

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 47/2024  
[2024] NZSC 87

BETWEEN BODY CORPORATE 207624  
Applicant

AND GRIMSHAW & CO  
Respondent

Court: Glazebrook, Kós and Miller JJ

Counsel: D R Bigio KC and S F Pearson for Applicant  
L J Taylor KC, P J L Hunt and R J Scott for Respondent

Judgment: 1 August 2024

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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 was found liable for loss to the applicant caused by professional negligence, with damages of \$3,268,201 and costs of \$1,019,866 awarded by the High Court.<sup>1</sup> The respondent has appealed to the Court of Appeal. A four-day fixture in the substantive appeal has been allocated in March 2025.

[2] The respondent also applied for stay of execution of both judgments. The High Court dismissed that application.<sup>2</sup> The respondent then appealed the stay decision to the Court of Appeal. A significant aspect of that appeal concerned the fact

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<sup>1</sup> *Body Corporate 207624 v Grimshaw & Co* [2023] NZHC 979 (Tahana J); *Body Corporate 207624 v Grimshaw & Co* [2023] NZHC 1155; and *Body Corporate 207624 v Grimshaw & Co* [2023] NZHC 3381.

<sup>2</sup> *Body Corporate 207624 v Grimshaw & Co* [2024] NZHC 375 (Tahana J).

that the applicant was bound to pay the proceeds of judgment to its litigation funder, which would then distribute part to its investors and retain part for the applicant until final determination of the case (including all appeals).

[3] The Court of Appeal, differing in result from the High Court, allowed the stay appeal.<sup>3</sup> It reasoned:

- (a) agreeing with the High Court, no very significant risk had been shown that the funder itself would fail and be unable to repay damages and costs received in the event the substantive appeal was allowed;<sup>4</sup>
- (b) disagreeing with the High Court, there was nonetheless some risk of non-recovery, delay and difficulty in recovery:<sup>5</sup>

We do not have financial details of [the funder], any details of the investors nor of the arrangements between [the funder] and those investors in the event that funds were required to be repaid[;]

- (c) the funding arrangement meant the applicant would not be deprived of the fruits of the judgment as the result of a stay; rather the arrangements had that effect by precluding any distribution to the applicant anyway until final determination of the case:<sup>6</sup>

In those circumstances, it is not really the Body Corporate but its litigation funder that is being deprived of the fruits of a judgment by the grant of the stay[; and]

- (d) the alternative course of the funds instead being held in an independent interest-bearing solicitor's trust account would not therefore prejudice the applicant; any marginal investment disadvantage could only accrue to the funder, and the applicant had not tendered evidence

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<sup>3</sup> *Grimshaw & Co v Body Corporate 207624* [2024] NZCA 119 (Mallon and Cooke JJ) [CA judgment].

<sup>4</sup> At [10].

<sup>5</sup> At [11].

<sup>6</sup> At [12].

demonstrating prejudice beyond “frustration and disappointment generally arising from the delays associated with the appeals”.<sup>7</sup>

[4] For those reasons the Court of Appeal concluded the overall justice of the case meant stay should be granted on the terms proposed by the respondent—i.e., retention in an independent, interest-bearing solicitor’s trust account.

[5] The applicant seeks leave to appeal. It contends the Court of Appeal’s reasoning disadvantages a litigation-funded plaintiff, will impede access to justice and involves a departure “from the long-established starting point that the successful plaintiff is entitled to the fruits of its judgment”. It is said the effect of the decision:

... is to create greater risk of a litigation-funded plaintiff being deprived of the fruits of its judgment than a non-funded plaintiff simply because it has contracted to pay costs to the funder.

### **Our assessment**

[6] This Court must not give leave to appeal against an order made by the Court of Appeal on an interlocutory application unless satisfied it is necessary in the interests of justice for the Supreme Court to hear and determine the proposed appeal before the proceeding concerned is concluded.<sup>8</sup> That threshold is not met here.

[7] The decision of the Court of Appeal on stay, under r 12(3) of the Court of Appeal (Civil) Rules 2005, is discretionary as well as interlocutory. Such a decision will seldom be suited to pre-emptive resolution in this Court. Were the applicant self-funded, stay on the terms proposed by the respondent, rather than distribution to the applicant or its members, would be the predictable counterfactual. Here, instead, much the same outcome inures as a result of the litigation funding arrangement. The *funder* may potentially be economically disadvantaged, but the extent of prejudice was left opaque in the funder’s evidence, as were the exact arrangements between the funder and its investors for repayment in the event of reversal in the substantive appeal. We do not therefore perceive likely error by the

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<sup>7</sup> At [13]–[16].

<sup>8</sup> Senior Courts Act 2016, s 74(4).

Court of Appeal in its analysis,<sup>9</sup> including its disregard of the funder's position, and are not persuaded that substantial risk of a miscarriage of justice, as that expression is understood in a civil context, is likely.<sup>10</sup>

[8] We agree also with the Court of Appeal's observation that:<sup>11</sup>

The appropriateness of a grant of a stay is heavily dependent on the particular facts and circumstances of each case and no particular authority is decisive here. The principles are well established.

The proposed appeal would turn very much on the particular facts of this case, and no matter of general (or commercial) importance is engaged.<sup>12</sup>

[9] It is not therefore necessary in the interests of justice for this Court to hear the proposed appeal now.<sup>13</sup>

## **Result**

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

[11] 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>9</sup> See *Kacem v Bashir* [2010] NZSC 112, [2010] NZFLR 884 at [32].

<sup>10</sup> Senior Courts Act, s 74(2)(b); and see *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].

<sup>11</sup> CA judgment, above n 3, at [9].

<sup>12</sup> Senior Courts Act, ss 74(2)(a) and (c).

<sup>13</sup> Section 74(1).