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Defective building litigation update

High Court decision in $157 million Gore Street Apartments claim

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The High Court has issued its liability decision in the $157 million defective building claim brought by the Body Corporate and owners of Gore Street Apartments. The decision is something of a one stop shop for the current word on a wide range of key defective building claim issues.

GORE STREET APARTMENTS CLAIM

Gore Street Apartments are a 40-storey apartment building on Gore Street in Auckland CBD. They suffer from serious design and construction issues including weathertightness, structural, seismic and fire protection defects. The Body Corporate and owners first brought their claim against the design and construction team, including Auckland Council, back in 2014. This is the largest single building defects claim brought against Auckland Council to date.

The claim, for more than $157 million, was heard over 21 weeks in 2022. Most of the 11 original defendants either settled or were liquidated, leaving Auckland Council as the key defendant remaining. The High Court has now issued its decision finding the Council liable to the Body Corporate and owners.

The decision dealt with liability but not quantum. It is likely that the award once quantified will be in the many millions of dollars.

The Council put the Body Corporate and owners to proof on almost every aspect of their claim and raised several affirmative defences. The High Court's decision, which runs to 469 pages, therefore covers a wide range of topical defective building issues including who can bring claims under the current Unit Titles legislation, what a 'defect' is for the purposes of defective building liability, limitation issues, contributory negligence and failure to mitigate findings, and commentary on the current judicial approach to general damages.

Who can bring a claim for multi unit defective buildings?

The Gore Street Apartments claim was brought by both the Body Corporate and a significant proportion of the owners of units in the building (including some former owners who sold for a loss).

The parties contested who the proper plaintiff/s were. The outcome would affect whether GST could be claimed (which on a $157 million claim would be significant) and whether the affirmative defence of contributory negligence was available.

The Court found that, under the current Unit Title legislation, the Body Corporate had responsibility for arranging repairs and maintaining the building. Therefore, it was the proper plaintiff for all defects except those relating to individual bathrooms inside the units. As the bathroom defects only affected each individual unit rather than the building more generally, with no effect on neighbouring units, the individual owners had to bring the bathroom defects claims themselves.

However, the Court noted that the Body Corporate's claim was only as good as the underlying owners' claims, as it was the owners who made up the Body Corporate. Therefore, individual contributory negligence issues would proportionally reduce the Body Corporate's claim.

What is a 'defect'?

The plaintiffs alleged that the defendants were liable for designing and constructing Gore Street Apartments with several 'defects'. The Court considered what amounts to a 'defect' in the context of a defective building claim.

It found that, while 'defect' is not a term of art, an actionable 'defect' can be used in a non-technical way as follows:

- Some error, shortcoming or imperfection in relation to an aspect of construction;
- Assessed through the appropriate temporal lens – i.e. at the time of construction rather than with the benefit of hindsight;
- Which doesn't meet the requirements of the New Zealand Building Code.

Limitation issues

Limitation is an affirmative defence which will completely bar a claim if that claim is brought too late, meaning it is outside the relevant limitation period.

The Council raised both 6-year Limitation Act 1950 and 10-year Building Act defences.

1. 6-year Limitation Act 1950

Defendants will have a defence to a claim if it is brought more than 6 years after the defects or damage were reasonably discoverable. Note that this defence only applies to acts or omissions prior to 1 January 2011. The Limitation Act 2010 applies to conduct after 1 January 2011 and includes a shorter, 3-year late knowledge period. Claims under the Limitation Act 2010 must be brought within 6 years of the act or omission in question, but that time may be extended by 3 years if the plaintiff has late knowledge of the claim. That extension is subject to the 10-year longstop discussed below.

The defendants here argued that the plaintiffs should reasonably have discovered the issues more than 6 years before they brought their claim. The High Court disagreed. Water ingress into one area of the 40-storey building (the carpark) was not sufficient to alert the Body Corporate and owners to the wider issues. There were several exploratory reports carried out by experts before a comprehensive report identifying the issues that are the subject matter of the claim were identified. Where even experts have difficulty identifying the cause of water ingress, the Body Corporate and owners could not have reasonably discovered the defects. Their claim was not barred by the Limitation Act 1950.

2. 10-year Building Act longstop

The Building Act requires any claim relating to 'building work' to be brought within 10 years of that work. The plaintiffs amended their claim as their experts' investigations progressed, including amending the defects alleged. The defendants claimed that defects added later amounted to 'fresh causes of action' brought more than 10 years after the work in question and were therefore time barred. The Court agreed in part and found that certain alleged defects had been added too late and were time barred.

The High Court's assessment of when amendments to pleadings will amount to a fresh cause of action was fact specific. It emphasised that the issue was one of degree. Just because a pleading raises new facts does not mean it is necessarily a new cause of action. To amount to a fresh cause of action for limitation purposes:

(a) The essence of the new pleading must be different from what was previously pleaded.

(b) The analysis and remediation of the new defect must involve a very different approach.

(c) There must be no evident causal connection between the new defect and the previously pleaded defects.

This serves to emphasise the importance of plaintiffs working closely with their expert to ensure so far as possible that all potential issues are investigated and captured within the requisite timeframes.

Contributory negligence and failure to mitigate – plaintiffs' conduct requirements

Defendants may argue for discounts to plaintiffs' claims based on failings in the plaintiffs' conduct which have contributed to their own losses. Here, the Court found that some discounts were appropriate to certain owners' claims due to issues with their purchase due diligence, but no discount was appropriate for any failure to mitigate.

1. Contributory negligence - purchaser due diligence issues

The Court did not accept that individual pre-purchase inspection reports were likely to have identified systemic issues as they would have had access to and been focussed on the individual unit. Therefore, any failure to obtain a pre-purchase inspection report was not causative of any loss. However, the Court did accept that purchasers who failed to obtain Body Corporate AGM minutes after August 2010 (when the standard ADLS agreement recommended purchasers make those inquiries) were contributorily negligent. The affected owners' claims (and their proportions of the Body Corporate's claim) were discounted by between 10% to 30% depending on what information was available at the time of their purchase.

2. Failure to mitigate

The Court did not consider that the defendants had established any failures by the Body Corporate and owners to reduce or mitigate their losses. Many of the claimed defects were, in the Court's view "*of the type that cannot be maintained away*", therefore any failures to maintain would not have prevented or reduced the damage. The Court held that the defendants failed to establish:

(a) What reasonable steps the plaintiff could and should have taken in mitigation.

(b) That those steps were not taken.

(c) How those steps could have reduced the damage, noting that it was not sufficient to demonstrate it would have cost less to remediate earlier, as it may be reasonable for a plaintiff to postpone remediation work because of a refusal of another to accept liability.

General Damages – compensation for stress and anxiety

Successful plaintiffs in defective building cases can obtain an award in addition to the cost to repair or loss in value of their property. This is to help compensate them for the stress and anxiety they have suffered as a result of the defective building issues. While companies do not have feelings and cannot claim general damages, individuals and personal (non-corporate) trustees may claim.

For a number of years, the level of general damages remained static, being between $15,000 and $25,000 depending on whether owners occupied or rented out their units and whether they owned alone or jointly. Joint owners' awards were, together, more than but not double the amount sole owners received, as joint owners would support each other.

The High Court in Gore Street Apartments agreed with other recent High Court authority, increasing the amounts claimable to adjust for inflation. The Court held that assignee plaintiffs, companies and trustees with no personal

economic interest were not entitled to general damages, and owners who owned more than one unit were only entitled to one award rather than an increased sum based on the number of units owned.

The general damages appear to have been quantified as follows (noting the decision was on liability with damages to be quantified later):

- Joint owner occupiers: $40,000.
- Sole owner occupiers: $30,000.
- Joint non-residents: $30,000.
- Sole non-residents: $20,000.

Conclusion

All parties to this claim have reportedly appealed this decision, so we are likely to get appellate level input into these defective building issues.

In the meantime, this case highlights the wide-ranging issues that need to be carefully considered in bringing and defending defective building claims. Assembling a strong team of legal and technical experts is fundamental to success.

We act in this area regularly and are able to assist whether you have a property suffering from suspected defective building issues or you are defending a claim. Get in touch if you would like more information or to discuss.

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