

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 99/2025  
[2026] NZSC 5

BETWEEN                      BODY CORPORATE 207624  
   Applicant  
  
AND                                GRIMSHAW & CO  
   Respondent

Court:                            Glazebrook, Kós and Miller JJ  
  
Counsel:                        M G Colson KC, A I C Denton and S F Pearson for Applicant  
   L J Taylor KC, J B Orpin-Dowell and P J L Hunt for Respondent  
  
Judgment:                      17 February 2026

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**JUDGMENT OF THE COURT**

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- A     The application for leave to appeal is dismissed.**
- B     The applicant must pay the respondent costs of \$2,500.**
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**REASONS**

[1]     The respondent, Grimshaw & Co, is a firm of solicitors.<sup>1</sup> The applicant, Body Corporate 207624, is the body corporate for the Spencer on Byron apartment and hotel complex.<sup>2</sup> Building defects in the complex were identified in 2006. The Body Corporate brought proceedings against the builder and council in 2007 on behalf of all unit owners, in respect of damage to the common property. Grimshaw began acting for the Body Corporate in 2008.

[2]     In March 2008, Grimshaw advised unit owners to join the Body Corporate as second plaintiffs. The benefit of doing so was said to be twofold. First, the owners

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<sup>1</sup> Referred to in these reasons as “Grimshaw”.

<sup>2</sup> Referred to as “the Body Corporate”.

would be able to claim for damage suffered to their individual unit property. Secondly, the Body Corporate would be able to claim for a greater proportion of the damage to common property. Under the Unit Titles Act 1972, common property was held by the owners as tenants in common, and the Body Corporate was empowered to bring proceedings in relation to the common property, on behalf of the owners, to the extent that it had their support.<sup>3</sup> Each owner was required to provide discovery; if an owner chose not to do so, the Body Corporate could not claim for that owner's share of the common property repair costs.<sup>4</sup>

[3] In March 2010, Grimshaw advised the Body Corporate and owners to enter into a Conduct and Distribution Agreement, governing the distribution of any settlement proceeds.<sup>5</sup> The CDA made no provision for the Body Corporate to receive settlement proceeds. Instead, settlement proceeds (after appropriate deductions) would go directly to the owners who had signed on (though, crucially, not all owners did so), and would be put towards each owner's contribution to the cost of repairs. If the settlement proceeds were less than the amount required to repair the development, the balance would be met by raising levies; if the settlement proceeds were greater than the amount required, the surplus would be distributed to the owners who had signed on. Litigation was funded by all owners via the Body Corporate, whether or not they had signed the CDA and joined the 2007 proceeding.

[4] On 19 April 2010, while the CDA was still being drafted, the Unit Titles Act 2010 was enacted.<sup>6</sup> On 8 June 2010 the CDA was finalised by Grimshaw,<sup>7</sup> and on 9 June 2010, it—along with a standard form letter (also provided by Grimshaw)—was sent to the owners.<sup>8</sup>

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<sup>3</sup> Unit Titles Act 1972, ss 9 and 13.

<sup>4</sup> *Grimshaw & Co v Body Corporate 207624* [2025] NZCA 392, [2025] NZCCLR 826 (Mallon, Cooke and Woolford JJ) [CA Judgment] at [9] and [98]–[100].

<sup>5</sup> Referred to as “the CDA”. All owners were advised that there were two options: (1) sign the CDA, join the proceeding as second plaintiffs and share in the proceeds; or (2) do none of the above and receive nothing. Ultimately, 202 owners signed the CDA and joined the proceeding; 16 owners did not.

<sup>6</sup> CA judgment, above n 4, at [16].

<sup>7</sup> At [19].

<sup>8</sup> At [19].

[5] In June 2011, while the proceeding was still live, the Unit Titles Act 2010 came into effect. The 2010 Act transferred ownership of common property from the owners to the Body Corporate,<sup>9</sup> and provided that the owners were beneficially entitled to the common property as tenants in common.<sup>10</sup> The statement of claim was amended to clarify the Body Corporate was now suing in its own right in respect of the common property.

[6] The CDA however remained unchanged. Its non-amendment is central to the Body Corporate's present claim.

[7] In July 2013—some two years after the 2010 Act came into force—Grimshaw advised the Body Corporate that it needed to pass a resolution agreeing to be bound by the terms of the CDA. It promptly did so, though the Court of Appeal took the view that it would likely have been bound by the CDA regardless.<sup>11</sup>

[8] The proceeding settled in September 2013 for \$20.05 million, but post-settlement disputes between the owners over the terms of distribution set out in the CDA (among other things) delayed repairs until 2018, increasing costs. Following an interpleader proceeding brought by Grimshaw, a mediated settlement was reached in late 2015 between the Body Corporate and the owners providing that 80 per cent of settlement funds would go to the Body Corporate to fund repairs to common property, setting aside the CDA.<sup>12</sup> Formal orders were made in early 2016.

### **Body Corporate's claim against Grimshaw**

[9] The Body Corporate sued Grimshaw for the delay-related costs, arguing that the CDA was (1) invalid and/or ineffective from 20 June 2011 (when the 2010 Act came into force) because it deprived non-plaintiff owners of the benefit of a share of settlement/litigation proceeds; and (2) ineffective from the date(s) on which some plaintiff owners sold their units and claimed the loss of value on sale, instead of estimated repair costs.

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<sup>9</sup> However, as discussed below, s 227 of the Unit Titles Act 2010 requires that proceedings commenced before June 2011 be continued and completed under the Unit Titles Act 1972.

<sup>10</sup> Unit Titles Act 2010, s 54.

<sup>11</sup> CA judgment, above n 4, at [38].

<sup>12</sup> *Grimshaw & Co v Body Corporate 207624* [2016] NZHC 715 (Faire J) at Appendix 1.

[10] The original (and first amended) statement of claim alleged Grimshaw had failed “to prepare a valid and effective agreement reflecting the correct legal position”, but this was removed from subsequent amended statements of claim—seemingly in response to a direction of Associate Judge Bell “to refine or amend the negligence allegations”.<sup>13</sup>

[11] The Body Corporate argued that had it been advised to seek amendment of the CDA when the 2010 Act came into force, it could have pre-empted these issues by making provision for a distribution to it, as owner of the common property, for the benefit of all owners (not just the plaintiff owners).

### **Judgments below**

[12] The High Court found Grimshaw had acted negligently by failing to advise the Body Corporate to amend the CDA after the 2010 Act changed ownership of the common property.<sup>14</sup>

[13] On appeal, the Court of Appeal held the 2010 Act did not affect accrued rights under the 1972 Act, meaning the CDA remained valid and effective.<sup>15</sup> Setting aside the High Court judgment, it found Grimshaw had not acted negligently and in any event had not caused the losses claimed.

### **Proposed appeal**

[14] For the Body Corporate it is submitted the application raises matters of general and public importance. First, whether the Court of Appeal was right to determine the claim based on how it considered the original proceeding ought to have proceeded (under the 1972 Act) rather than how it (allegedly) actually proceeded (under the 2010 Act). The Body Corporate contends that the 2010 Act applied to the original proceeding, because in 2012 the Body Corporate amended its statement of claim to remove reference to the 1972 Act and assert that it owned the common property pursuant to the 2010 Act. Second, the Court’s finding that the plaintiff owners retained

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<sup>13</sup> *Body Corporate 207624 v Grimshaw & Co* HC Auckland CIV-2018-404-2107, 14 May 2020 (Minute of Associate Judge Bell).

<sup>14</sup> *Body Corporate 207624 v Grimshaw & Co* [2023] NZHC 979 (Tahana J).

<sup>15</sup> CA judgment, above n 4.

tort claims despite no longer suffering loss (the burden—ownership of the common property—having been transferred to the Body Corporate) has implications wherever property ownership is transferred by statute. Third, the Court’s application of the “look through principle” (finding the applicant in substance acted for the owners under both the 1972 and 2010 Acts) has wider implications. Fourth, whether bodies corporate can enter into CDAs that do not reflect their ownership interests or duties is a question of broader relevance. Fifth, the role of counter-factual reasoning now requires clarification.

[15] The Body Corporate also says there is a risk of a substantial miscarriage of justice. There are “real doubts” as to whether the Court of Appeal’s decision was correct, and the Court may have erred in deciding the case on “a new point raised for the first time on appeal”—namely, that litigation rights had already been accrued by the time the 2010 Act came into force and were not disturbed by that Act. The Body Corporate adds that the elevated threshold under *Junior Farms Ltd v Hampton Securities Ltd (in liq)* “is based on the proposition that a civil case has already been the subject of a first error-correction appeal” so does not apply.<sup>16</sup>

### **Our assessment**

[16] We do not consider the leave criteria are made out such that it is necessary in the interests of justice for this Court to grant leave.<sup>17</sup>

[17] No matter of general or public importance is raised.<sup>18</sup> For the reasons following, we do not consider the points advanced by the Body Corporate are sufficiently arguable to compel leave in this Court. The only novel issue (the implications of s 227 of the 2010 Act in light of the statutory change of ownership arrangements concerning common property) is now moot by operation of the longstop limitation period in s 393(2) of the Building Act 2004.<sup>19</sup>

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<sup>16</sup> *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].

<sup>17</sup> Senior Courts Act 2016, s 74(1).

<sup>18</sup> Section 74(2)(a).

<sup>19</sup> Other than to the limited extent that issue might arise in the contribution context: see *Beca Carter Hollings & Ferner Ltd v Wellington City Council* [2024] NZSC 117, [2024] 1 NZLR 438.

[18] Nor is there a risk of a substantial miscarriage of justice.<sup>20</sup> In *Junior Farms*, this Court held that an applicant for leave in a civil appeal must, in invoking the miscarriage of justice ground, point to a clear and significant error by the Court of Appeal.<sup>21</sup> No such error is identified here, and we do not accept the Body Corporate's argument that a different standard should apply in this case.

[19] The Court of Appeal's findings as to causation appear sound: the Body Corporate cannot demonstrate that all 202 signatories to the CDA, who at the relevant time controlled it, would have agreed to amend the CDA in the manner proposed, relinquishing their superior position for the benefit of the Body Corporate on behalf of all owners, including non-signatories/non-plaintiffs. It follows that even if Grimshaw acted negligently by failing to advise the Body Corporate to seek such an amendment, no loss was proved because the latter could not and did not prove that amendment would have been secured.

[20] Nor do we think the Body Corporate has made out its argument that Grimshaw ought to have given the advice suggested. The effect of s 227 of the 2010 Act was clearly to preserve the plaintiff owners' claims as if the 1972 Act still applied. The 2010 Act did not confer on non-plaintiff owners an entitlement to the settlement proceeds and therefore did not render the CDA invalid or ineffective. Further, even if the change of ownership of the common property alone rendered the CDA ineffective, advice to seek variation by consent would have been impractical for the reasons already traversed. It is perhaps arguable that the CDA was unfair or unconscionable, given the change of ownership of the common property.<sup>22</sup> It is however far from clear that any alternative legal option available to the Body Corporate would have meaningfully reduced delay—and in any case, failure to give such alternative advice was not complained of by it in its pleadings.

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<sup>20</sup> Senior Courts Act, s 74(2)(b).

<sup>21</sup> *Junior Farms*, above n 16, at [5]. See also *Shell (Petroleum Mining) Company Ltd v Todd Petroleum Mining Company Ltd* [2008] NZSC 26, (2008) 18 PRNZ 855 at [4].

<sup>22</sup> This because the original basis of the CDA was that the settlement proceeds would vest, quite properly, in the signatories who were owners of the common property; but the result following the entry into force of the 2010 Act was that the signatories who did *not* own the common property received the funds to the exclusion of the now sole owner, the Body Corporate.

[21] For completeness, we note that the Body Corporate alleged in its fourth amended statement of claim that the advice in July 2013 that it should pass a resolution confirming it was to be bound by the CDA was itself negligent. That advice post-dated the entry into force of the 2010 Act and was not time-barred. However, the Court of Appeal found the Body Corporate was likely already bound by the CDA absent the resolution;<sup>23</sup> and in any case it had pleaded negligence only on the basis that the CDA was “invalid” or “ineffective” because of its consequences for the owners—a claim which cannot be sustained for the reasons already traversed. The same issues regarding causation of loss also remain.

## **Result**

[22] The application for leave to appeal is dismissed.

[23] The applicant must pay the respondent costs of \$2,500.

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

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<sup>23</sup> CA judgment, above n 4, at [38].