BUDDLE FINDLAY

Guide to litigation in New Zealand.

This document cannot be relied upon as legal advice

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Overview

In New Zealand, there is a national court system for formally determining disputes between commercial parties. This document is a high-level and general guide to litigation in that national court system. Parties can also agree to private forms of dispute resolution, such as arbitration or mediation, but those processes will not be discussed in this guide.

In general, key features of commercial litigation in New Zealand include the following:

- **Adversarial:** the New Zealand system is adversarial rather than inquisitorial. The judge relies on the evidence and legal argument provided by the parties and their lawyers in order to determine the facts and legal outcome
- **Public:** the presumption is that members of the public and press are permitted to attend hearings in the High Court, and the Court record is publicly available
- **Discovery:** prior to trial, the parties are generally obliged to disclose to each other documents relevant to the dispute, including electronic conversations and messages, regardless of whether they assist or harm their case
- **Evidence:** in advance of trial the parties exchange written statements of evidence by witnesses. At trial, the witnesses swear to the truth of these statements and are subject to cross-examination by the opposing party's lawyer
- **Costs:** generally, the losing party must make a contribution to the successful party's legal costs
- **Settlement:** it is common for parties to reach a negotiated settlement before trial.

The New Zealand legal system

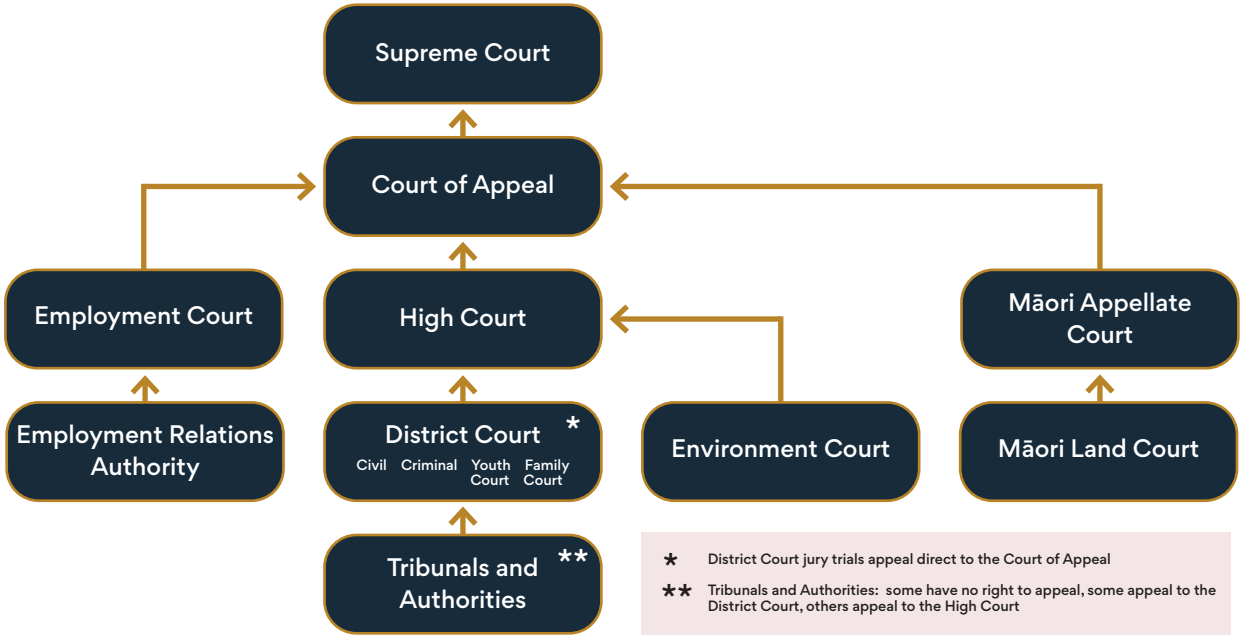
After the Treaty of Waitangi (Te Tiriti o Waitangi) was signed between Māori chiefs and the British Crown in 1840, British sovereignty was declared over New Zealand. New Zealand gained legal independence in 1947, although it continues to follow the Westminster system. The government of New Zealand is a constitutional monarchy with a parliamentary system of government. The Crown is represented in New Zealand by the Governor General. There are three branches of government which operate according to a separation of powers model:

- **Legislature:** the New Zealand Parliament is made up of representatives elected every three years. Parliament's role is to debate and vote on whether to pass laws proposed by the Executive branch
- **Executive:** the Executive branch comprises the Prime Minister, cabinet and government departments. The Executive proposes laws, and administers them if the laws are passed by Parliament
- **Judiciary:** the judicial branch is made up of judges and judicial officers appointed on the recommendation of the Attorney-General. The judiciary's role is to interpret, apply and develop New Zealand law, independently of the other two branches. Judicial officers sit in a variety of courts and tribunals.

New Zealand is a common law jurisdiction, meaning that statute law is supplemented by judge-made case law developed on the basis of precedent and - where appropriate - customary law including tikanga (Māori customary law).

The New Zealand court system

The diagram below illustrates how the New Zealand court system is organised.



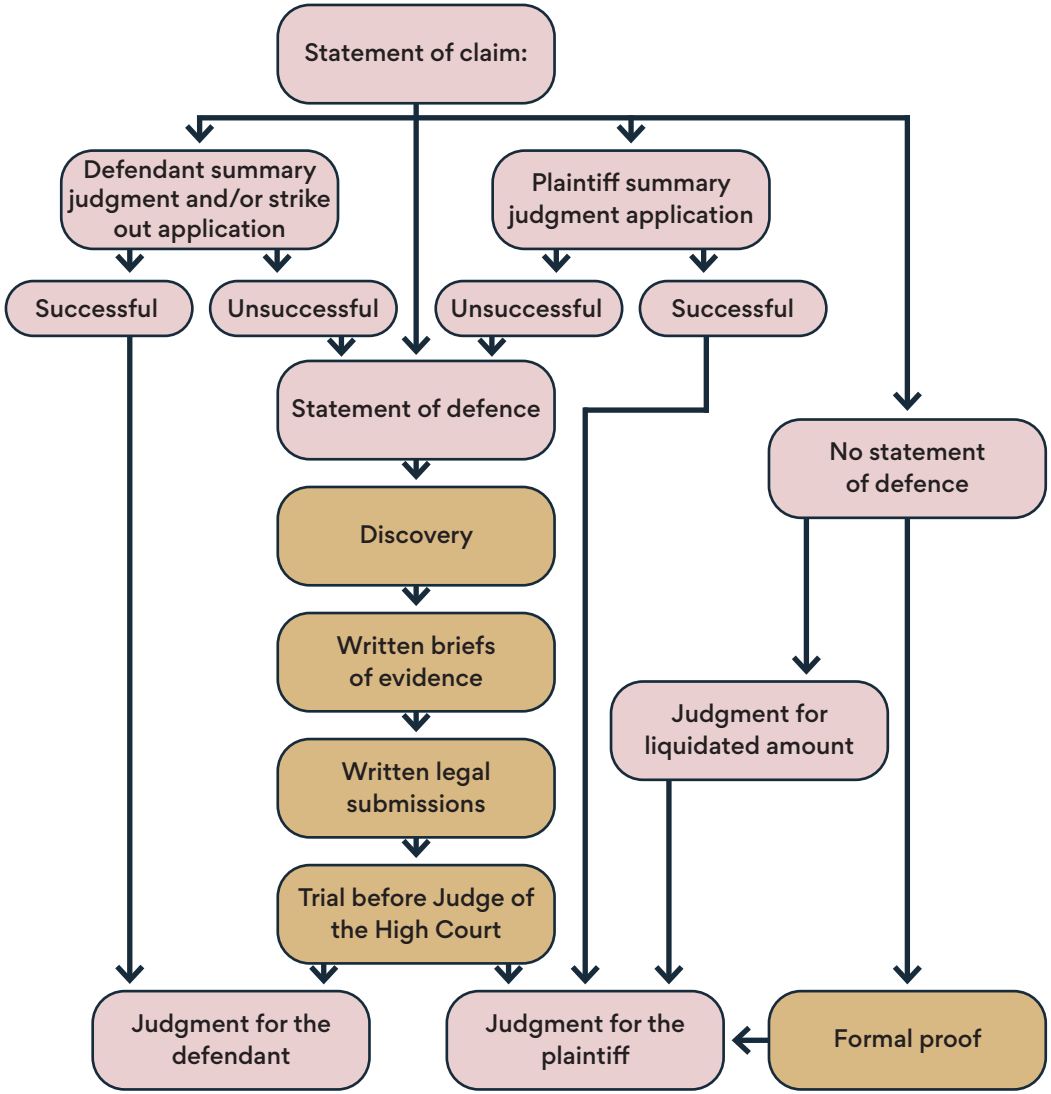
Most commercial disputes, other than those relating to specialist areas including family law, employment law, resource management and Māori land law are heard by one or more of the following bodies:

- **Disputes Tribunal:** the Disputes Tribunal provides a more informal forum for the determination of low-value disputes, up to a limit of NZ$30,000. Lawyers are not permitted to appear for the parties and the dispute is determined by a referee rather than a judge. There is a very limited right of appeal to the District Court (on grounds of procedural unfairness only)
- **District Court:** the District Court (Te Kōti ā Rohe) has jurisdiction to hear most forms of commercial dispute with a value of NZ$350,000 or less. Most commercial decisions of the District Court are subject to a right of appeal to the High Court. In order to be appointed as a District Court judge, a lawyer must generally have held a practicing certificate for at least seven years. The District Court is bound to follow judicial precedents set by higher courts
- **High Court:** the High Court (Te Kōti Matua) has a general jurisdiction, with no limit on the value of commercial cases it can hear. It hears cases at first instance and appeals from the District Court. Civil cases in the High Court are heard by judges and associate judges of the High Court, who must also have held legal practising certificates for at least seven years (and generally have considerably more experience as lawyers). The High Court is bound by precedents set by the Court of Appeal and Supreme Court
- **Court of Appeal:** the Court of Appeal (Te Kōti Pīra) is an appellate court which, in the civil jurisdiction, hears appeals from the High Court. Appeals are heard by panels of three or five judges. In order to sit on the Court of Appeal, judges must also be judges of the High Court. The Court of Appeal is bound by precedent made by the Supreme Court
- **Supreme Court:** the Supreme Court (Te Kōti Mana Nui) is New Zealand's highest court. Appeals to the Supreme Court may only be heard if the Court grants leave to appeal, which it must do only if it is satisfied that it is necessary in the interests of justice. The Court hears appeals as a bench of five judges. A person may only be appointed as a Supreme Court judge if they are a High Court judge or a Court of Appeal judge.

While in the District Court, both natural persons and companies may represent themselves, in the High Court, companies must be represented by lawyers. The majority of parties to commercial litigation in New Zealand are legally represented. While it is not compulsory for a person to be legally represented, self-represented parties may be disadvantaged as a result of their lack of knowledge of the relevant law and procedure.

Overview of a commercial proceeding

The diagram below illustrates the life cycle of a straightforward High Court general commercial proceeding in New Zealand, the various stages of which are discussed in this guide. There are other forms of proceeding available (such as originating applications) but they are not discussed in this guide.



Detailed procedural requirements apply to each stage of a proceeding and are contained in the High Court Rules 2016.

All defended civil claims in the High Court are subject to "case management", which requires the parties to adhere to timetable directions made by the High Court Rules and/or a judge for each of the steps shown above.

The judges of the High Court expect 90% of civil case judgments to be delivered within three months of the last day of hearing or receipt of the last submission.

Relief

The High Court has jurisdiction to grant a wide range of relief to plaintiffs (the claimants), depending on the nature of their claim. The most common forms of relief are as follows:

- **Interim relief:** the Court may make an interim order requiring a party to do, or refrain from, doing something pending the outcome of a trial. This is discussed further on page 8
- **Financial relief:** monetary compensation in the form of damages. Exemplary or punitive damages are very rare in New Zealand. Most awards of damages are calculated to equate to the actual loss suffered by the plaintiff
- **Equitable relief:** equitable remedies include injunctive relief (orders requiring a defendant to take, or refrain from taking a certain action), specific performance (which requires a defendant to perform obligations) and accounts of profits (which require defendants to pay over profits that they have made as a result of infringing the plaintiff's rights)
- **Declaratory relief:** the Court makes a declaration as to the rights and/or obligations of a party or parties, without ordering further remedies. Applications for declaratory relief are often made in relation to disputes concerning the interpretation of a statute or document, but are not confined to such matters.

Cost and fees

Parties are responsible for their own legal costs up to and including trial. If a party to legal proceedings is on a low income, they may be entitled to Legal Aid, a Government- run programme which provides funding for legal fees.

Following judgment after trial, the general principle is that the party who fails should pay costs to the successful party. Usually, the amount of costs payable is determined by reference to the "scale" in the High Court Rules that set out appropriate recovery rates and time allowances for key steps in the proceeding, depending on its complexity. In practice, scale costs generally amount to between one third and one half of a party's actual legal costs.

In certain rare cases, the Court will award increased or indemnity (full) costs. Examples include where a party has failed to comply with the High Court Rules or a direction of the Court, taken an unnecessary step or pursued an unmeritorious argument or acted vexatiously.

New Zealand lawyers are not permitted to act on a contingency fee basis. However, they may enter into conditional fee arrangements provided such arrangements comply with prescribed criteria.

Class actions and third party litigation funding

While there is no specific class action legislation in New Zealand, claims may be brought as "representative actions" under the High Court Rules, which are claims brought on behalf of, or for the benefit of all persons with the same interest in the subject matter of the proceeding. New Zealand has seen an increasing number of representative actions brought on an "opt-out" basis. A class action legislative regime has been recommended by the Law Commission, and this is likely to be enacted and implemented in the near future.

There is no specific regulatory framework governing third party litigation funding in

New Zealand and the courts take a "cautiously permissive" approach to it.

Commencing proceedings

Statement of claim

Ordinary High Court civil proceedings are commenced by the filing with the Court of a statement of claim. The party that files the claim is known as the plaintiff. The plaintiff is generally obliged to pay a filing fee to the Court.

A statement of claim is a succinct document that sets out:

- The material facts relied on for the plaintiff's claim
- The relief or remedy sought by the plaintiff (eg damages or other relief).

Once the statement of claim has been accepted by the Court, the plaintiff must serve it on the party or parties claimed against (known as the defendant/s).

Statement of defence

Once served with a statement of claim, a defendant generally has 25 working days in which to file and serve a statement of defence. Again, a filing fee is usually payable.

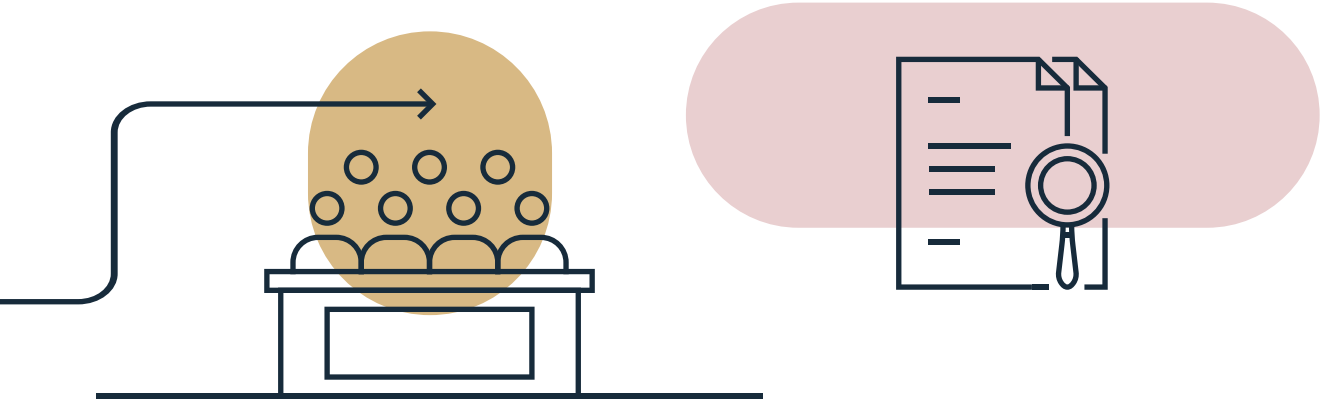
A statement of defence must admit or deny each of the allegations in the statement of claim. It should contain sufficient detail to inform the plaintiff and the Court of the basis for the defence.

Where a defendant fails to file a statement of defence:

- If the claim is for a liquidated (precise) sum, the plaintiff may request judgment by default, pursuant to which the Court gives judgment for the amount claimed without the need for the plaintiff to file evidence or appear in Court
- If the claim is not for a liquidated amount, the plaintiff may obtain judgment by formal proof, which requires an appearance in Court and affidavit evidence to support the claim.

Counterclaim

In addition to a statement of defence, a defendant may also file a counterclaim against the plaintiff, seeking its own relief. Where a counterclaim is filed, the plaintiff is required to file a statement of defence to that counterclaim.



Commencement of claims by or against foreign persons

A statement of claim may be served out of New Zealand without the leave of the Court in a number of prescribed circumstances, including (but not limited to) where it concerns a claim:

- Relating to a contract made or performed in New Zealand or governed by New Zealand law; or
- In tort where damage was sustained in New Zealand; or
- Concerning land in New Zealand; or
- Against a person domiciled or ordinarily a resident in New Zealand.

Where leave of the Court is required, it may be granted if the applicant establishes that the claim has a real and substantial connection with New Zealand, that there is a serious issue to be tried, that New Zealand is the appropriate forum and any other relevant circumstances supporting an assumption of jurisdiction.

Pre-trial disposal - summary judgment and strike out

Summary judgment

The summary judgment process is a fast-track procedure, used where the plaintiff believes there is no defence to its claim. Summary judgment is an efficient way to enforce unpaid debts and other breaches of contract. Buddle Findlay does most of its summary judgment work for banks and finance companies against debtors who have defaulted on loans or under guarantees.

A plaintiff can apply for summary judgment when filing its statement of claim. The plaintiff must provide affidavit evidence to support the assertions in the claim. If the defendant wishes to oppose the application for summary judgment, it must file a notice of opposition and its own affidavit evidence. If, following a hearing, the Court agrees with the plaintiff, and the defendant does not file a statement of defence, judgment may be ordered without the need for discovery or a full trial.

A defendant may also apply for summary judgment against a plaintiff, if it believes that the plaintiff's claim cannot succeed.

The threshold for obtaining summary judgment, whether as plaintiff or defendant, is a high one.

Strike out

If a statement of claim or defence does not disclose a reasonably arguable case or is an abuse of process of the Court, a counter-party may apply to have it "struck out" before trial. If the strike out application is successful, the proceeding comes to an end. While strike out applications can be made at any stage of proceeding, they are commonly made by defendants prior to the date for filing of a statement of defence.

The threshold for striking out a claim is very high.

Pre-trial emergency and interim relief

Interim relief

The High Court has jurisdiction to grant interim or emergency relief prior to trial. Most commonly this takes the following form:

- **Interim injunctions:** which prevent a defendant from doing, or require a defendant to do, something pending the outcome of the trial
- **Freezing orders:** which prevent a defendant from disposing of assets prior to the outcome of the trial
- **Search orders:** which require a defendant to permit entry to premises to secure or preserve evidence
- **Preservation of property:** which require a defendant to preserve property or a fund, the right to which is in question.

Security for costs

If a defendant is concerned that a plaintiff will not be able to contribute to the defendant's legal costs if the claim is unsuccessful, the defendant may apply for an order for "security for costs", requiring the plaintiff to pay a certain amount into court (or provide equivalent security) pending the outcome of the proceeding.

The Court will usually order security for costs if satisfied that the plaintiff is a resident outside of New Zealand or there is reason to believe that it will be unable to pay the costs of the defendant if ultimately unsuccessful.

Other applications

Various other applications can be made following the commencement of a proceeding, including an application to join other parties or protests to jurisdiction.

Discovery

In ordinary proceedings in the High Court, each party to a proceeding is required to disclose documents that are, or have been, in that party's control, and:

- On which that party relies
- That adversely affect that party's own case
- That adversely affect another party's case; and
- That support another party's case.

The term "document" is very broad and includes all electronic documents including text messages and social media conversations. The obligation is to disclose all documents, including commercially confidential documents, in a sworn list of documents (ie a list attached to an affidavit).

In complex or large cases, the Court may limit the scope of discovery to "tailored" discovery, with reference to certain categories of documents only.

Retention obligations

As soon as a High Court proceeding is in contemplation, a party or prospective party must take all reasonable steps to preserve potentially discoverable documents in its control. This includes refraining from deleting potentially discoverable electronic documents.

Restrictions on disclosure

A party will not necessarily have access to all documents discovered by other parties to a proceeding:

- **Privilege:** a party is not required to provide access to documents that are subject to legal privilege. The main categories of privilege are as follows:
  - **Legal advice privilege:** applies to confidential communications made between a legal advisor and client in the course of and for the purpose of obtaining or providing professional legal services
  - **Litigation privilege:** applies to communications or information made for the dominant purpose of preparing for a proceeding or apprehended legal proceeding
  - **Without prejudice privilege:** applies to confidential communications between parties to a dispute made in connection with settling a dispute
- **Confidentiality:** some documents may contain confidential or commercially sensitive information.

Written evidence and submissions

Evidence

In ordinary proceedings, prior to trial, the parties must provide each other with written witness statements containing the evidence that will be relied on to prove their respective cases at trial. The date for service of the statements is set by the Court as part of the case management process.

The statements may be made by witnesses of fact or expert witnesses and must comply with the requirements of the High Court Rules and the Evidence Act 2006 (which, amongst other things, restrict the admissibility of hearsay evidence). Expert witnesses must comply with a Code of Conduct forming part of the High Court Rules, which requires them to act impartially.

Witnesses may, and usually do, refer to non-privileged documents disclosed on discovery to support assertions in their written statements. If a document has not been discovered, a witness may not introduce it into evidence without the leave of the Court.

Prior to trial, the parties put together a "bundle" of the documents that will be referred to by all of the witnesses (or the lawyers), and file this with the Court.

Legal submissions

Following the exchange of witness statements, and prior to opening their case at trial, the parties exchange written submissions setting out the legal arguments on which they respectively rely. These submissions are also filed with the Court.

Pre-trial settlement

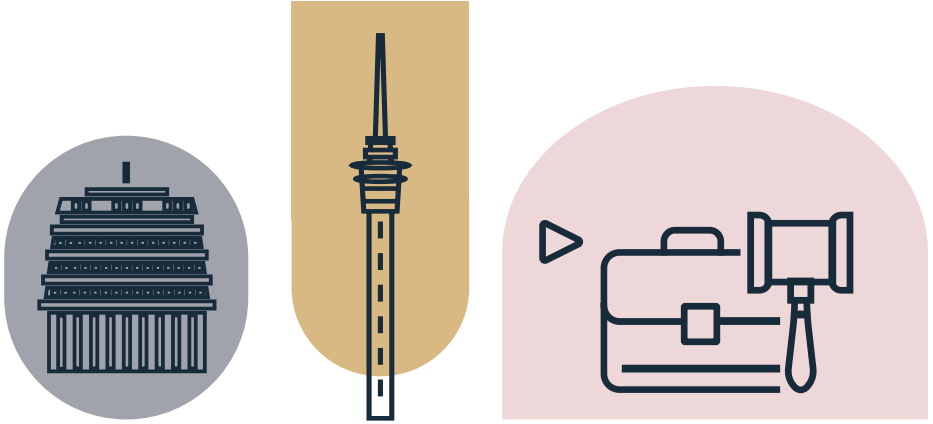
It is common for litigants to explore settlement of the dispute on commercially acceptable terms. Settlement negotiations may occur at any stage of a proceeding, including during the trial, but most commonly occur in advance of it.

Settlement terms may be negotiated directly between the parties and/or their lawyers. Parties can also engage in a formal mediation before a qualified mediator to attempt to settle a dispute. According to a 2019 survey, around 1,000 commercial mediations take place a year in New Zealand, with most mediators reporting a settlement rate of over 80 percent.

Trial

Key features of an ordinary High Court commercial trial are usually as follows:

- The presumption is that members of the public and press are permitted to attend the trial
- The trial is presided over by a single judge. Civil jury trials are extremely rare
- The role of the judge is to determine, after hearing the evidence of the witnesses and the legal arguments of the parties, whether the plaintiff has proven its case on the balance of probabilities
- In practice, this means that in order to rule in favour of the plaintiff, the judge must be satisfied that it is more probable than not that the plaintiff's case is correct. In percentage terms, this means a conclusion that it is 51 percent, or more, likely that the plaintiff is right
- Witnesses who give evidence knowing it to be false or with the intention of misleading the Court commit perjury, which is a crime punishable by imprisonment
- If English is not a witness's first language, the witness is entitled to use an interpreter provided by the Court who simultaneously translates their evidence for the Court.



Judgment and appeal rights

Following the closing submissions, the judge will generally reserve their judgment and provide it in writing at a later date. High Court judges aim to deliver their judgments within three months from the conclusion of trial.

Judgments of the High Court after a civil trial may be appealed to the Court of Appeal. In the normal course, a notice of appeal must be filed within 20 working days of the date of judgment.

Decisions of the Court of Appeal may be appealed to the Supreme Court only if the Supreme Court grants leave to appeal, on the basis that it is satisfied that an appeal is necessary in the interests of justice.

Enforcement of judgment

There are a variety of methods available to a successful plaintiff who wishes to enforce the judgment of the Court against a defendant who has refused to comply with it.

These commonly include:

Insolvency proceedings: in the case of an individual who refuses to pay a judgment debt (judgment debtor), the successful plaintiff (judgment creditor) may institute bankruptcy proceedings. If the judgment debtor is a company, the creditor may apply (following service of a statutory demand) to put it into liquidation. In the event of bankruptcy or liquidation, the debtor's assets are distributed between creditors according to a statutory order of priority.

Charging orders: a judgment creditor may obtain a charging order over the judgments debtor's property, including money and real estate, preventing the debtor from disposing of it until the judgment debt has been paid.

Sale orders: a judgment creditor may issue a sale order entitling a bailiff to seize and sell the judgment debtor's personal property, with certain exceptions. Where money seized is insufficient to pay the judgment sum the bailiff may also sell seized chattels and any interest the judgment debtor has in land.

Enforcement of foreign judgements

Foreign judgments are not automatically enforceable in New Zealand. They must be enforced by one of the following methods:

- **Australian judgments:** judgments covered by the Trans-Tasman Proceedings Act 2010 (TTPA) may be enforceable in New Zealand through a simple registration process.
- **Other judgments:** judgments not subject to the TTPA may be enforced through application to the High Court. The procedure will differ depending on which country the judgment originated in. In each case, the party against whom the judgment was given will have an opportunity to oppose the enforcement application on a variety of grounds, including that the judgment is still under appeal or that it was obtained through an abuse of process.

BUDDLE
FINDLAY

AUCKLAND

HSBC Tower, 188 Quay Street, PO Box 1433

Auckland 1140, New Zealand

DX • CP24024 P • 64 9 358 2555

WELLINGTON

Aon Centre, 1 Willis Street, PO Box 2694

Wellington 6140, New Zealand

DX • SP20201 P • 64 4 499 4242

CHRISTCHURCH

The Regent, Level 3, 33 Cathedral Square

Christchurch 8011, New Zealand

DX • WX11135 P • 64 3 379 1747

buddlefindlay.com