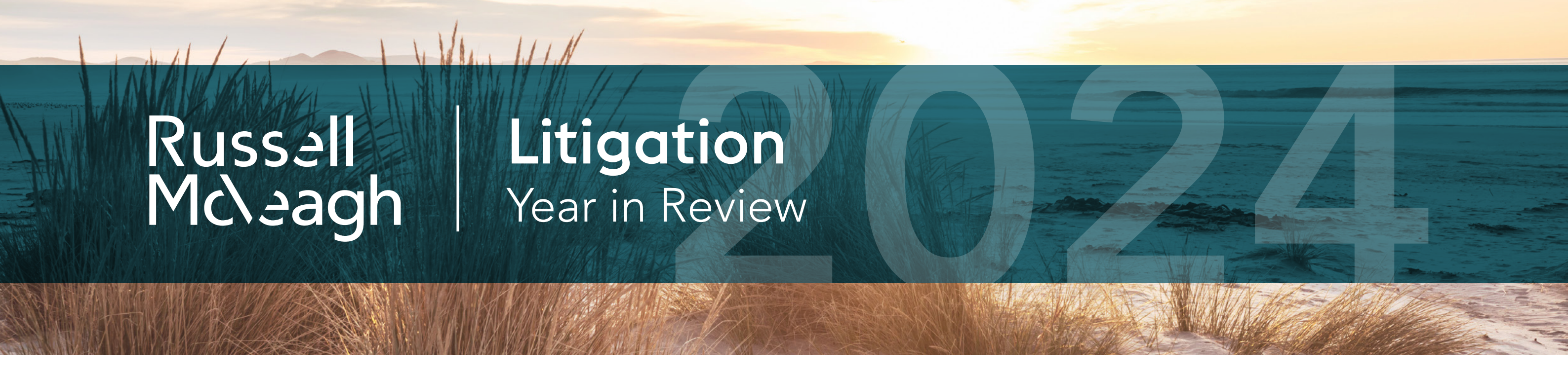

Russell McVeagh | Litigation Year in Review 2024

With 2024 drawing to a close, it is timely to reflect on key developments that have emerged from New Zealand's courts in 2024 and look ahead to what is likely to be in frame in 2025.

This year has seen several significant decisions issued and proceedings launched, with substantial developments relating to class actions, property, construction, employment, and restructuring and insolvency.

Over the coming year, legislative reforms commenced by the National-led Coalition Government are likely to influence the direction of travel, with major reforms expected in companies law, insurance, court procedure, and health and safety. We anticipate that ESG will continue to be an area of focus for strategic litigation, and that tikanga will continue to feature in judicial reasoning.

Our further reflections are set out below. If you would like to discuss any of the matters in this publication, please get in touch with one of our experts below or your usual Russell McVeagh contact.

Lots of action in class actions

With no sign on the horizon of the Law Commission's proposed statutory regime for class actions being implemented, the shaping of class action procedure has continued to fall to the courts in 2024. While the Court of Appeal brought an end to the long-running "leaky building" class action in *Cridge v Studorp* (see our earlier insight from 2 October 2024 linked here), new applications for proceedings to be brought on a representative basis continue to be made.

Following the Supreme Court decision in *Southern Response Earthquake Services Ltd v Ross* in 2020, it has become more difficult for defendants to resist applications by representative plaintiffs to proceed on an opt-out basis, where potential claimants are automatically included in the "class" for the purposes of the proceedings unless they opt out. While this was refused in one decision at the end of 2023,[1] this year the Court of Appeal confirmed the Supreme Court's guidance in *Ross* that a court should generally adopt the representative order sought by the plaintiff / applicant (which will often be opt-out) unless there is "good reason" to do otherwise.[2] Given the significance of opt-in vs opt-out to the way representative proceedings are managed by the courts, the scope of the issues and the scale of potential liability, we expect to see these "good reasons" continue to be tested in future cases.

2024 also marked the first time that a New Zealand court has granted a common fund order, which requires all members of an opt-out class action to give the litigation funder a portion of any proceeds recovered in the proceeding, whether or not they have signed the funding agreement.[3] In finding it had jurisdiction to make the order and in making it at an early stage of the proceedings, the Court of Appeal's decision distinguishes New Zealand from two key comparative jurisdictions – Australia, where common fund orders are (at least currently) only permitted at the end of proceedings,[4] and the UK where no such jurisdiction has yet been recognised. As at the date of this update, leave to appeal to the Supreme Court has been sought but not yet granted.

Seismic assessments continue to be controversial

The past few years have seen a trend of cases considering seismic ratings for buildings in various contexts.[5] This trend continued in 2024, with the Court of Appeal's judgment in *Tadd Management Ltd v Weine*.[6] That case concerned a claim for misrepresentation during the sale of a building. The vendor's sale pack included an engineer's Initial Seismic Assessment (**ISA**) concluding the building was 60% New Building Standard (**NBS**), which was described as "good". Later assessments undertaken post-purchase rated the building 10–30% NBS. The Court of Appeal held there was no misrepresentation, emphasising the stark difference between ISAs and more detailed assessment methodologies and noting that that reasonable, competent engineers could reach (sometimes significantly) different %NBS ratings applying those methodologies. As at the date of this update, leave to appeal to the Supreme Court has been sought but not yet granted.

Construction disputes

The construction sector has seen a contentious year in 2024, with high construction costs and interest rates contributing to a high volume of disputes. While many of these disputes have been confidentially resolved through alternative dispute resolution, a number of key decisions also emerged:

- **Longstop does not apply to contribution claims:** In *Beca Carter Holdings & Ferner v WCC*, the Supreme Court determined that the limitation "longstop" under the Building Act 2004 (which gives a plaintiff 10 years from the date that the building work was carried out to issue proceedings) does not apply to claims for contribution.[7] Contribution claims are those in which a defendant sues a party it considers is also liable to the plaintiff to seek an appropriate "contribution" towards liability, and these must be brought by the defendant within two years after a judgment is delivered (or a claim is settled). For more information, see our summary here.
- **Potential criminal liability for misstatement in Producer Statement:** In *Re Solicitor-General's Reference (No 1 of 2022)*, the Court of Appeal determined that a negligently issued Producer Statement (which is a professional opinion that building work complies with the Building Code) can result in a criminal conviction under s 40 of the Building Act 2004.[8] This is in addition to potential civil liability, which is already well established in this area. We anticipate that this development may have the effect of further driving up construction costs.
- **Liability caps upheld:** In *Tauranga City Council v Harrison Grierson Holdings Limited*, the High Court upheld clauses imposing a limit on a building professional's liability.[9] In that case, the plaintiff had argued that these clauses (which are a common way of allocating risk in construction contracts) offended against the professional's obligations under the Building Act 2004 and Fair Trading Act 1986. Tauranga City Council has appealed the High Court's decision. For more information, see our summary here.

Employment status continues to drive litigation

While a fulsome overview of employment law developments is outside the scope of this update, we would be remiss not to mention the continued focus on employment status, including in a Court of Appeal decision earlier this year.[10] This issue relates to when a person is an employee with the associated protections of employment law, as opposed to something else (e.g. a volunteer or contractor). In recent years, significant decisions have considered the status of couriers, catering workers, Uber drivers and even the residents of Gloriavale. For further information on this issue, see episode 1 of our Employment Essentials series here.

Last month, the Government announced a planned amendment to the Employment Relations Act 2000, which would introduce a gateway test as an exclusion criterion to prevent captured independent contractors from challenging their employment status. The Government has indicated that this amendment will be introduced to Parliament in 2025. If passed, this amendment could have significant implications for the way that the traditional employer vs contractor test is applied in New Zealand.

Ripples of the recessionary environment continue to be felt

Restructuring and insolvency has continued to be fertile ground for disputes in 2024 as businesses have dealt with challenging economic conditions. Given this type of activity typically picks up in a recessionary environment (with a lag), we expect to see this continue into 2025. Check back here later this week for our specialist Restructuring & Insolvency year in review.

ESG litigation continues to gain momentum

Reflecting international trends, ESG-related litigation has continued to gather steam in 2024 and we see this as a key area to watch in coming years.

In 2024, the most significant domestic development was the release of the Supreme Court's decision in *Smith v Fonterra* in February. In that case, the Supreme Court determined that Mr Smith's novel tort-based claim against some of New Zealand's largest emitters may proceed to trial. This case is significant because it leaves the door open for tort-based liability for greenhouse gas emissions, and potentially signals internationally that New Zealand could be a fruitful jurisdiction for climate-related claims. For further information on the *Smith* decision, see our update here.

2024 has also seen the release of the first disclosures under New Zealand's mandatory climate-related disclosures regime and developments in greenwashing litigation. A key decision from the Court of Appeal in relation to the emissions reduction pathways in the Climate Change Commission's May 2021 advice to the Government is awaited. For further detail about trends in ESG litigation in New Zealand and overseas, see our ESG round-up and outlook publication here.

Further affirmation of the role of tikanga in judicial decision making

This year has seen tikanga's role in the law continue to gain judicial attention, following the publication of the Law Commission's seminal paper *He Poutama* at the end of 2023. In particular:

- Tikanga featured (albeit briefly) in the Supreme Court's decision in *Smith*, with the Court observing that the trial judge would need to grapple with the fact that Mr Smith purports to bring his claim both as an individual and as kaitiaki for the whenua, wai and moana (see further in our case update here).
- More recently, in the much-anticipated judgment in the ongoing *Nelson Tenths* litigation (*Stafford v Attorney-General*),[11] the High Court determined that the claimant iwi was entitled on the basis of a prior agreement with the Crown to certain lands at the top of Te Waipounamu (the South Island), as well as compensation. The Court applied tikanga principles in determining the scope of lands the Crown ought to have reserved for the claimants. The High Court did not however finally determine the quantum of compensation owing for the Crown's breaches. The Court also accepted that there were compelling reasons to recognise a claim for cultural loss, informed by tikanga, but considered this was not the case for such a development.
- Just yesterday, the Supreme Court issued a further significant judgment restating the test for determining customary marine title.[12] Relevantly, the Supreme Court considered how land can be held in accordance with tikanga and how tikanga informs exclusive use and occupation. The release of the decision coincides with proposed changes to the Marine and Coastal Area (Takutai Moana) Act 2011, which are currently progressing through the legislative process. The Government will now need to decide how to deal with the Supreme Court's decision as part of that proposed reform.
- We expect tikanga to continue to feature in judicial reasoning. For example, on the horizon is the Supreme Court's decision in *Sustainable Otakiri Inc v Whakatāne District Council*, a case regarding consents for the expansion of a bottling plant in the Bay of Plenty. Among other issues, the Supreme Court will consider whether the Environment Court was correct to exclude consideration of certain negative tikanga effects (despite an earlier Court of Appeal decision refusing leave to appeal this point).

Looking ahead – reform, reform, reform

In addition to the trends highlighted above, we expect the direction of travel for litigation in the long term to be influenced by the suite of regulatory reform that the National-led Coalition Government has started to implement through the first year of its Parliamentary term. In particular, we see the following areas of reform as particularly relevant in the litigation context:

- Proposed reforms to the **Companies Act 1993**, the first phase of which is expected to progress in early 2025. This first phase will relate to modernisation, simplification and digitalisation of the Act, and will include a range of changes intended to reduce compliance costs in specific areas of companies law. Further (more significant) changes to directors' duties and related liability may also arise following a review by the Law Commission later in 2025. The review will consider issues raised in the *Mainzeal* case among others (see our update here.)
- The **Contracts of Insurance Act 2024**, which modernises and consolidates existing insurance law and includes changes relating to the duty of disclosure of policyholders (and remedies for non-disclosure) and the application of the unfair contracts regime in the Fair Trading Act 1986 to contracts of insurance. We expect 2025 to be a busy year in the insurance sector as people get up to speed with the new requirements now that the changes are 'actually happening'. While the Act leaves many aspects of insurance contracting law largely untouched, we expect there is potential for disputes and litigation (in an area which already sees a high volume of contentious activity) as the new law beds in. For more information see our previous update on the Contracts of Insurance Bill here.
- The Courts are actively taking steps to improve access to civil justice. The Courts' Rules Committee has proposed an overhaul that looks to dramatically change the manner in which civil proceedings are conducted, the aim being to bring disputes to an earlier resolution. The Government is also aiming to improve access to justice through the **Disputes Tribunal Amendment Bill**. If passed, the Bill will double the financial jurisdiction of the tribunal from $30,000 to $60,000. This will open the door for more low-cost dispute resolution for low-value civil claims. We'll be watching closely to see if there is a resulting uptick in small claims being brought.
- Consultation on reforms to **health and safety** law, which closed on 31 October 2024. The Government has indicated that a wide range of options are possible, including a complete overhaul of the current framework. Discussions around reform come in the context of several significant legal developments including the conviction of the former Ports of Auckland CEO (see our article here) and the High Court's approval of settlement in the *Salter* proceeds of crime recovery case (see our article here). The tenor of the possible reforms is clear from the consultation documents, which refer to high compliance costs, poor outcomes and the need for a rebalanced risk vs benefit assessment. While wholesale reform may still be a long way off, we anticipate that there will be at least nips and tucks to the health and safety regime.

As you can see, we anticipate that 2025 will be another busy year for litigation with a range of complex issues before our senior courts and a wide range of reform on the table.

Any questions? Talk to one of our experts

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1. *Body Corporate Number DPS 91535 v 3A Composites GMBH* [2023] NZCA 648, [2023] NZCCLR 27.
2. *Simons v ANZ Bank New Zealand Ltd* [2024] NZCA 330, [2024] NZCCLR 219 at [85] *citing Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126, [2021] 1 NZLR 117 at [95].
3. *Simons v ANZ Bank New Zealand Ltd* [2024] NZCA 330, [2024] NZCCLR 219.
4. The High Court of Australia has held that there is no jurisdiction to make common fund orders at the early stages of class actions within the federal regime, but Federal Courts have made CFOs at the conclusion (or settlement) of proceedings. Further development is expected following a decision of the Full Federal Court of Australia to allow common fund orders for solicitors' fees, of which special leave to appeal has been granted. See *BMW Australia Ltd v Brewster* [2019] HCA 45; *R&B Investments Pty Ltd (Trustee) v Blue Sky (Reserved Question)* [2024] FCAFC 89; and *Kain v R&B Investments Pty Ltd* [2024] HCASL 286.
5. Including *Oyster Management Ltd v MSC Consulting Group Ltd* [2019] NZHC 913, [2019] NZAR 1055; *Sipka Holdings Ltd v Merj Holdings Ltd* [2015] NZHC 1980; and *Overton Holdings Ltd v APN New Zealand Ltd* [2015] NZCA 526, (2015) 17 NZCPR 251.
6. *Tadd Management Ltd v Weine* [2024] NZCA 323. The Court of Appeal reversed the High Court's judgment: *Tadd Management Ltd v Weine* [2023] NZHC 764, (2023) 24 NZCPR 1.
7. *Beca Carter Holdings & Ferner v WCC* [2024] NZSC 117, [2024] 1 NZLR 438.
8. *Re Solicitor-General's Reference* (No 1 of 2022) [2024] NZCA 514.
9. *Tauranga City Council v Harrison Grierson Holdings Ltd* [2024] NZHC 714.
10. *Rasier Operations BV v E Tū Inc* [2024] NZCA 403.
11. *Stafford v Attorney-General* [2024] NZHC 3110.
12. *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira o Waioweka* [2024] NZSC 164.