

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2018-404-002107
[2020] NZHC 34**

BETWEEN BODY CORPORATE 207624
 Plaintiff

AND GRIMSHAW & CO
 Defendant

Hearing: 16 December 2019

Counsel D Bigio QC and H Yiu for the Plaintiff
 P Hunt and J Heard for the Defendant

Judgment: 29 January 2020

JUDGMENT OF ASSOCIATE R M BELL

*This judgment was delivered by me on 29 January 2020 at 4:00pm
pursuant to Rule 11.5 of the High Court Rules*

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Registrar/Deputy Registrar

Solicitors / Counsel:
D Bigio QC, Auckland
Wilson Harle, Auckland (H Yiu)
McElroys, Auckland (P Hunt), (J Heard)

What the case is about

[1] In this professional negligence claim the parties cross-apply for further discovery. Grimshaw & Co, the defendant firm of lawyers, acted for the body corporate and unit owners in a major leaky building case for the multi-level unit title development at Byron Avenue, Takapuna, Auckland known as Spencer on Byron. At the start of the case the Unit Titles Act 1972 was in force. Grimshaw & Co replaced other lawyers who had started the claim in 2007 with only the body corporate as plaintiff. On Grimshaw & Co's advice, unit owners were added as second plaintiffs.¹ Not all the unit owners were plaintiffs, but all owners were levied to pay the costs of the proceeding. In 2010 Grimshaw & Co prepared a "Conduct and Distribution Agreement" between the body corporate and plaintiff owners in the proceeding for the distribution of the settlement proceeds.² Unit owners who were not plaintiffs were not parties to the agreement. During the proceeding, some owners sold but remained plaintiffs. They could not claim for costs of repair. Instead, they made claims for loss of value. Some plaintiffs discontinued.

[2] The leaky building case settled in 2013 and the law firm received the settlement proceeds. By then the Unit Titles Act 1972 had been repealed and replaced by the Unit Titles Act 2010.³ Differences arose how the settlement proceeds should be applied between the body corporate, the plaintiff owners and owners who had taken no part in the proceedings. Grimshaw & Co began an interpleader proceeding for directions how to divide the settlement proceeds. The matter was resolved at mediation. In April 2016 the court approved the terms for payment of the settlement proceeds.⁴

[3] The body corporate says that the conduct and distribution agreement was invalid and unenforceable. (I add that another way of putting its case is that the agreement was not fit for purpose.) It did not provide for owners who were not plaintiffs yet still asserted claims on the fund, nor for plaintiffs who had sold their units. It was no use when the settlement proceeds were to be divided. The body

¹ There were over 200.

² The agreement is called a "settlement agreement" but both parties referred to it as a conduct and distribution agreement. That is a better description.

³ It came into force on 26 June 2011.

⁴ *Grimshaw & Co v Body Corporate 207624* [2016] NZHC 715.

corporate's case is that Grimshaw & Co ought to have reviewed the agreement and recommended that it be amended, given changes in circumstances: the addition of claims for loss of value and the effect of the Unit Titles Act 2010 coming into force.

[4] The body corporate says that the time taken to resolve the division of the settlement proceeds delayed the start of remedial works. If funds could have been used at the start of 2014, the estimated repair costs were in the order of \$26,000,000. The remedial work started in May 2018 and is now estimated to cost \$37,500,000.

[5] The body corporate claims as damages the costs in dealing with the interpleader proceeding (\$128,000), the costs of taking part in the mediation (\$13,000), fees charged by Grimshaw & Co for the interpleader proceeding (\$80,000), commission charged on the settlement sum while it was held in Grimshaw's trust account (\$45,000); and the increase in remedial costs (estimated at \$11,360,000). The body corporate gives credit for interest on the settlement sum. It sues Grimshaw & Co for breach of contract and/or negligence.

[6] As well as denying liability generally, Grimshaw & Co pleads these affirmative defences:

- (a) limitation under the Limitation Acts 1950 and 2010;
- (b) contributory negligence;
- (c) failure to mitigate;
- (d) settlement; and
- (e) res judicata.

As part of its case Grimshaw & Co puts causation in issue. Even if it was negligent, it did not cause all the losses claimed by the body corporate.

[7] It admits these facts (among others):

- i) It drafted the conduct and distribution agreement. The agreement's terms are not in dispute.
- ii) It advised former owners to change their claims to loss of value and amended the pleadings accordingly.
- iii) It advised the body corporate to ratify the agreement.
- iv) It advised the body corporate to distribute the settlement proceeds according to the agreement.
- v) It did not advise the body corporate to change the agreement.

The conduct and discovery agreement

[8] More about the conduct and distribution agreement. That is not only to help understand the discovery applications, but also to comment on the basis for the body corporate's criticism of the agreement and of Grimshaw & Co for not recommending that it be reviewed.

[9] The agreement is between the body corporate and the unit owners who became plaintiffs in the proceeding – called "Proprietors". Owners who were not originally parties to the agreement could become parties by signing up, paying their share of legal and professional fees and being added as plaintiffs. The agreement establishes a settlement committee to run the proceeding and to settle it. That is the "conduct" part of the agreement. The distribution part includes these provisions:

- 4 **Settlement funds**
 - 4.1 Any distribution will be subject to the terms of the settlement.
 - 4.2 The balance of the settlement proceeds ("the Net Settlement Proceeds") shall be held in an interest-bearing account with a New Zealand bank account nominated by the settlement committee pending distribution.
 - 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.

- 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.
- 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 costs of repairs is to be distributed to the Proprietors in accordance with the unit entitlements as set out in Deposited Plan 207624.

[10] Under the agreement the settlement proceeds are held by the body corporate for the second plaintiffs beneficially to be allocated among them according to their unit entitlements. The body corporate will carry out repairs meeting the costs from levies imposed on all owners, not just plaintiffs. Non-plaintiff owners will also be levied for the costs of repairs but will not receive any credit for any share of the settlement proceeds allocated to them.

[11] When the agreement was prepared, apparently all the plaintiffs were owners (rather than former owners). The agreement made no provision for plaintiffs who sold before settlement.

[12] As part of the background, there was a repair scheme under s 74 of the Unit Titles Act 2010. The scheme authorised the body corporate to impose levies for repairs but did not deal with distribution of settlement proceeds.⁵

[13] Sections 9 and 13 of the Unit Titles Act 1972 provided:

⁵ The application for the scheme was made in November 2011 under CIV 2011-404-7460.

9 Common property

- (1) The common property shall be held by the proprietors of all the units as tenants in common in shares proportional to the unit entitlement in respect of their respective units:

provided that nothing in this subsection shall affect the interests among themselves of the proprietors of a stratum estate in an individual unit.

- (2) While the same person is proprietor of all the units, subsection (1) shall apply as if there were different proprietors for each of the units.
- (3) The proprietors of all the units may sell or lease part of the common property or may grant an easement over the whole or any part of it.

...

13 Actions by and against body corporate

- (1) The body corporate shall be capable of suing and being sued in its corporate name and of doing and suffering all that bodies corporate may do and suffer.
- (2) Without restricting the generality of subsection (1), the body corporate may sue for and in respect of damage or injury to the common property caused by any person, whether that person is a unit proprietor or not.

[14] While the body corporate did not own the common property, it could sue for damage to the common property.⁶ Because it did not own the common property, it would be accountable to the unit owners for any funds it received on account of damage to the common property. That is all the unit owners, not just the plaintiffs. It is therefore arguable for the body corporate that there were problems with the agreement right from the start because non-plaintiffs could require the body corporate to account to them for their share of the proceeds of the settlement, so that they could enjoy the same credits towards repair levies as the other owners.

[15] I was advised that at the time of the agreement it was assumed that damage to the complex could be apportioned 50 per cent more or less to common property and 50 per cent to damage to unit properties. In the light of more recent advice from consultants, the repair costs can be allocated 80 per cent to the body corporate and 20 per cent to unit owners.

⁶ *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 at [57]-[58].

[16] The body corporate's case is that changes under the Unit Titles Act 2010 required Grimshaw & Co to review the conduct and distribution agreement. Section 54 of the 2010 Act provides:

54 Ownership of common property

- (1) The common property is owned by the body corporate.
- (2) The owners of all the units are beneficially entitled to the common property as tenants in common in shares proportional to the ownership interest (or proposed ownership interest) in respect of their respective units.
- (3) Nothing in subsection (2) affects the interests among themselves of the owners of an individual unit.

The body corporate pleads:⁷

As a result of s 54 of the Act:

- (a) The Plaintiff became the owner of the common property in its own right.
- (b) All current unit owners had a beneficial entitlement as tenants in common in the common property proportional to their "ownership interest" (known under the Unit Titles Act 1972 as unit entitlement) in respect of their (sic) representative units.
- (c) The Plaintiff was required to account to all unit owners for their share of any settlement/litigation proceeds received in relation to damage to common property in accordance with their respective ownership interests, regardless of whether a unit owner was a second plaintiff in the proceedings.

[17] Grimshaw & Co accept (a) and (b), but not (c). I also have my doubts as to (c). I give my reasons, if only to allow the body corporate to reassess its case. There may be another way it can claim. As I have set out above, under the 1972 Act the body corporate had to account to all owners for funds it received for damage to common property, but that did not carry through to the 2010 Act. Under the new Act the body corporate could receive funds for damage in its own right and decide how they should be applied, by resolution in general meeting or by a committee acting within delegated powers.

⁷ Amended statement of claim, paragraph [17].

[18] The new Act provides that the body corporate has repair and maintenance responsibilities not only for the common property but also any building elements and infrastructure that relate to or serve more than one unit.⁸ The body corporate's responsibility for repairing and maintaining both common property and building elements and infrastructure that serve more than one unit was upheld in *Wheeldon v Body Corporate (No 1)*.⁹ Just as the body corporate has a repair responsibility for both common property and building elements and infrastructure serving more than one unit, it also has standing to sue for damage to those parts of the unit title development that are part of its repair responsibility, even if it is not common property.¹⁰ Unit owners are required as plaintiffs only for damage to unit property not covered by the body corporate's repair responsibility.

[19] Because the body corporate can receive funds for damage to both common property and some parts of unit property in its own right, it does not hold the funds as trustee or agent for the owners. In *Small v Body Corporate 324525*, the plaintiffs, dissident unit owners, submitted that the body corporate was required to account for the settlement proceeds of litigation to owners according to their ownership interests. I said:¹¹

[36] ... The reference to s 54(2) to unit owners being beneficially entitled to the common property as tenants in common in shares proportional to their ownership interests under s 38 might give the impression that the section creates some form of trust. That is not the case. The Act sets out extensively the responsibilities, governance, management, powers and duties of a body corporate and Part 2 subparts 12 and 13 without using the language or concepts of trust law. The unit owners' beneficial entitlements in s 54(2) are triggered in relatively unusual circumstances, as under cancellation of a unit plan. A body corporate's conduct of litigation is ultimately under the control of all unit owners in that they will authorise it in general meeting or the committee acting under delegation will authorise it and must report to the body corporate. There is no need or ground for separate accountability under trust law.

[20] It may also be noted that any surplus may be distributed under s 131 which provides that surplus funds are distributed among unit owners in the same proportions

⁸ Section 138(1).

⁹ *Wheeldon v Body Corporate 324525* [2015] NZHC 884, (2015) 16 NZCPR 829, *Wheeldon v Body Corporate 324525* [2018] NZCA 20, leave to appeal refused [2016] NZSC 125.

¹⁰ *Body Corporate 324525 v Stent* [2017] NZHC 2857 at [137]–[150].

¹¹ *Small v Body Corporate 324525* [2018] NZHC 19 at [36].

in which the money was raised. That is not necessarily according to ownership interests.

[21] In this case, that does not mean that the body corporate would have *carte blanche* how it dealt with the settlement proceeds. Assume that there was no agreement dealing with the distribution of the settlement proceeds. There would be claims on the fund: litigation costs, consultants' costs, repair costs already incurred, future repair costs for damage to common property, future repair costs for damage to building elements and infrastructure that serve more than one unit, future repair costs for other damage to unit property, claims by unit owners for individual losses (including distress and costs of alternative accommodation while repairs are carried out) and claims for loss of value by plaintiffs who had sold. While it is common for settlement proceeds to be applied to costs of litigation and consultants, then to repairs, there is not any single right way how the fund should be used.¹² Because claims on the fund include those by unit owners in their own right, the body corporate does not have the only say in how the settlement proceeds are to be applied. A resolution in general meeting is unlikely to be effective to oust unit owners' personal claims on the fund. On the other hand, those who elected not to become plaintiffs could presumably not claim a personal interest in the fund as they did not claim for any damage they had suffered.

[22] The body corporate's claim against Grimshaw & Co may need to be assessed against the above considerations. The body corporate would have a major claim on the settlement fund in its own right but it would not be the only claimant. It would not have to account as agent or trustee to each owner, or to each plaintiff as the agreement seems to provide. It would have to work out some accommodation with plaintiffs who had sold.

[23] It is arguable for the body corporate that the agreement made in 2010 was not suitable as originally drafted because the body corporate would have to account to all owners, not just plaintiffs, for the settlement proceeds, but that later changes also meant that the agreement had to be reviewed. The agreement did not provide for

¹² See a similar finding in *Small v Body Corporate 324525* [2018] NZHC 19 at [34].

plaintiffs who had sold their units and had loss of value claims, and under the 2010 Act the body corporate was entitled to claim a large part of the settlement sum in its own right without accounting as agent or trustee to the owners.

Discovery to date

[24] Early in the proceeding the parties agreed that tailored discovery was appropriate for this proceeding. Both sides have made extensive discovery. The applications for further discovery were filed while the parties were attending to discovery. There are bona fide differences between the parties as to the extent of discovery required. The applications involve fixing the scope of tailored discovery. There is no suggestion that either side has been irresponsible in dealing with discovery.

[25] There is no significant difference between the parties on the principles to be applied on the discovery applications. They agreed that the court considers the four questions stated by Asher J in *Assa Abloy (NZ) Limited v Allegion (NZ) Limited*.¹³ It was also common ground that pleadings determine the limits of relevance and in determining relevance the case of the party seeking discovery must be assumed to be true, not that of the party from whom the discovery is sought. The court will not try the case during a discovery application to decide the ultimate relevance alleged by the party seeking discovery, unless it is clear that the party seeking discovery is on a hiding to nothing. Since the applications were originally filed, each side has modified their discovery requests.

The body corporate's discovery application

[26] At the hearing the body corporate sought discovery of these documents:¹⁴

All final and executed agreements prepared by and/or provided by the defendant to clients other than the plaintiff that have the effect of agreeing a method of distribution of the proceeds of building defects litigation however described, redacted so as to prevent identification of the parties to the

¹³ *Assa Abloy (NZ) Limited v Allegion (NZ) Limited* [2015] NZHC 2760, [2018] NZAR 600 at [14]. See also *Lighter Quay Residents' Society v Waterfront Properties (2009) Ltd* [2017] NZHC 818 at [16]-[17] and *Minister of Education v James Hardie New Zealand* [2019] NZHC 245 at [46]-[50].

¹⁴ Its application also sought documents prepared by Grimshaw & Co that discuss or comment on s 54 of the Unit Titles Act 2010 but did not pursue that in light of Grimshaw & Co's proportionality objection. See paragraph [48] below.

agreement as well as the property which is the subject of the agreement. The proposed date range for these documents is 20 June 2011 to 31 December 2014.

[27] The body corporate says that Grimshaw & Co undertakes substantial leaky building litigation for unit title developments. It is therefore likely to have prepared settlement agreements for other bodies corporate. Those agreements will be relevant, as showing whether Grimshaw & Co had a system for dealing with unit title distribution agreements. If other agreements they prepared also did not address the matters for which it says this agreement was defective, that would show faults in Grimshaw & Co's systems that would go to prove negligence in the advice to the body corporate. Alternatively, if Grimshaw & Co did address these matters in other agreements, that would show the firm's negligence in this case. Accordingly, Grimshaw & Co should disclose other distribution agreements. It proposes that the firm search its electronic files for body corporate clients for which final distribution agreements were prepared, using suggested search terms. Any documents found could be redacted to protect client confidentiality.

[28] Grimshaw & Co objects that the proposed discovery is irrelevant, disproportionate and involves breaches of client privilege and confidentiality.

[29] As to relevance, in general carelessness towards other clients is normally not evidence that the lawyers acted carelessly towards this client. And documents that go to show carelessness towards other clients are not relevant to a client's claim in negligence. In *Thorpe v Chief Constable of the Greater Manchester Police* Dillon LJ put it this way:¹⁵

... while ... there are cases in which the evidence of what happened in one transaction may be relevant to the question of what happened in another, where that is not so to order discovery in respect of what may turn out to be similar fact transactions would be likely to be oppressive and so the order should not be made... But in an action for damages for professional negligence against a solicitor evidence of other claims for negligence made or established against the defendant by other clients in respect of other matters would be irrelevant and inadmissible and discovery in respect of such other matters would be oppressive; a plaintiff charging a solicitor with negligence in one matter could not investigate other areas of his practice in an endeavour to establish that he had a propensity to be careless.

¹⁵ *Thorpe v Chief Constable of the Greater Manchester Police* [1989] 1 WLR 665 (CA) at 669, followed in *Tohengaroa v Connolly* HC Hamilton CIV 2006-419-968, 17 December 2007.

[30] The body corporate cited cases where similar fact discovery had been ordered:¹⁶ *Cook v Evatt*, *Mao-Che v Armstrong Murray* and *H Investments (NZ) Ltd v Carlin Enterprises Ltd*. In *Cook v Evatt*, a claim for breach of fiduciary duty by a client against an adviser in which exemplary damages were sought, evidence of similar transactions by the defendants was admitted on the basis that repetition of the same conduct was unlikely to be by oversight. In *Mao-Che v Armstrong Murray* plaintiffs alleging a lawyer-client relationship with the defendant firm were given discovery of files relating to transactions by others (also from Tahiti) as relevant to whether there was a lawyer-client relationship. In *H Investments (NZ) Ltd v Carlin Enterprises Ltd* a purchaser of a development alleging misrepresentations by the vendor as to time frames and costs was given discovery of communications with other interested purchasers as being relevant to whether the defendants made the alleged misrepresentations. In these cases the judges emphasised the need for care in working out what was in issue.¹⁷ They recognised the general principle that care is needed in allowing similar fact evidence or discovery to establish similar facts, but in each case held that the similar facts would go to establish a matter in issue.

[31] While the body corporate did not refer to it, I also note that under s 40 of the Evidence Act 2006 in a civil proceeding a party may offer propensity evidence about any evidence, that is:¹⁸

evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved; but

(b) does not include evidence of an act or omission that is –

...

(ii) the cause of action in the proceeding in question.

Any propensity evidence admissible under s 7(3) and s 40 of the Evidence Act may be excluded under s 8, if its probative value is outweighed by the risk that the evidence

¹⁶ *Cook v Evatt* [1992] 1 NZLR 673, *Mao-Che v Armstrong Murray* (1992) 6 PRNZ 371, *H Investments(NZ) Ltd v Carlin Enterprises Ltd* HC Christchurch CIV 2006-409-2200, 24 October 2007.

¹⁷ *Cook v Evatt* at 674, *Mao-Che v Armstrong Murray* at 376, *H Investments (NZ) Ltd v Carlin Enterprises Ltd* at [29].

¹⁸ Evidence Act 2006, s 40(1).

will have an unfairly prejudicial effect on the proceeding or needlessly prolong the proceeding. Again, deciding whether evidence as to alleged propensity is admissible will require an analysis of what is issue. The same applies to requests for discovery of documents going to alleged propensity.

[32] Grimshaw & Co's admissions in paragraph [8] above have reduced the factual matters in issue. Evidence is not required to prove any of those matters and discovery of documents on those issues is irrelevant. Grimshaw & Co has however not admitted any breach of duty in contract or tort. The standard for liability of a lawyer in negligence in tort and in contract (unless some other standard is set by express agreement) is objective: what the reasonably competent practitioner would do having regard to the standards normally and reasonably adopted in their profession.¹⁹ The profession does not set the standard. That is for the court. But the court will be helpfully informed by experienced practitioners giving expert evidence. Evidence of what Grimshaw & Co did in other cases will however not assist in deciding whether it did not reach the required standard in this case. Because the standard is objective, it does not matter what Grimshaw & Co did or did not understand at the time or what it did in other cases. The merits or otherwise of the agreement and of Grimshaw & Co's advice or failure to advise will not change according to what it did in other cases. Evidence of other agreements Grimshaw & Co prepared for other bodies corporate is accordingly not relevant to the issues in this case. Equally disclosure of other agreements is also irrelevant and not required.

[33] The body corporate's discovery application fails on the relevancy objection. It is accordingly not necessary to deal with the other objections.

Grimshaw & Co's discovery application

[34] Grimshaw & Co's discovery application is to be assessed in the light of its challenges to two counterfactuals on which the body corporate's case is based:

¹⁹ *Lai v Chamberlains* [2005] 3 NZLR 291 (CA) at [184]-[188].

- (a) If Grimshaw & Co had advised the body corporate correctly, there would have been a new agreement for the distribution of funds by February or March 2014.
- (b) Because there were no enforceable arrangements for the distribution of the litigation proceeds and the interpleader was required to decide the distribution, remedial works could not be started because the body corporate could not give any assurance to contractors that it could pay them, and the works could not start until May 2018.

[35] As to (a), Grimshaw & Co says that the claim is based on speculation what people not party to the original conduct and distribution agreement might have done. While a loss of a chance is a recognised head of loss, in determining what would have happened if something had happened, the court makes an estimate of the chances of a matter occurring and reflects those chances in its damages award. Grimshaw & Co referred to *Powerbeat Canada Ltd v Powerbeat International Ltd*.²⁰ To allow the court to assess the chances, evidence is required as to what unit owners would have agreed to. Documents showing what they would have wanted are therefore relevant and discoverable.

[36] As to (b), Grimshaw & Co says that there are other explanations for the delay in starting the remedial works. It says that even if the funds could have been distributed in early 2014, the body corporate was not in any position to start works then. Documents showing the body corporate's ability or otherwise to start work, regardless of any defects in the conduct and distribution agreement, are therefore relevant and discoverable.

[37] Its amended application seeks discovery of documents under these general heads:

- (a) building defects litigation
- (b) section 74 scheme

²⁰ *Powerbeat Canada Ltd v Powerbeat International Ltd* [2002] 1 NZLR 820.

- (c) the conduct and distribution agreement
- (d) documents concerning the non-plaintiffs and former owners in the building defects litigation
- (e) draft interpleader documents
- (f) remediation works

The particular documents sought were detailed in a schedule to the application.

[38] By the hearing, the body corporate had agreed to provide some of the documents sought:

- (a) all documents in (f) relating to remedial works,
- (b) and in categories (a) and (b):
 - (i) body corporate and/or body corporate committee resolutions, meeting minutes, levies, correspondence by the body corporate, committee members and/or its authorised representatives and/or agents from June 2010 onwards, and
 - (ii) body corporate subcommittee resolutions, notices, agendas, and minutes of meetings, circulars, memoranda, information sheets, and other formal body corporate correspondence from 2012.

Grimshaw & Co withdrew some of its discovery requisitions, categories (d) and (e), saying that they were subsumed in other categories.

[39] The matters remaining for decision are:

- (a) *Building defects litigation*

Documents in the date range June 2008 to October 2013 relating to:

the building defects litigation including rights to participate, and remedial works including the manner of levying for the works;

the distribution of the proceeds of litigation; and

entitlement to the proceeds of the litigation.²¹

(b) Section 74 scheme

Documents relating to:

the section 74 scheme including rights to be heard, remedial works, the manner in which levies would be raised/were raised;

the distribution of the proceeds of the litigation/the conduct and distribution agreement and its intersection with the s 74 scheme; and

entitlement to the proceeds of litigation.

The date range is from when it was decided to apply for a s 74 scheme until the final payment.

(c) The conduct and distribution agreement

Documents in the date range May 2010 to April 2016 relating to:

the conduct and distribution agreement including rights and entitlements.

[40] For (a), (b) and (c), in addition to what the body corporate has agreed to provide, Grimshaw & Co seeks these types of documents:

- (a) advice received by the body corporate and/or body corporate committee and/or its members on the litigation and/or its implementation and on

²¹ Under this head the body corporate has agreed to disclose documents relating to the scope or repairs, tenders, meetings with council, consents. This overlaps with documents it has agreed to disclose under (f).

the conduct and distribution agreement and/or its implementation from its professional advisers; and

- (b) communications to and/or from the body corporate and/or the body corporate committee and/or its authorised representatives and/or agents and/or its members/former members on the litigation, the s 74 scheme and the conduct and distribution agreement.

It says that the people and organisations likely to hold these documents are the body corporate, the body corporate secretary, body corporate committee members and law firms who acted for the body corporate (but not counting Grimshaw & Co).

[41] The body corporate's consent to disclose the documents in category (f), remedial works, goes to Grimshaw & Co's challenge to the second counterfactual in paragraph [34] above. The rest of the application goes to the first counterfactual – the claim that if Grimshaw & Co had recognised the flaws in the conduct and distribution agreement and advised the body corporate, all those interested would have entered into a fresh agreement. Grimshaw & Co requires the body corporate to disclose documents that would indicate what positions these people would take if they had been asked to enter into a new agreement. The body corporate has already come part way in agreeing to disclose its formal records and communications, the documents in paragraph [38](b) above.

[42] Grimshaw & Co says that there is reason to believe that there may be other documents within its discovery request that may cast light on the counterfactual. It has done that by putting in evidence documents that came into existence when disputes arose as to the distribution of the settlement proceeds and after the interpleader started. The purpose of the discovery request is to require disclosure of documents that may cast light on what people might have agreed if asked to make a new distribution agreement. The request is directed at times before anyone apparently realised that the original agreement was defective. There is a sense of unreality in expecting documents to cast light on a hypothetical question that no-one had considered.

[43] There is instead another source of documents that does give useful information on the hypothetical question: the pleadings and evidence in the interpleader proceeding. Grimshaw & Co advised the body corporate about the distribution of the settlement funds in the early stages of the dispute, until it advised the body corporate to obtain independent advice. The interpleader was run on the basis that the distribution agreement did not apply. All interested owners and former owners were joined as defendants (with some minor exceptions).²² All had the opportunity to take part in the proceeding and to submit for their preferred distribution. As Grimshaw & Co, the plaintiff in that case, already has the documents in that proceeding, it knows what those people expected when asked to agree on a new distribution of the settlement proceeds. Those documents are likely to be far more useful than documents that came into existence before anyone realised that there was a problem.

[44] The body corporate has shown that it is improbable that there are documents going back before the dispute arose. It has put in evidence copies of affidavits in the interpleader by parties opposed to the settlement committee's proposed distribution. None of the affidavits refer to documents of the kind sought by Grimshaw & Co going back before settlement of the litigation. The body corporate also points out that Grimshaw & Co was the source of advice on the conduct and distribution agreement.

[45] I accept the body corporate's complaint that it cannot be expected to obtain documents from former committee members. There have been many people on the committee, some have retired, some have sold their units and moved on. It would be burdensome to track them down and ask for documents. I also query whether documents in the possession of former members are in the control of the body corporate for discovery purposes.

[46] Grimshaw & Co seeks documents relating to the s 74 scheme. It says that there were problems with the scheme. All owners were levied, but not all would receive distributions from the litigation; the apportionment of remedial costs (fifty per cent to unit property and fifty per cent to common property) was flawed; the scope of repairs and the estimated repair costs in the leaky building case were inaccurate and

²² *Grimshaw & Co v Body Corporate 207624 CIV-2014-404-2493*, minute of 3 October 2014.

unreliable; and it was realised that the scheme would need to be changed (although this was not done). This goes to Grimshaw & Co's causation arguments. It is not being sued for the s 74 scheme, but flaws in that scheme caused delays and difficulties for which it was not responsible. I note that some of those difficulties were aired in the interpleader and in correspondence leading up to it.

[47] The issue here is proportionality. That involves balancing the time and costs of making discovery against the potential value of discovery.²³ It is possible that there are documents in the control of the body corporate, other than the body corporate's and the committee's formal records and communications, which could cast light on the strength of the body corporate's first counterfactual, but the chances are not very high. The value of those documents is not likely to be great, as the matter in issue, the first counterfactual, was not a live issue at the time.

[48] In opposing the body corporate's discovery application, Grimshaw & Co ran a proportionality argument. It said that unit title leaky building litigation is document-heavy. The *Spencer on Byron* case generated 86 large boxes of documents, each with between five and seven files, and each file containing hundreds of pages. It would be unduly burdensome to require it to go through all those boxes to look for documents on the s 54 question and to go through other files for cases for other bodies corporate. The body corporate's records must also be considerable. It would also be burdensome to require it to go through all its records to look for documents that might have a bearing on the first counterfactual.

[49] Grimshaw & Co has framed its discovery requests to cover the first counterfactual but also to sweep up other documents: see paragraph [39] above. That suggests a "train of inquiry" approach, which is unnecessary for this case. It runs the risk of over-discovery with consequential applications to file an amended discovery affidavit.²⁴ The over-discovery risk is that a conscientious solicitor going through files to find documents about a hypothetical question that has not occurred to anyone may

²³ *Karam v Fairfax New Zealand Ltd* [2012] NZHC 887 at [137]-[142] and *Southland Building Society v Barlow Justice Ltd* [2013] NZHC 1125 at [16]-[17].

²⁴ *Edge Protection Ltd v Bank of New Zealand* [2013] NZHC 2592 and *NZX Ltd v Ralec Commodities Pty Ltd* [2014] NZHC 376.

not personally believe that a document is relevant, but may include it out of caution, in case the other side may consider it should be disclosed.

[50] Overall, it would be disproportionate to make the body corporate disclose the documents in paragraphs [39] and [40] above. To hold otherwise would impose a considerable commitment of time and effort with little prospect of anything useful coming to light. That would be inefficient without adding much to the prospects of a just outcome.

Result

[51] The body corporate's discovery application is dismissed.

[52] The body corporate is to file and serve by 13 March 2020 a further affidavit of documents stating whether these documents are or have been in its control, and if they have been but are no longer in its control, its best knowledge and belief when they ceased to be in its control and who now has control:

- (a) these types of documents:
 - (i) body corporate and/or body corporate committee resolutions, meeting minutes, levies, correspondence by the body corporate, committee members and/or its authorised representatives and/or agents from June 2010 onwards, and
 - (ii) body corporate subcommittee resolutions, notices, agendas, and minutes of meetings, circulars, memoranda, information sheets, and other formal body corporate correspondence from 2012

- (b) relating to:

Building defects litigation

the building defects litigation including rights to participate, and remedial works including the manner of levying for the works;

the distribution of the proceeds of litigation; and

entitlement to the proceeds of the litigation;

the scope and cost of repairs, tenders, meetings with Council, and consents

Section 74 scheme

the section 74 scheme including rights to be heard, remedial works, the manner in which levies would be raised/were raised;

the distribution of the proceeds of the litigation/the conduct and distribution agreement and its intersection with the s 74 scheme; and

entitlement to the proceeds of litigation.

The date range is from when it was decided to apply for a s 74 scheme until the final payment.

The conduct and distribution agreement

the conduct and distribution agreement including rights and entitlements.

(c) And these documents relating to the scope of works, costs of works and delay of the remedial works in the date range from 2011 until completion:

(i) Initial feasibility study and budgets

- (ii) Any testing/analysis carried out and/or advice given to produce plans and specifications including investigations, invasive or otherwise (on or off site)
- (iii) Negotiation of contracts
- (iv) Recommendations related to the currently approved/signed contracts
- (v) Communications/advice
- (vi) Payment claims and payment certificates
- (vii) Engineers' and/or architects' certificates/contract instructions.

[53] The body corporate is not required to include in its affidavit documents that it has already discovered. It is to make the documents available for inspection. I understand that the remedial works are still under way. The body corporate will have ongoing discovery obligations for documents that come into existence after it files its new discovery affidavit. The parties should be able to work out arrangements for ongoing discovery, but if they cannot, directions can be given at the next case management conference.

[54] Leave is reserved to apply for further directions. Reasonable requests for extensions of time will be considered. Grimshaw & Co has reserved its right to seek disclosure of documents outside the date ranges proposed by the body corporate but will inspect the documents first.

[55] I ask the parties to confer as to costs. If they cannot agree, memoranda may be filed, and I will decide costs on the papers. The party opposing costs should file their memorandum within five working days of the other side's.

[56] The Registrar is to arrange a further case management conference. I suggest that that should be in April 2020, after Grimshaw & Co has had time to inspect the body corporate's documents.

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Associate Judge R M Bell