GLI GLOBAL LEGAL INSIGHTS

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glg global legal group

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New Zealand

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Efficiency of process

New Zealand has two main courts of first instance – the District Court (for claims up to NZ$350,000 in value) and the High Court (for claims over NZ$350,000 in value). There are also two levels of appellate courts – the Court of Appeal and the Supreme Court. Decisions of the District Court may be appealed to the High Court.

Most civil claims are permitted one appeal as of right, with leave being required for further appeals.

A decision by a higher court is binding on lower courts. Decisions of the Supreme Court, as the final appellate court, are binding on all other courts. The rule of precedent provides that cases that are legally similar will generally be decided the same way, conforming to the decisions of a higher court. This ensures consistency and certainty in how the law is applied.

New Zealand also has a range of specialised lower courts and tribunals. The Employment Court, for example, hears and determines cases specifically relating to employment disputes.

The High Court and District Court share common procedures. Proceedings are commenced with the filing and service of a statement of claim together with initial disclosure of the key documents relating to the claim. The statement of claim informs the defendant of the case to answer and concisely summarises the issues before the court. These proceedings must be served on the defendant personally (not by post) unless an alternative agreement is reached. Legally represented parties will typically have their lawyers accept service of proceedings on their behalf. The defendant then responds by filing and serving a statement of defence.

Once the pleadings have been filed and exchanged, the parties will exchange discovery of all relevant (but not privileged) documents. Other interlocutory applications can also be brought to clarify the issues in dispute. Regular case management hearings take place to govern the conduct of the proceeding.

If a plaintiff believes that the defendant has no defence to a claim, an application for summary judgment can be filed at the same time as the statement of claim, supported by affidavit evidence. A defendant who wishes to oppose an application must file a notice of opposition along with its own affidavit evidence. The court does not hear oral evidence in a summary judgment application. This means the judge will generally refuse an application for summary judgment if there is a significant factual dispute, on the basis that a full hearing of the evidence is required.

An ordinary defended proceeding may take two to three years to reach a hearing after proceedings are issued. In contrast, a defended summary judgment claim is likely to be heard within approximately six months of the claim being filed.

All courts accept electronic filing of documents and online payment of court fees. For some documents, such as affidavits, original hard copies must also be filed physically.

New Zealand was fortunate to have relatively short, sporadic and geographically confined lockdowns due to the COVID-19 pandemic, so it has not resulted in wholesale changes to the way the court system operates. The higher courts are now more open to audio-visual link (AVL) hearings, particularly for procedural matters or where there is no oral evidence. COVID-19 has exacerbated a lengthy civil case backlog, especially in the District Court.

The Rules Committee (which sets procedural rules for the courts) has released a range of proposed amendments to the current procedures to improve access to justice and reduce the time it takes to bring proceedings to a hearing, which are now being considered. However, any changes are likely to be some years in the making.

Integrity of process

New Zealand's central government is democratically elected every three years by a Mixed Member Proportional system. The government is divided into three branches:

- Parliament, which makes and amends laws by passing legislation;
- Executive, which administers and enforces the law through government departments; and
- Judiciary, which interprets and applies the law through the courts.

Judicial independence in New Zealand is formally protected by the Constitution Act 1986. Judges cannot be dismissed by the government except on the grounds of "misbehaviour or of that Judge's incapacity to discharge the functions of that Judge's office". The government also cannot reduce a judge's salary while in office.

While judges are appointed on the recommendation of the Attorney-General, a Minister of the Executive, in practice, the process for appointment is impartial and devoid of political influence and concern.

Courts in New Zealand apply the rules of natural justice. In practice, this means that a person must be given notice of a hearing if they are likely to be affected by any decision that might flow from that hearing. The notice should give particulars of any allegations that will be made in the course of the hearing, and of any possible outcomes or the range of orders that may be made. A decision-maker committed to deciding specific issues may not deal with further related issues without giving further notice and allowing the parties time to prepare and to make submissions. There is also a duty of disclosure of material relevant to the decision, to allow the person affected to oppose or correct the material in issue, unless there is some statutory or other reason that removes that obligation.

Privilege and disclosure

Discovery is governed by the High Court and District Court Rules. The starting point is that all relevant documents in a party's control are discoverable. Relevant documents are those documents:

- on which the party relies;
- that adversely affect that party's own case;
- that adversely affect another party's case; or
- that support another party's case.

Documents do not need to be provided to the other party if they are privileged. Legal advice is generally protected by privilege under both the common law and the Evidence Act 2006. The Evidence Act generally governs the application of privilege in the context of litigation and arbitration. There are three primary categories of privilege in the Evidence Act.

Legal advice privilege protects communications between a person and their legal adviser if the communication was intended to be confidential and was made in the course of, and for the purpose of requesting, obtaining or giving professional legal services. Legal advice privilege applies whether or not the person actually obtains such services so, even if a lawyer is unable to act, the privilege may still apply to initial communications.

However, it cannot be assumed that all documents exchanged between a party and its lawyer will be covered by this privilege. Legal advice privilege only applies to professional legal services and does not always extend cover to general commercial advice or any investment advice that may be provided by a lawyer. Similarly, for the privilege to apply, the communications must be confidential.

Litigation privilege applies in respect of material created at a time that litigation is reasonably apprehended, and where the material is created for the dominant purpose of that litigation. This privilege extends beyond communications with lawyers and captures communications between a person or their lawyer and a third party.

Without prejudice (or settlement negotiation) privilege applies to:

- communications between parties that were intended to be confidential, and which were made in connection with an attempt to settle or mediate a dispute in which relief could be granted in civil proceedings; and
- documents that the person has prepared, or caused to be prepared, in connection with an attempt to mediate the dispute or to negotiate a settlement of the dispute.

A party cannot unilaterally waive without prejudice privilege; it may be waived only by all the persons who enjoy the privilege, which will include, for instance, the sender and recipient of correspondence sent as part of an attempt to settle a dispute. There are limited exceptions to without prejudice privilege. A document may be disclosed if:

- it sets out the terms of an agreement settling the dispute;
- it shows that a settlement has been reached;
- it is expressed as being "without prejudice except as to costs", and it is disclosed for the purpose of determining costs; or
- the court considers that, in the interests of justice, the need for the communication or document to be disclosed in the proceeding outweighs the need for the privilege.

The Evidence Act 2006 also provides for a privilege against self-incrimination. The privilege against self-incrimination applies to an individual who is required to provide information in the course of a proceeding by a police officer or person exercising statutory authority and where the information would be likely to incriminate the person under New Zealand law for an offence punishable by a fine or imprisonment. It does not apply where the person would only show themselves to be liable for a civil claim.

In limited circumstances, a party may claim that a document is confidential, and seek to restrict the use of or access to that document in discovery. Confidential documents will usually need to be provided to the lawyers acting for the other parties to the dispute but may be able to be withheld from the parties themselves. In practice, the courts expect the parties to a dispute to agree the terms on which confidential documents are to be exchanged and used in a proceeding.

Evidence

The courts in New Zealand follow an adversarial legal system. Each party has the opportunity to present evidence and to test the other parties' evidence.

In a substantive hearing, written briefs of evidence for each witness are exchanged prior to the hearing. At the hearing, the witness will either read the written brief aloud in court or, in some situations (usually where the brief of evidence is very lengthy), sections of the written brief will be "taken as read" and not read aloud. The witness may then be cross-examined by the other parties. The party who called the witness is then given an opportunity to re-examine the witness on matters raised during cross-examination. Once all parties have questioned the witness, the judge may ask questions of the witness before the witness is released.

The court can permit a witness to give evidence in an alternative way, such as by AVL. This is more common where the witness is located overseas and considerable inconvenience and expense would be caused by requiring the witness to give evidence in person. This has become more common as a result of the COVID-19 pandemic. Applications are required in advance for evidence to be given in this way.

In both the High Court and District Court, witnesses can be subpoenaed to give evidence if the party seeking to call the witness can show the court that the witness is in possession of information that is relevant to the proceeding. Failure to comply with a subpoena may result in the witness being fined or the court issuing a warrant for the person's arrest.

If a non-party has documentary evidence that is relevant to the proceeding, the court can order them to provide discovery of those documents. This will usually only be granted where necessary in the interests of justice.

Parties are allowed to lead opinion evidence from an appropriately qualified expert if the court is likely to obtain "substantial help" from the opinion. Expert witnesses provide briefs of evidence and give oral evidence at trial in the same way witnesses of fact give evidence. Expert witnesses may be cross-examined and re-examined. Impartiality of expert witnesses is critical, and experts are not permitted to advocate for any party. Expert witnesses must agree to abide by a Code of Conduct prescribed by the High Court Rules and have an overriding duty to the court to assist the court impartially on relevant matters within their area of expertise. Experts on the same area of expertise for each party may be asked to confer, and where possible to agree to a joint position.

Costs

The costs regime operates on the foundation principle that the party who fails should pay costs to the party who succeeds. However, this will almost never result in full costs recovery for the successful party, and courts typically retain a measure of discretion when determining the level of costs to be awarded to a successful party.

Costs are calculated based on a "scale" in the Court Rules, which aim to achieve predictability, consistency and expediency in the determination of costs. Scale costs are calculated by reference to a formula that takes into account the complexity and significance of the proceeding and what is considered a reasonable period of time for each step taken in the proceeding.

An award of scale costs is not expected or intended to result in full recovery of the successful party's actual costs. Scale costs are intended to result in a recovery of around two-thirds of actual costs. In more significant and large-scale commercial litigation, an award of scale costs is unlikely to result in the successful party recovering more than a quarter of its actual costs.

The court can order "increased costs" above the scale calculation or "indemnity costs" in certain limited situations. This includes where a party has failed to act reasonably or has taken inappropriate steps that increased the cost of the proceeding. Indemnity costs can also be claimed where this is provided for in a contractual agreement between the parties.

Indemnity costs are determined with reference to actual costs but may be less if the court considers that the actual costs are unreasonably high.

A settlement offer can be made on the basis that it is "without prejudice except as to costs". These are known as *Calderbank* offers. *Calderbank* offers cannot be referred to during the trial but can be provided to the court once the trial is over and when costs are being determined.

A properly made *Calderbank* offer means that (subject to any contrary view from the judge) the offeror may apply to the court for an order that the offeree pays the offeror's costs incurred from the date of the *Calderbank* offer. This is based on the view that: the offeree should have accepted the *Calderbank* offer (which was for an amount higher than the judgment) when it was made; had the offeree accepted the offer, the costs for the proceedings incurred by the offeror after the date of the *Calderbank* offer would have been saved; and hence the offeree should pay the offeror's costs even though the offeree succeeded in the court.

A defendant may apply for a plaintiff to provide security for costs. This ensures that if the plaintiff's claim is unsuccessful, the defendant will be able to recover an award of costs. Whether or not to order security and, if so, the quantum, are matters for the court's discretion. The court will consider the balance of two competing interests: the defendant's interest in being protected from a barren costs order; and the plaintiff's right of access to the court.

Litigation funding

Litigation funding has been comparatively uncommon in New Zealand. However, the number and activity of funders have steadily increased and there have been several recent high-profile representative actions filed with the support of funders, many of which would likely not have been brought had litigation funding not been available. The courts have recognised that representative actions and the use of litigation funders increases access to justice and have taken a cautiously permissive approach in the absence of a specific legislative regime.

There is no specific regime to regulate litigation funding in New Zealand. However, in 2022, the Law Commission released a report on class actions and litigation funding, and recommended that formal procedures be put in place for court approval of litigation funding.

Historically, the law has prohibited a person who is not a party to a civil proceeding, and has no direct interest in the outcome, from providing financial assistance to a party in return for a share of any recovery. The New Zealand courts recognise that such funding can have an important role in ensuring access to justice. The Law Commission has recommended that this law be abolished.

The New Zealand courts will monitor funding arrangements to look at:

- the extent of control a funder has in managing a court proceeding;
- the profits a funder makes if the funded plaintiff is ultimately successful; and
- how potential conflicts of interest between the funder, the funded plaintiff, and the lawyer who has been engaged are managed.

The courts have stayed proceedings where they determine that the proceedings are being conducted for the benefit of the litigation funder rather than the plaintiff.

Contingency fee arrangements, where the fee is calculated as a proportion of the amount recovered, are prohibited in New Zealand by the Lawyers and Conveyancers Act 2006. However, conditional fee arrangements, where payment is conditional on a successful outcome, and the fee is either a normal fee or a normal fee plus a premium, are permitted. The use of these conditional fee arrangements is becoming more common but remains rare.

Class actions

New Zealand does not have formal class action legislation that sets out the procedural steps for bringing and progressing a claim on behalf of a group of people with a common interest. Instead, New Zealand has a procedure for a "representative action", which is provided for in one relatively short rule in the High Court Rules. The courts have provided some guidance in recent years, recognising that these actions can improve access to justice, facilitate efficient use of court resources and incentivise consumer businesses to ensure they comply with the law.

The procedure for bringing a representative action is largely determined by the courts on a case-by-case basis. Both opt-in and opt-out cases are permitted, and which is used in any proceeding will be at the discretion of the court. In general:

- it will be up to the applicant seeking to represent others to propose whether members of a class should opt in or opt out;
- an opt-in approach may be preferable where the class is small and there is a specific, existing connection between the class members; and
- the remedy sought could also be a factor: an opt-out approach may be more appropriate if the claim seeks a declaration or an injunction, or where there is an error of law, rather than damages.

Both the Rules Committee (which develops and updates the High Court Rules) and the Law Commission have been reviewing class actions in recent years, and have indicated that New Zealand should have a statutory class actions regime. In its report from 2022, the Law Commission formally proposed a Class Actions Act, and provided draft legislation. However, a formal regime for class actions is likely to still be some years away. For now, the lack of a clear procedural framework does mean that representative actions often face a range of procedural challenges.

Interim relief

Interim injunctions are available from the High Court where needed to preserve the *status quo* pending a hearing. They are a temporary and discretionary remedy.

To obtain an interim injunction, the plaintiff must show that the proceeding is capable of supporting a claim for a perpetual injunction or other sufficient equitable relief whether or not there is also a claim for damages.

The court may also grant an "interim interim injunction" on a very short-term basis to preserve the *status quo* pending a hearing on whether there should be an interim injunction. The general principles in determining whether an interim injunction should be ordered are:

- whether there is a serious question to be tried in the proceeding;
- where the balance of convenience lies; and
- the overall justice of the matter.

The High Court may grant a freezing order to stop a respondent from dealing with any assets, whether located in or outside of New Zealand. In contrast, the District Court may only issue a freezing order in respect of New Zealand assets.

Enforcement of judgments/awards

Both the District Court Rules and the High Court Rules contain provisions for enforcement of judgments and court orders.

The most common way of enforcing a money judgment against a company is to issue a statutory demand. If the company does not pay the amount claimed in the demand within

15 working days, the company is deemed to be unable to pay its debts as they fall due. The judgment creditor can then make an application to the court that the company be put into liquidation. A similar process in bankruptcy applies to individual debtors.

There are a number of alternative options for enforcing court judgments and orders. These differ slightly depending on whether enforcement is sought in the District Court or High Court and include:

- **Seizure of property** – a person who has obtained a judgment for the recovery of certain chattels can request that the court issue a warrant, which will direct a bailiff or constable to seize the chattels referred to in the warrant and deliver them to the person referred to in the warrant.
- **Garnishee order** – where a person (A) who owes money to a judgment debtor (B) can be directed to pay that money directly to the person who has obtained a judgment (C) for any amount of the debt owing or accruing. Garnishee orders are made at the court's discretion.
- **Charging order** – which has the effect of preventing an owner of land or other types of property from selling that property until the payment owed under the judgment is paid.
- **Attachment order** – which has the effect of directing that money owed under the judgment is to be a charge against the salary or wages of the judgment debtor. Once the employer has been served with the attachment order, it must deduct from the judgment debtor's net earnings a specified sum that is to be paid directly to the judgment creditor.
- **Sale order** – in the High Court, a judgment creditor can apply for a sale order at any time after a money judgment has been sealed. A sale order authorises and commands the enforcing officer to seize all of the judgment debtor's chattels, except for their "necessary tools of trade" or "necessary household furniture and effects", including clothing.
- **Possession order** – in the High Court, a plaintiff can, at the start of the proceeding, apply for an order for the possession of land or chattels named in the proceeding. Where the subject of the possession order is land, the court officer must immediately deliver to the judgment creditor complete and vacant possession of the land, which means he must use his authority to eject, by force if required, all other persons who are present on the land.
- **Sequestration order** – this High Court order authorises a sequestrator to take possession of all real and personal property of the party against whom the order is directed.

Arbitral awards from any country are recognised as binding and can be entered as a judgment in the New Zealand courts and therefore enforced as one. This can either be achieved by agreement of the parties to the award or on application to the District Court (for awards of less than NZ$350,000) or the High Court (for awards of NZ$350,000 or more). Arbitral awards can also be enforced directly by action under the Arbitration Act 1996. There are some grounds on which the court may refuse to enforce an arbitral award set out in the Arbitration Act, including for matters such as incapacity, a failure of correct procedure (e.g. by lack of notice, or process not in accordance with the arbitration agreement), and if the award addresses matters not contemplated or not falling within the terms of the arbitration agreement.

Cross-border litigation

New Zealand courts may, at the judge's discretion, give interim relief in support of overseas proceedings. Before making an order for interim relief, the court must be satisfied that there is a real connection between the subject matter of the interim relief and the territorial jurisdiction of the court. The court must also be satisfied that an order is not inconsistent with interim relief granted in the overseas proceedings by the court outside New Zealand.

In particular, the High Court may grant a freezing order against a respondent, where the substantive proceeding is taking place in another jurisdiction. The court will consider whether the connecting link between the subject matter of the order and the territorial jurisdiction of the court is satisfied in circumstances where the assets sought to be frozen are within New Zealand.

The Evidence Act 2006 includes provisions for the taking of evidence in New Zealand for use in overseas proceedings. An order will be granted where there is reason to believe that relevant evidence may be obtained from the witness.

A defendant may object to the jurisdiction of the court, whether because a different jurisdiction would be more appropriate or because the parties have agreed to arbitrate. In that case, the defendant can file and serve an appearance *in lieu* of a statement of defence. The defendant may apply to dismiss the proceeding, and the plaintiff may apply to dismiss the appearance. The court, if satisfied that no jurisdiction exists, must dismiss the proceeding, and if satisfied that jurisdiction does exist, must dismiss the application and set aside the appearance.

International arbitration

The Arbitration Act 1996 regulates the rules and procedure of arbitrations in New Zealand and incorporates the UNCITRAL Model Law on International Commercial Arbitration.

The majority of arbitrations conducted in New Zealand are *ad hoc* domestic arbitrations with limited involvement or oversight from arbitral institutions. The Arbitration Act also covers international arbitrations.

The courts are generally supportive of the arbitration process and respect the parties' choice of dispute resolution mechanism. Where a party to an arbitration agreement attempts to bring court proceedings in breach of the agreement, the court will usually stay the proceedings and refer the matter to arbitration. The only real exception to this is where the arbitration agreement is void or contrary to public policy.

The conduct of an arbitration and the procedures that apply are usually agreed by the parties. This includes the rules of evidence and the level of formality to be adhered to.

Generally, the courts do not interfere with an arbitral award unless there are very compelling reasons to do so. Arbitral awards can be appealed on questions of law but only where the parties agree or the High Court grants leave. There exists a right of appeal on the grounds of natural justice.

Mediation and ADR

Mediation of claims is a popular process for resolving civil disputes in New Zealand, whether or not court proceedings have been issued. Most New Zealand parties to civil disputes and lawyers are open to mediation and many expect that it will be a part of any dispute resolution process.

Mediation is generally voluntary. However, it is a mandatory step in a number of specialist dispute resolution fora. Employment and tenancy disputes and claims to the Human Rights Review Tribunal must usually go through a mediation process before an authority or court will hear the matter.

The precise format of the mediation and whether the dispute is settled and how depends on the agreement and cooperation of the parties. Legal obligations can be considered at mediation, but the parties are not limited by what is legally "right". Instead, parties are encouraged to work together as problem-solvers, usually assisted by an independent

mediator appointed by the parties to facilitate the mediation, to develop mutually acceptable outcomes without the need for formal legal procedures. Parties are not limited to remedies that would be available to them in a court and can develop creative resolutions that better match their interests. Although mediation does not guarantee the resolution of a dispute, should the parties be unable to reach an agreement and the dispute proceeds to arbitration or litigation, the mediation process is unlikely to have been wasted effort. Having spent time defining and exploring the issues, parties should be better prepared and able to assist an arbitrator or court in achieving a final decision.

A similar process to mediation, available through the court, is a judicial settlement conference. There is a presumption that civil proceedings in the District Court will involve a judicial settlement conference. However, they are comparatively uncommon in the High Court.

A judicial settlement conference is held on a "without prejudice" basis, so anything that is said at such a conference cannot be used later should the matter not settle and proceed to a hearing. A judge presides over the conference and assists the parties in evaluating important issues in the dispute and discussing whether a settlement can be reached, similar to the role typically played by a mediator in a mediation. The judge will not give an opinion as to the likely outcome of the litigation. If a proceeding does not settle, the judge who presided over a judicial settlement conference will not be allocated to the hearing of the proceeding.

Regulatory investigations

There are a range of regulatory agencies that cover consumer and business affairs. These agencies take a variety of approaches depending on their resourcing and focus areas. These include:

- The Commerce Commission, which is one of the more active agencies and enforces competition, fair trading and consumer credit laws. Current areas of focus for the Commerce Commission are the criminalisation of cartel conduct under legislation that came into force in 2021, and competition in the market for building supplies.
- The Office of the Privacy Commissioner has recently expanded powers under the Privacy Act 2020. These include powers to issue notices compelling businesses and others holding personal information to take steps to comply with their privacy obligations. There are also new financial penalties for failing to comply with these notices or failing to notify privacy breaches. We expect to see these new powers being exercised. The Privacy Commissioner will also take steps to prevent information obtained through a data breach from being used, including by obtaining injunctions in the High Court.
- WorkSafe is the primary workplace health and safety regulator. It is an active regulator and brings a number of prosecutions each year. It is currently carrying out its largest-ever investigation in response to the volcanic eruption on Whakaari/White Island in December 2019.

Other significant regulatory agencies include the Reserve Bank of New Zealand, the Department of Internal Affairs, the Securities Commission and the Overseas Investment Office.

There are also a wide range of industry and professional regulatory agencies that enforce standards relevant to their jurisdictions.

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Jonathan specialises in commercial disputes and has particular experience managing large, complex cases. He regularly appears as counsel in the Courts at all levels as well as in various specialist tribunals and in mediation. He is engaged in a wide range of commercial litigation and disputes work. His practice includes contract, defamation, estate, insolvency, insurance, judicial review, property, professional liability & discipline and trust disputes. Jonathan is a former chair of Duncan Cotterill's partnership and board. He is a member of the Presidential Council of the International Insurance Law Association and has previously worked at a leading litigation firm in London, and as a judges' clerk at the High Court. Jonathan is a contributing author to various legal texts and speaks regularly at industry events and conferences on dispute resolution.

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