, and that the legal advice should have been that the CDA had to be amended. The Judge correctly found that a conclusion that serious failings of a law firm did not lead to loss would involve the proposition that proper legal advice would have been ignored.[37]

[131] The process for amending the CDA was straightforward. The second plaintiffs had no legal entitlement to share the fruits of the Body Corporate's claim for common property repair costs, and the Body Corporate had pursued such claims for all unit owners, even those who were not second plaintiffs.

[132] It was not necessary for the Judge to address contingent hypotheticals involved in the counterfactuals. It was open to the Judge to conclude that it was likely that the Body Corporate and the second plaintiffs would have agreed to an 80/20 split, particularly given the "favourable response" to the recommendation that the settlement funds be divided on an 85/15 split recorded at the 2015 annual general meeting.

Analysis

[133] Our analysis of this issue proceeds on the assumption that we are wrong in the conclusion that the 2010 Act did not have the effect found by the Judge. We accordingly address this issue in the alternative — if the High Court correctly found that the 2010 Act did change the entitlements in the litigation, and in particular did have the effect that all members of the Body Corporate had an entitlement to share in the proceeds of the litigation relating to the common property damage, was the Judge right to find that the required amendments to the CDA would have been in place before the settlement of the leaky building litigation in 2013?

[134] For the reasons we set out below, we do not agree with the Judge that the amended CDA along the lines suggested would have been so agreed between the parties. More particularly, we do not agree that an amended CDA regulating distribution would have been in place before the litigation was settled, or that the

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[37] At [292]–[297], referring to *Blackwell v Edmonds Judd [on appeal from Blackwell v Chick]* [2016] NZSC 40, [2016] 1 NZLR 1001 at [54].

delays that arose after that settlement would have been avoided had Grimshaw & Co advised the Body Corporate to propose such amendments to the CDA.

Purpose of the CDA

[135] As highlighted above, when originally formulating the terms of the CDA, Grimshaw & Co advised in April 2010 that it did not address all of the distribution issues, and it was better to reach an agreement to allow settlement discussions to take place and then address distribution issues later as "[a]nything else may be unworkable given all the circumstances". When this advice was provided, the alternative raised by the Body Corporate was to apply to the court for directions about distribution. We consider that the reason why an application to the court was raised was precisely because it was recognised that it was unlikely that all unit owners would agree on a distribution mechanism in advance. In any event it is apparent that the Body Corporate agreed to deferring the distribution issues.

[136] We also consider it significant that the terms of the CDA were originally formulated, and then proposed to unit owners, in a way that promoted unit owners joining the litigation. That was the strategy adopted by the Body Corporate. The correspondence advised that all unit owners should join as plaintiffs precisely because doing so would increase the total amount claimed, and their entitlements may be lost if they did not. If the proposed amendments allowed non-participating unit owners to benefit from the fruits of the litigation, this strategy would have been undermined. We also accept Mr Taylor's submission that an attempt to amend the CDA at this stage would also have been seen as weakening the plaintiffs' case, especially given the settlement discussions.

[137] We consider that Grimshaw & Co's advice in April 2010 was sound, or at the very least it was not negligent. It would likely have been too difficult to reach an agreement on all distribution issues in the CDA in advance. That is because there were a number of distribution complications. The enactment and coming into force of the 2010 Act did not avoid these complications or the need to address them only subsequent to the outcome of the litigation being apparent. We reach that conclusion for a number of related reasons which we explain below.

Binding non-parties

[138] One of the first complications with any amended CDA is that the required agreement would need to bind non-parties. In particular, unit owners in the position of Mocles and Mr Cooper were not parties to the CDA. By itself this created difficulties in proposing an amendment that would address all relevant distribution issues.

[139] We accept the amended terms the High Court Judge contemplated recognised what was said to be the entitlement of the non-parties, and that the Judge contemplated an extraordinary general meeting could have been held to confirm the revised agreement.[38] But there were still issues. For example, the amended CDA would need to provide that non-parties would not benefit from a settlement sum attributable to any claim for damage to their own unit, and regulate how to divide up a global sum between the common property and unit property claims. Moreover, the CDA divided the proceeds of the litigation on a pro-rata basis irrespective of whether any particular unit owner's claim was weaker than others for any reason. But the unit owners who were not parties had not agreed to this approach.

[140] Differences of view were likely on these issues. We do not consider that it can reasonably be concluded that all unit owners would have agreed to such terms before the fruits of the litigation, and the implications of division of those fruits, were known.

Effect of the 2010 Act

[141] The second major complication was that the effect of the vesting of the common property in the Body Corporate under the 2010 Act was far from clear. As Mr Taylor submitted, the subsequent authorities have inconsistent views over whether the change effected by the 2010 Act meant that the relevant duty of care is owed to the

[38] See judgment under appeal, above n 1, at [298]–[311]. We do not address whether a revised CDA approved at an extraordinary general meeting would have been binding on unit owners who were not parties.

Body Corporate itself rather than the owners of the units.[39] One view was that the vesting of the common property in the Body Corporate did not so vest that property fully, or beneficially. On that view the common property was still held by the Body Corporate on behalf of the unit owners under the 2010 Act.

[142] That was the view of Mr Allan, who gave evidence that the general view was that the "look through principle" continued to apply under the 2010 Act, and that he considered that this was the view generally held. He said that the 1972 Act involved agency principles, and the 2010 Act involved trust principles, but both still involved the Body Corporate acting as a representative of the unit owners. On this basis, the failure of a unit owner to join the proceedings would still mean that the Body Corporate's ability to advance a claim in relation to that unit owner's proportionate share of the common property was impaired, or at least potentially impaired.

[143] We consider that the unit owners who had agreed to be second plaintiffs would not have been prepared to freely give up entitlements given this view. Lawyers other than those at Grimshaw & Co specialising in this field, such as Mr Allan, were of this view. Indeed, Mr Allan's evidence was that he was "not aware of anyone [who's] reached a conclusion to the contrary". In those circumstances the existing second plaintiffs, or at least some of them, would likely have preferred that the resolution of the distribution issues be deferred until the claims to the proceeds of the litigation were known in preference to giving away such pro-rata shares of the proceeds attributable to the common property in advance. That was particularly so given that the defendants to the building defects claims had taken the stance that these claims were impaired.

[144] It is also apparent that the Body Corporate itself did not think that there were non-plaintiff unit owners who wished to so share in the fruits of the litigation. When Mr Lewis advised Mr Powell on 15 November 2011 that it was "not clear" whether non-participants had good common property claims but that he thought it appropriate to bring to his attention, Mr Powell replied that such unit owners had been "advised

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39 See *Body Corporate 406198 v Argon Construction Ltd*, above n 15, at [318], where Andrew J held a duty of care was owed to both the Body Corporate and the individual owners; *Body Corporate 366567 v Auckland Council*, above n 15, at [136]–[137], where Walker J disagreed with Andrew J's conclusion of a concurrent duty; and *Body Corporate 455529 v Auckland Council*, above n 15, at [42]–[44], where Gordon J declined to make a declaration regarding whether councils owe a duty of care to bodies corporate in their own right.

numerous times" of the impact of not joining as second plaintiffs, and that the Settlement Committee had not been advised of any such parties who planned to recover from the settlement.[40] We consider it unlikely that the Body Corporate, and the second plaintiffs then effectively in control of the Body Corporate, would have agreed to such terms in those circumstances.

[145] Moreover, as Mr Taylor submitted, this exchange shows that Grimshaw & Co did expressly raise the potential for such parties claiming an interest. So it is difficult to say that Grimshaw & Co was negligent in failing to advise the Body Corporate of this potential implication. We do not agree with the High Court Judge's conclusion that this advice was confusing and consider that finding to be interlinked with the finding that the 2010 Act meant that it was no longer appropriate to allocate the fruits of common property claims only to the second plaintiffs.

[146] Furthermore, whilst we address this issue on the assumption that we are wrong in concluding that accrued litigation rights were preserved, the view we have reached on that issue must, at least, contribute to the legal uncertainty on the suggested effect of the 2010 Act. For this reason also we do not consider that all second plaintiffs would have been prepared to give up their claim to the settlement proceeds in favour of those who did not participate in the litigation.

[147] It is also relevant that some unit owners had discontinued their claims as plaintiffs. When the distribution issues arose, it was proposed that their share of the common property claim be excluded. This was a further relevant distribution complication that may have prevented agreement to amend the CDA to allow all unit owners to share equally in the proceeds of the litigation. Rather, these issues had to be debated and were only likely to be agreed once the settlement sums were received and all claimants were known.

Sale of units

[148] A further complication would have arisen as a consequence of the sale of units after the CDA was entered into. As explained above, under the 1972 Act a vendor

[40] See above at [23]–[24].

would retain the benefits of the litigation after such a sale unless there were special terms in the sale and purchase agreement to the contrary.[41] In the case of Mr Cooper, whose company purchased units in 2011 and 2012, there were such special conditions under which his vendor retained the benefit of any general damages awarded but the right to damages attributable to property damage were assigned to Mr Cooper's company.[42] Under the 2010 Act, if the common property claim was vested in the Body Corporate, as the Judge found, parties such as Mr Cooper's company might so benefit even without the existence of such clauses.

[149] We agree with the High Court that cl 4.5 of the CDA did not address the position of those plaintiffs who sold their units.[43] But amending the CDA to give effect to the proposition that all purchasers were entitled to the fruits of the claims relating to the common property would have involved a number of complications. The CDA did not regulate distribution entitlements following sales. There would also be difficult issues arising from the existence of special conditions, such as in the case of Mr Cooper, of potentially varying kinds. Moreover, if an attempt had been made to amend the CDA after the 2010 Act came into effect, a question would also arise in relation to the sales that had already taken place. Vendors could not be assumed to have been agreeable to so surrendering their share of the common property proceeds. Again, we do not consider it likely that all second plaintiffs would have agreed to such terms in those circumstances.

What was to be divided?

[150] We also consider it highly likely that the second plaintiffs, or at least some of them, would have wanted to know whether the litigation had been successful, and the proportions of the success that were attributable to the common property and the units, before agreeing to a distribution. Apart from anything else, if the fruits of the litigation arose from a court judgment, it would be that judgment, rather than the terms of the CDA, that would regulate distribution. When it came to seeking to resolve this

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41 See above at [28] and [110].

42 We do not accept Mr Taylor's argument that Mr Cooper had no valid claim given he had purchased the units with knowledge of the building defects. Mr Cooper's claim arose from being assigned the benefit of the claims of his vendors.

43 Judgment under appeal, above n 1, at [284]–[285].

question after settlement of the building defects litigation, the parties also found it necessary to get advice on the proportion of the claim that was attributable to the common property following a rescoping assessment. It was only after advice was received that resolution was possible.

[151] This is reflected in what actually happened following receipt of the proceeds of the litigation. On 3 June 2014 the Body Corporate sent a proposal to all current unit owners and second plaintiffs. The Settlement Committee explained that independent advice had been taken about the distribution issues. The Committee then proposed that 49.35 per cent of the proceeds be allocated to the Body Corporate and 50.65 per cent to the second plaintiffs (ie essentially a 50/50 division). The Committee said that this was "fair and equitable", and it was based on the advice that had been received that this was the percentage division of the cost of repairing common property and the units. But this proposal was not accepted by all parties claiming an interest in the proceeds, and the ratio subsequently agreed following mediation was 80/20.

[152] We accept that an amended CDA could have provided that the proceeds would be divided on the basis of independent advice on the ratio of the cost of repairing common property and unit property damage. But even securing agreement to that approach may not have been universal as it involved all unit owners being treated equally notwithstanding differences in the damage to their units and factors impacting on the strength of individual claims.

Second plaintiffs and loss

[153] There is a final element that we address only briefly given that it was not addressed in argument and its significance is ultimately subsumed by our other findings.

[154] This claim was brought only by the Body Corporate against Grimshaw & Co. But Grimshaw & Co had other relevant clients at the time, in the form of the second plaintiffs. It had a duty to act in their best interests as well as the Body Corporate's best interests. The position of the second plaintiffs potentially complicates the loss analysis — the Body Corporate as a whole may have suffered loss as a consequence of the delays in resolving distribution issues, but that is only because the terms of the

CDA gave a financial preference to the second plaintiffs as against the other unit owners (who were not clients of Grimshaw & Co). Those second plaintiffs ultimately partly surrendered this financial preference when the other unit owners challenged their entitlements. No claim is advanced by them on the basis that they were required to give away too much, and no credit is given for the element that they kept.[44] But for them, it was a trade-off between this financial advantage and the cost of delays. The timing of this surrender, if it was required, was ultimately in the hands of the second plaintiffs, and they comprised a substantial majority of the Body Corporate members. It can therefore be argued that the delay was not caused by Grimshaw & Co's negligence but arose from the failure of those who controlled the Body Corporate to earlier give up what the Judge found they were not entitled to. Any loss analysis would need to take into account this factor, and might also complicate the question whether the loss was within the scope of the duty.[45]

[155] Given our findings that Grimshaw & Co were not negligent in failing to advise the Body Corporate to amend the CDA to abandon this financial preference, we need not take this matter further, however.

Conclusion

[156] For these reasons we consider it clear that, had Grimshaw & Co proposed that the CDA be amended so that all unit owners would benefit from the common property claims, this would not have been agreed. Indeed, we are satisfied that the Body Corporate would not even have proposed such an amendment. It would have been inconsistent with the strategy of encouraging unit owners to join the litigation as second plaintiffs, with the original view that the distribution issues were too complex to fully regulate in the CDA and the view that subsequent agreement may be required if and when the litigation succeeded. Moreover, we consider it likely that the Body Corporate, and the second plaintiffs then in control of the Body Corporate, would have been of the view that it was unfair to surrender any benefit of the litigation to non-participating unit owners.

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44 Arguably the additional five per cent said to be attributable to common property damage given the assessment that the proportions were 85/15 as compared to the 80/20 apportionment subsequently agreed.

45 See above at [73].

[157] It was also likely, or even highly likely, that the Body Corporate and second plaintiffs would have been independently advised that it was at least arguable, or even strongly arguable, that non-participating unit owners' common property claims remained impaired and that the CDA remained enforceable.

[158] For these reasons we disagree with the High Court Judge's conclusions on this second issue, and consider that the claim against Grimshaw & Co should have been dismissed for this reason also. No loss was caused by the alleged negligent failure to recommend that the CDA be amended.

Was the High Court correct in its findings in relation to the period of delay caused, and the financial implications of that delay?

[159] We have concluded:

(a) that the High Court erred in concluding that the 2010 Act had a significant effect on the rights of Body Corporate members to the fruits of the litigation, and accordingly in finding Grimshaw & Co negligent in failing to advise that the CDA needed to be amended to reflect this effect; and

(b) that the High Court erred in finding that amendments to the CDA would readily have been agreed in a manner that would have avoided the delays caused by the distribution arguments.

[160] We accordingly need only address the remaining issues briefly. Seeking to do so in greater detail is artificial given the above findings.

[161] In its appeal Grimshaw & Co criticises the High Court Judge's findings that it was the distribution arguments that delayed the repair works, and it argues that the Body Corporate would have approached the period leading up to commencing the repairs in the same way, whether or not there were such distribution arguments. In its cross-appeal the Body Corporate contends that the High Court Judge made findings unnecessarily generous to Grimshaw & Co and that the delays caused by the negligence, and consequential increases in costs, were much greater.

High Court findings

[162] Remedial works on the building did not commence until March 2018, approximately four years after the building defects litigation settled. The Judge considered competing evidence on whether this delay was caused or partially caused by the negligence that she had found. She held that the required documentation of the works would have been undertaken more efficiently were it not for the disputes, that delays due to the unavailability of a peer reviewer on the façade work would not have arisen, and that delays caused by change in policy by Auckland Council in mid-2015 would still have occurred but at a stage when the Body Corporate would have been much more advanced in the remedial process.[46] Given those conclusions, she held that the overall period of delay caused by the unavailability of the settlement funds due to the dispute was 18 months.[47]

[163] The Judge then assessed the detailed evidence as to what additional costs were caused by this period of delay. In a subsequent judgment she found Grimshaw & Co liable in the amount of $3,268,201.14, with the largest single contributor to this award being costs escalation of $2,803,110.90.[48]

The relevant principles

[164] We consider that there was no error in the Judge's approach as a matter of principle. As this Court found in *Benton v Miller & Poulgrain (a firm)*, loss assessment can present difficulties in this kind of case, but generally uncertainties as to how a plaintiff would have acted if proper advice had been given are determined on the balance of probabilities on an "all or nothing" basis rather than a "loss of a chance" basis.[49] A plaintiff has the burden of proving that it would have acted differently if it had been properly advised, to be determined on the balance of probabilities.[50] But equally, a court should not too readily conclude that serious failings on behalf of a law firm did not lead to any loss.[51] This involves an intensely factual assessment, and may

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46 Judgment under appeal, above n 1, at [383].
47 At [388].
48 Damages decision, above n 2, at [3].
49 *Benton v Miller & Poulgrain (a firm)* [2005] 1 NZLR 66 (CA) at [44], [47] and [49].
50 At [47]–[48].
51 *Blackwell v Edmonds Judd [on appeal from Blackwell v Chick]*, above n 37, at [54].

involve the court making broad judgments. The court should assess the evidence available as completely as practicable, whilst recognising that extremely complicated counterfactual analyses may soon develop a lack of reality. A degree of robust judgment may ultimately be called for. We see the approach of the High Court Judge as consistent with these principles.

Delays caused by rescoping

[165] We do not accept Grimshaw & Co's argument that the High Court Judge was wrong to conclude that the delays were caused by the distribution arguments, and that the real cause of the delay was the need to rescope the remedial works. The Judge accepted that it always was the Body Corporate's intention to reassess the scope of the works and then negotiate a price for the work based on that scope. For that reason she held that the Body Corporate was unlikely to have contracted with a builder by late May 2014.[52] But, as she held, the Body Corporate's minutes in June and July 2014 recorded that the investigation work had been stopped because there was no longer access to the settlement funds because of the distribution dispute.[53] The Judge accepted the analysis of Grimshaw & Co's delay expert, Mr Fouad El Chikhani, that the lack of funds delayed the investigation and prototyping works between May 2014 and May 2015 — a 12-month delay.[54] She then accepted that Auckland Council's change in approach in relation to the approval of façades started from mid-2015.[55] This led to the conclusion that the total delay would have been 18 months.

[166] These findings carefully assess competing evidence as to what was likely to occur. It is always possible to emphasise different factors when undertaking such an analysis. But we are not persuaded that the High Court Judge was wrong in the assessment she undertook. Each of the features she relied upon were present, and we consider it unrealistic to say that the distribution dispute did not contribute to the delay. The ultimate conclusion on the period of the delay was also reasonable. In reaching that conclusion she did not simply adopt the view of either party's expert but took both

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52 Judgment under appeal, above n 1, at [351].
53 At [357]–[358].
54 At [364]–[366].
55 At [378].

views into account. As we have said above, this kind of analysis requires robust conclusions taking into account all the available evidence.

[167] For similar reasons we do not accept the Body Corporate's arguments on its cross-appeal that, were it not for the alleged negligence of Grimshaw & Co, the remedial works would have taken place much more quickly. The Body Corporate proposed two dates for the commencement of works, October 2014 or February 2015. These dates involve a much longer period of delay attributable to Grimshaw & Co's alleged negligence.

[168] One of the key complications with the counterfactual analysis arose because there was a change in approach by Auckland Council in relation to the requirements for building façades. In short, the requirements became more extensive and then took longer to process. Although the evidence about this change was to some extent limited, we see no reason to conclude that the High Court was wrong to find that this policy change occurred from mid-2015.

[169] We also see no basis for the Body Corporate's argument that the consent from Auckland Council would have been processed within the statutory period of 20 working days. The rescoping investigation and the consequential changes to the consent cannot realistically be described as minor or only involving deletions. Both the 2013 and 2017 consent applications took several months to process, and it is appropriate to consider the factual when assessing the counterfactual. Once it is accepted that the revised consent went beyond merely deleting elements from the previous consent, the basis for this argument falls away. There is accordingly no basis for adopting the October 2014 date.

[170] We also accept Grimshaw & Co's argument that the High Court was right to conclude that the preparation of consent documentation would not have been done at the same time as the façade design, investigation and prototyping work. That is inconsistent with the contemporaneous documentation and the evidence of Mr Powell and Mr Francis Cleary, all of which suggest that the amended consent application would have been prepared after the investigation work. We also consider that it is unlikely that the consent documents would have been prepared as swiftly as alleged.

We agree with these findings for similar reasons to those we summarised above for rejecting Grimshaw & Co's arguments. We accordingly do not accept the Body Corporate's arguments for adopting the February 2015 date.

[171] For these reasons we are not persuaded that the Judge erred either on this aspect of the appeal by Grimshaw & Co or on the Body Corporate's cross-appeal.

[172] We note that it is accepted that there is an error in the quantification of damages, reducing the award in the amount of $152,878. Given that we are allowing Grimshaw & Co's appeal for the reasons outlined above, however, the correction of this error is no longer material.

Costs

[173] Grimshaw & Co also advanced an appeal against the costs determination of the High Court. Given that it has succeeded with its main appeal, this is no longer relevant. The appropriate order is for costs to be redetermined in the High Court in light of this judgment.

[174] But there are elements of the arguments that have been advanced before us relating to costs in the High Court that are appropriately addressed to assist the parties in resolving the costs issues without further recourse to the High Court.

[175] The parties originally agreed to the proceedings being categorised as category 2. After the Body Corporate had succeeded, however, Tahana J was persuaded to recategorise the proceedings as category 3.[56] We accept that the case was of the complexity where category 3 categorisation could be justified. But we do not agree that it was appropriate to recategorise the proceedings in this way only after trial. Rule 14.3 of the High Court Rules 2016 requires the proceeding to be classified for costs purposes. Rule 7.3(2)(a) and cl 3 of sch 5 contemplate that the categorisation will occur at the first case management conference.[57] Rule 14.3(2) provides that this classification will apply to all subsequent determinations of costs in the proceeding

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56 Costs decision, above n 3, at [7]–[15].

57 Categorisation is contemplated to take place at the judicial issues conference in accordance with the High Court (Improved Access to Civil Justice) Amendment Rules 2025.

unless there are "special reasons to the contrary". This determination, particularly when it is agreed, is significant. It determines the rules of engagement for the proceeding and allows the parties to know where they stand in relation to the costs of the proceeding as it progresses.[58] The High Court Rules also require costs of interlocutory steps to be determined as the proceedings progress rather than being deferred, unless there are "special reasons", for the same basic reason.[59] The schedular approach to costs is generally intended to promote predictability of costs consequences.[60]

[176] The circumstances are particularly significant here as the categorisation of the proceedings as category 2 was applied by the High Court in September 2021, when a three-week trial of the proceedings had to be adjourned. Grimshaw & Co was awarded wasted costs on the adjournment, and the Court expressly noted that the proceedings were categorised at category 2 and not category 3 when doing so.[61]

[177] Special reasons do not exist in this case. The only factors referred to warranting recategorisation were that the initial assessments, such as the assessment of the length of the trial, underestimated the extent of the work. But those factors relate to the extent of the work, which is addressed by the time allocations under r 14.5, not the classification of the proceeding under r 14.3. Here the potential complexity of the proceeding was clearly apparent at the outset. It was a claim in negligence against former solicitors because of the advice given on distributing approximately $20 million to a large number of body corporate members following settlement of a complex building defects litigation. The potential complexity of the proceedings cannot realistically be said to have become apparent only after trial. As this Court said in *Paper Reclaim Ltd v Aotearoa International Ltd*, it is "far too late to be suggesting a recategorisation after the substantive hearing and after the result is known".[62]

[178] As to the other issues raised in relation to costs, we make the following observations to assist the parties:

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58 *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZCA 544, (2007) 18 PRNZ 743 at [29].
59 High Court Rules, r 14.8(1).
60 *Lepionka & Company Investments Ltd v Gibson Sheat* [2023] NZHC 2745 at [4]–[7].
61 *Body Corporate 207624 v Grimshaw & Co* [2021] NZHC 2608 at [15].
62 *Paper Reclaim Ltd v Aotearoa International Ltd*, above n 58, at [30].

(a) We see no error in allowing 40 days for preparing for trial, as it is an approach broadly consistent with other authorities.[63]

(b) We do not consider that the settlement offers warrant any increase to the award of costs under r 14.6(3)(b)(v).

(c) Whilst we agree that the proceedings have involved the advancing of a number of arguments of little merit, we do not consider that that should lead to a discount on the costs award under r 14.7(f)(ii).

[179] As to costs in this Court, these should be awarded to Grimshaw & Co for a complex appeal under band B with an allowance for second counsel. There is no separate award of costs on the cross-appeal, or the costs appeal.

Result

[180] For the above reasons the appeal is allowed and the judgment of the High Court is set aside.

[181] The cross-appeal and the costs appeal are dismissed.

[182] The respondent must pay the appellant costs for a complex appeal on a band B basis together with usual disbursements. We certify for second counsel. There is no separate award of costs on the cross-appeal or the costs appeal.

[183] The order of costs in the High Court is set aside and costs in the High Court are to be reconsidered in light of this judgment.

Solicitors:
McElroys, Auckland for Appellant
Wilson Harle, Auckland for Respondent

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[63] See *Cridge v Studorp Ltd* [2022] NZHC 2024 at [89]–[92]; and *Houghton v Saunders* [2021] NZHC 3590 at [55].