

Jurisdiction: New Zealand

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1. What is the structure of the court system in respect of civil proceedings? What is the role of the judge in civil proceedings?

New Zealand's highest court is the Supreme Court. The Supreme Court was established on 1 January 2004 and replaced the Privy Council (based in the United Kingdom) as the court of final appeal in New Zealand. Appeals to the Supreme Court may only be brought with leave, which can be granted where the subject matter is of general or public importance, or if a substantial miscarriage of justice has occurred or may occur, or the matter is of general commercial significance. Supreme Court appeals are heard by a bench consisting of five judges.

The Court of Appeal is the second highest court in New Zealand and has jurisdiction to hear appeals from decisions of the High Court and, in some special circumstances, appeals from decisions of District Courts. Most appeals are heard by a bench comprising of three judges.

The High Court functions as both a court of first instance and an appellate court. The High Court's first instance jurisdiction includes claims in excess of NZ\$350,000 and certain complex claims, such as proceedings under the Companies Act 1993, bankruptcies, disposition of real property (land), administration of trusts and estates, and admiralty. The High Court also has jurisdiction to hear appeals from some lower courts and tribunals, such as the District Court, Family Court and Environment Court.

The District Court has jurisdiction to hear claims up to NZ\$350,000. Disputed claims under NZ\$15,000 (or \$20,000 by agreement of the parties) may be determined by the Disputes Tribunal.

There are a number of specialist courts and tribunals. For example, the Family Court, Youth Court, Employment Relations Authority and Employment Court, Environment Court, Waitangi Tribunal, Maori Land Court, Coronial Services, Tenancy Tribunal, Weathertight Homes Tribunal, Immigration and Protection Tribunal and Canterbury Earthquakes Insurance Tribunal.

The role of the judge

The role of the judge in civil proceedings in New Zealand is to determine disputes between parties. The process is adversarial, rather than inquisitorial or investigative. Each party has the opportunity to present their case to the judge who fairly and impartially decides the outcome by applying the facts of the case to the relevant law.

As New Zealand has a common law system, the relevant law includes not only the law embodied in statutes and regulations, but also case law principles (judicial precedents). A judge in a lower court is required to take notice of and follow any relevant judicial precedent set by a higher court. On appeal, a judge may overturn a decision of a lower court.

Judges have the power and jurisdiction to ensure that proceedings before them are conducted in accordance with the law. Judges of the High Court have an inherent jurisdiction to make any order that is necessary to ensure the court's effective operation, such as orders to prevent the abuse of the court's processes.

Another aspect of a judge's role is to assist in the development of the law by case law principles. Where a novel situation arises and there is no applicable judicial precedent, the judge's

decision may extend the existing law by adding a new judicial precedent to the body of case law.

2. Are court hearings open to the public? Are court documents accessible by the public?

Civil trials are open to the public unless there are reasons for confidentiality – for example, if the subject matter is of a sensitive nature, it is in the public interest, or where there are good reasons to protect the identity of a party or witness.

While most trials are open to the public, not every appearance by a lawyer before a judge is a trial. Many appearances are of an administrative or procedural nature and are not generally open to the public.

Accessibility to court documents

Judgments are accessible by the public, except in exceptional circumstances. In some judgments, the identities of parties and confidential information may be prohibited from publication, but the legal reasoning and outcome of the case will be made available to the public. Judgments of the High Court, Court of Appeal and Supreme Court are routinely made available online by the Ministry of Justice. The availability of judgments to the public is a

principal tenet of a common law system.

Other court documents are not made generally available to the public, although an application can be made for access.

3. Do all lawyers have the right to appear in court and conduct proceedings on behalf of their client? If not, how is the legal profession structured?

Yes. A lawyer is a person who holds a current practising certificate as a 'barrister sole' or as a 'barrister and solicitor' (section 6, Lawyers and Conveyancers Act 2006). Either can appear in any of New Zealand's courts and conduct proceedings. Generally, a barrister sole must receive client instructions via an instructing solicitor.

4. What are the limitation periods for commencing civil claims?

The Limitation Act 2010 proscribes the limitation periods for most civil claims, where the cause of action has arisen on or since 1 January 2011. Certain statutes under which proceedings may be brought have their own specific limitation periods. Common types of claims and their applicable limitation periods are as follows:

TYPE OF CLAIM	LIMITATION PERIOD
Money claims, includes any claim for monetary compensation, including under contract, tort, equity and most statutes providing for monetary relief	6 years from the date of the act or omission on which the cause of action is based
Claims seeking non-monetary or non-declaratory relief (for example variation or cancellation of a contract or specific performance) under the Contract and Commercial Law Act 2017, Part 2	6 years from the date of the act or omission on which the claim is based
Action for an account	6 years from the date the matter arose in respect of which the account is sought
Claim for conversion	6 years from the date of the original or first conversion

TYPE OF CLAIM	LIMITATION PERIOD
Action for current, future or equitable interests in land	12 years (unless claimant is the Crown or claiming through the Crown)
Enforcement of a judgment or arbitral award	6 years from the date on which the decision became enforceable (by action or otherwise) in the country in which it was obtained
To have a will declared invalid	6 years from the date of the grant of probate or administration
Action for a beneficiary's interest in a trust	6 years from the date on which the interest in the trust falls into possession or when the beneficiary first becomes entitled to trust income or property
Claims for a share or interest in a personal estate	6 years from the date on which the right to receive the share or interest accrues
Claims relating to building work	10 years from the date of the act or omission on which the proceedings are based (longstop limitation period)
Defamation actions	3 years from the date of the act or omission on which the claim is based
Claims under the Fair Trading Act 1993	3 years from the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered

For some types of claims, a “late knowledge” period may apply to extend the ordinary limitation period. Where a late knowledge period applies, a “longstop period” also applies to set a maximum period or end date within which a claim may be brought.

5. Are there any pre-action procedures with which the parties must comply before commencing proceedings?

No. However, it is common to correspond with the opposing party before commencing proceedings to explore whether a resolution can be reached without resorting to the courts.

6. What is the typical civil procedure and timetable for the steps necessary to bring the matter to trial?

Each court has a set of rules which govern the conduct of cases before it.

In a defended civil claim, the procedure and timetable will vary depending on the nature and complexity of the case, subject matter, and other factors. A general guide to case management in an ordinary High Court proceeding is set out in the table below.

STEP IN PROCEEDING	TIME
Claim commenced by plaintiff by filing a statement of claim in court and serving on the defendant	Varies, depending on plaintiff (and any applicable limitation provisions)
Defendant files and serves a statement of defence	25 working days from service
Parties file memoranda addressing case management matters, including issues and pleadings, further parties, discovery, interlocutory applications, and readiness for trial	Within 15 working days after statement of defence
Judicial officer makes orders requiring parties to take steps to address case management matters	Varies
Parties provide discovery. This involves the listing, exchange and inspection of discoverable documents	Varies
Interlocutory applications. A party may apply for pre-trial orders, such as further discovery, particulars of pleadings, interrogatories and other preliminary orders. Applications may be opposed or consented to	Often 20 working days after discovery completed
Parties may be required to attend a second and subsequent case management conference before a judicial officer	
Resolution of interlocutory applications. If an interlocutory application is opposed, a hearing must be convened before a judge to determine the issue	Varies, depending on nature of application, court schedule and judge's determination
Staged exchange of written statements of evidence and documents for trial	Varies, often plaintiff's evidence first, defendant's evidence 10-20 working days following
Final hearing/trial	Varies depending on court

7. Are parties required to disclose relevant documents to other parties and the court?

Yes, both the District Court and the High Court have processes for initial disclosure upon filing a proceeding. In the District Court, a plaintiff must provide a list of documents relied on, and a defendant may request copies of those documents (which the plaintiff must provide). In the High Court, an initial disclosure bundle must be provided to the other parties at the time when the proceeding is served. A defendant must also provide a bundle of initial disclosure when serving their statement of defence.

In addition to initial disclosure, in most civil proceedings, parties are or can be ordered to give 'discovery' of documents. An order for 'standard discovery' requires parties to make available all documents that either support or are adverse to their own or any other parties' case. An order for 'tailored discovery' must be made where the interests of justice require it and allows parties to discover a more limited range of documents, depending on the circumstances of the case.

A party to a proceeding has an obligation to comply with a Discovery order, and a failure to do so may be in contempt of court. Furthermore, under the District Court Rules and the High Court Rules, a solicitor has a personal obligation to the court to ensure compliance with discovery orders. A solicitor must take reasonable care to ensure a party for which it acts understands its obligations under a Discovery order and fulfils those obligations.

Documents obtained during the discovery process may only be used for the purposes of the proceeding and, unless the document has been read in open court, may not be provided to any other person.

8. Are there rules regarding privileged documents or any other rules which allow parties to not disclose certain documents?

The Evidence Act 2006, Part 2 subpart 8, sets out the statutory framework for claiming privilege.

Various categories of privilege exist, the most common of which is 'legal professional privilege', which protects confidential communications between legal advisers and clients where legal advice has been obtained or given. 'Litigation privilege' is also common and may be claimed over documents prepared for the dominant purpose of preparing for or defending a proceeding, including communications among the party, its legal advisers and non-parties.

Other categories of privilege include confidential communications made in connection with an attempt to settle or mediate a dispute between parties, communications with ministers of religion, and trust accounting records kept by a solicitor/law firm.

Non-disclosure or limited/restricted disclosure of documents may also be ordered where they contain confidential information (e.g. commercially sensitive information such as trade secrets, personally sensitive information such as medical records, or State secrets where the public interest is not served by disclosing the information).

9. Do parties exchange written evidence prior to trial or is evidence given orally? Do opponents have the right to cross-examine a witness?

In preparation for trial, parties exchange unsworn but signed, written briefs of evidence. Supplementary briefs may also be provided. The written briefs are then given orally and under oath at the hearing. A witness at the trial must read a brief of evidence before it becomes part of the court record and part of the evidence-in-chief.

After a witness has given evidence in chief, the witness may be cross-examined by the other parties (other than the party calling the witness). The ability to cross-examine can be limited in certain circumstances (for example, the court may limit the ability of the party intending to cross-examine a witness if that party has (substantially) the same interest in the proceeding as the witness). Additionally, a court may grant the party calling the witness

permission to cross-examine a hostile witness.

In a judge-alone trial, affidavit evidence may be admitted where there is agreement between the parties or if the court orders.

10. What are the rules that govern the appointment of experts? Is there a code of conduct for experts?

Parties are entitled to engage expert witnesses to provide expert evidence. Alternatively, the court may appoint an expert witness to enquire into and report on any question of fact or opinion. A court-appointed expert may be appointed with the consent or agreement of the parties. If the parties are unable to agree on an expert, the court may make an appointment from nominations given by the parties.

All expert witnesses are required to comply with the Code of Conduct (Schedule 4 to the High Court Rules 2016). This includes experts appearing in a court or tribunal other than the High Court. The Code of Conduct imposes on expert witnesses an overriding duty to act impartially on matters within the expert's area of expertise and for the assistance of the court. Expert witnesses must not act as advocates or give evidence on questions of law. They must state whether their evidence is subject to any limitations or qualifications.

11. What interim remedies are available before trial?

Judges of the High Court have wide powers to make interim orders and grant pre-trial relief. Some interim orders provide temporary relief pending a final determination, whereas other orders are directed to maintaining the status quo or preserving evidence.

Interim injunctive relief can take many different forms, including orders to restrain trade, halt the liquidation of a company, stop the exercise of a mortgagee's powers, restrain publication, halt a nuisance or trespass, or stay an arbitration proceeding. Other types of interim relief include orders requiring the preservation of property or funds, the sale of perishable property and retention of proceeds, the

transfer of property and the payment of income.

Freezing orders, previously referred to as Mareva injunctions, prevent a respondent party from dissipating or removing assets outside the court's jurisdiction, where there is an intention to defeat an applicant's interest in the assets. A freezing order prevents a party from dealing with, diminishing or disposing of assets pending trial, so that judgment may be executed or enforced in respect of the asset.

Search orders, previously known as Anton Pillar orders, are invasive orders that allow a party to enter onto the opposing party's property to search for and remove evidence and preserve it for trial. A search order may be granted where there is a risk that evidence might be removed, destroyed or concealed before trial.

12. What remedies are available at trial?

In civil proceedings, the relief granted is usually for the purpose of compensating a wronged party, rather than being of a punitive nature. Remedies available at trial include orders requiring the payment of money (e.g. compensatory damages), specific performance, permanent injunctions, or declarations.

Exemplary damages are available only in exceptional circumstances where the defendant has acted in flagrant disregard of the plaintiff's rights. Awards to date have been nominal in nature.

13. What are the principal methods of enforcement of judgment?

Where a successful party (the judgment creditor) obtains judgment for the payment of money against the unsuccessful party (judgment debtor), but the judgment is unsatisfied, the judgment creditor has a range of enforcement options. The court can make an order allowing a judgment creditor to register a charge against property owned by the judgment debtor, allowing the court to take possession of and/or sell the property registered to the judgment debtor, or requiring an employer to make deductions from the judgment debtor's

salary or wages and pay them to the judgment creditor.

Where the judgment debtor is a company, an unsatisfied judgment may be the basis for an application to put the company into liquidation. Where the judgment debtor is an individual, an unsatisfied judgment may form the basis for an application for bankruptcy.

Where an unsatisfied judgment is not for the payment of money, the court has the power to issue an arrest order, which provides for the arrest and detention of the defaulting party by an enforcing officer, so that the defaulting party may be brought before the court.

14. Are successful parties generally awarded their costs? How are costs calculated?

Yes, an award for legal costs is generally made in favour of a successful party for steps taken in a legal proceeding. Because costs are intended to be certain and identifiable by parties at any stage of a proceeding, they are almost always calculated by reference to a scale of costs that specifies the level of recovery for each step in a proceeding. The complexity of a proceeding and the reasonableness of time taken for a step are also factored into the calculation of costs.

Indemnity costs may be ordered if they have been provided for in a contract or agreement between the parties. Increased or indemnity costs may also be awarded if a party has acted unreasonably, unnecessarily or improperly in the conduct of a proceeding.

15. What are the avenues of appeal for a final judgment? On what grounds can a party appeal?

In most cases, where a judicial decision has the effect of finally determining a proceeding, there is a right of appeal to the next highest court. In some exceptional circumstances, a second right of appeal may be granted, but leave is required before a second appeal can be brought.

Generally, a party can appeal a decision on the grounds that there has been an error of fact or law. However, appeal rights from tribunals

and specialist courts may be limited. Where a decision involves the exercise of judicial discretion, an appeal may be brought on the grounds that the court below acted on a wrong principle, took into account some irrelevant matter or failed to take into account some relevant matter, or made a decision that was plainly wrong.

16. Are contingency or conditional fee arrangements permitted between lawyers and clients? Is third-party funding permitted?

Contingency fee arrangements, where a lawyer's remuneration is calculated as a proportion of a client's successful outcome, are not permitted in New Zealand.

Conditional fee agreements in civil proceedings are permitted provided certain criteria are met. Under a conditional fee agreement, a lawyer and client may agree that the lawyer will only be remunerated if a successful outcome is obtained. The lawyer's remuneration must be the lawyer's normal fee or the lawyer's normal fee plus a premium (provided the premium is not calculated as a proportion of the outcome). The premium is to compensate the lawyer for the risk of not being paid at all and for the disadvantages of not receiving payments on account.

Third party funding

Third-party funding, also referred to as litigation funding, is permitted in New Zealand. Third-party funding is the payment of the plaintiff's (usual) litigation costs. This includes legal fees, expert costs and other disbursements, security for costs and adverse costs orders.

Litigation funding agreements are only those agreements which provide funding from a party unrelated to the claim and their remuneration is tied to the success of the proceeding and/or they exercise control over the proceeding. It excludes relatives or associated bodies who may fund litigation, solicitors' conditional fee arrangements, and litigation funded by insurance.

The Supreme Court held that New Zealand courts have no general rule regulating the bargains between litigation funders and parties. However, the court will step in to prevent an abuse of process which arises as a result of litigation funding. An abuse may arise where the process has been used improperly, deceptively or viciously, or where the true effect of a litigation funding agreement is to assign a legal claim to the funder.

Where there is a litigation funding arrangement in place, once proceedings are issued, the identity and location of any litigation funders must be disclosed, and the litigation agreement itself may be required to be disclosed where it is relevant to an application for third-party costs, abuse of process, or security for costs.

17. May litigants bring class actions? If so, what rules apply to class actions?

There is no specific legislative provision that permits class action suits.

When one or more persons have the same interest in the subject matter of the proceeding, they may sue on behalf of, or for the benefit of, all of those persons through a representative action. The 'same interest' extends to a significant common interest in the resolution of any question of law or fact arising from the proceedings. This has provided an avenue for commercial class action law suits to come before the courts and allowed for the promotion of access to justice, elimination of duplication and a sharing of costs. The court's position has been to provide a liberal and flexible approach without restriction from precedent and allow for the 'exigencies of modern life'.

18. What are the procedures for the recognition and enforcement of foreign judgments?

Foreign judgments may be enforced in New Zealand by registration under the Trans-Tasman Proceedings Act 2010, the Reciprocal Enforcement of Judgments Act 1934, the Judicature Act 1908, or an action may be

brought at common law.

The Trans-Tasman Proceedings Act 2010 allows for registerable Australian judgments (i.e. certain, final and conclusive judgments given by an Australian court or certain Australian tribunals) to be registered in a New Zealand court and enforced as if given by a New Zealand court.

The Reciprocal Enforcement of Judgments Act 1934 provides for the enforcement of judgments given in the United Kingdom or certain other countries. Other countries include Australia, Belgium, Botswana, Cameroon, Fiji, France, Hong Kong, India, Kiribati, Lesotho, Malaysia, Nigeria, Norfolk Island, Pakistan, Papua New Guinea, Sabah, Sarawak, Singapore, Sri Lanka, Swaziland, Tonga, Tuvalu, and Western Samoa.

If judgment for a sum of money has been obtained from a Commonwealth country, it is enforceable under the Judicature Act 1908.

To enforce judgments from other countries, an action may be brought at common law. For a judgment to be enforceable in New Zealand under the common law, a foreign court's jurisdiction over a person or an entity against whom the judgment is awarded must be recognised by New Zealand law, and the judgment must be final and conclusive and for a definite sum of money.

19. What are the main forms of alternative dispute resolution? What are the main alternative dispute resolution organisations in your jurisdiction?

Mediation is the most common form of alternative dispute resolution in New Zealand.

First instance courts sometimes provide for the convening of settlement negotiation meetings with the assistance of a judge. Such meetings are known as judicial settlement conferences. This is an alternative to mediation. A judge who participates in a judicial settlement conference is precluded from later determining the substance of the proceeding.

A common alternative to litigation through the courts is private arbitration, which is governed by the Arbitration Act 1996. Parties must agree to submit to arbitration, and commercial contracts often specify arbitration as the applicable dispute resolution forum.

Alternative dispute resolution organisations in New Zealand

The main private alternative dispute resolution organisations in New Zealand include the Arbitrators' and Mediators' Institute of New Zealand (AMINZ), the New Zealand Dispute Resolution Centre (NZDRC), the New Zealand International Arbitration Centre (NZIAC), the Resolution Institute (Lawyers Engaged in Alternative Dispute Resolution (LEADR) and Institute of Arbitrators and Mediators Australia combined), and FairWay Resolution Limited.

20. Are there any proposals for reform to the laws and regulations governing dispute resolution currently being considered?

The New Zealand Law Commission is reviewing the need for legislation regulating class action claims.

21. Are there any features regarding dispute resolution in your jurisdiction or in Asia that you wish to highlight?

New Zealand has a stable democracy and a judiciary that upholds the rule of law. According to Transparency International, it is the second least corrupt country in the world.¹ As a result, parties undertaking dispute resolution in New Zealand can have a high degree of confidence that their matter will be determined on its merits, uninfluenced by corruption or other external factors.

¹ Transparency International, 'Corruption by Country/Territory' (www.transparency.org/country/NZL, last accessed 20 August 2019)

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