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Dispute resolution in New Zealand – trends and insights

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This publication provides a snapshot of the state of litigation and dispute resolution in New Zealand, exploring the key trends Chapman Tripp's experts see gaining momentum over the coming 12 months.

Overview

A number of trends are either emerging or gathering intensity in the litigation and dispute resolution arena which have the potential to expose corporates to increased litigation risk and cost. Many of these are in response to legislative change, and will require careful and thoughtful management.

Class actions are becoming more popular, we are seeing the entry of the litigation funder to the New Zealand market, and the most business-relevant regulators have been given more and sharper teeth.

The litigation waves created by finance company collapses, leaky building claims and the post-GFC insolvency disputes have now largely run their course, though pressure caused by low dairy prices will increase the potential for financial distress in the rural sector. In any event, we expect activity levels to remain high throughout the remainder of 2015, supported by disputes arising out of the Canterbury earthquakes and by a steady stream of private commercial disputes.

Alternative dispute resolution (*ADR*) outside the Courts continues to grow in popularity – a trend which will be reinforced in the construction and property sector by the wider availability of adjudication under the soon to be enacted Construction Contracts Amendment Bill. We also see increasingly creative and sophisticated use of structured negotiation (including private mini-trials), mediation, expert determination and arbitration in bespoke processes.

Over the past 12 months, the Supreme Court has issued two significant arbitration decisions; the second of which confirmed that parties who have agreed to arbitrate will be held to that bargain, even where one of them subsequently prefers to seek summary judgment through the courts.

The increasing use and sophistication of ADR techniques may lead over time to a subtle re-focussing of the Courts' role to areas where State-sponsored dispute resolution has a competitive advantage – for example, class actions and regulatory enforcement.

The rise of the regulator

Corporates are exposed to increased regulatory risk, particularly around their interactions with consumers, borrowers and investors, as a result of reforms that have increased the powers and reach of key regulators, who show every sign of being itchy to use them.

- The Commerce Commission may now seek declarations that terms in standard form consumer contracts are unfair and, therefore, unenforceable.
- Under the Responsible Lending Code, which has just gone live, the Courts have the power to make compensation and other orders, or to grant an injunction, in respect of a breach of the new lender responsibility principles in the Credit Contracts and Consumer Finance Act 2003.
- The Financial Markets Authority, having largely flushed through its post-GFC legacy work on failed finance companies, is now accustoming

itself to the brave new world of the Financial Markets Conduct Act. Its enforcement team is large and well-resourced, and has shifted its focus to offshore entities taking improper advantage of registration on the Financial Services Providers Register.

The Health and Safety Reform Bill is also expected to come into force before the end of this year, with greater regulatory oversight of health and safety in the workplace and access to criminal sanctions as a tool to address market misconduct.

Market participants should prepare for increased scrutiny across the board, as regulators demonstrate their resolve and test their pre-enforcement powers of monitoring and investigation. How well this scrutiny is handled will likely dictate who will be first off the blocks in formal enforcement actions. Strategic consideration of regulatory interactions, and a clear understanding of the new features of the regulatory landscape, will be essential.

In the event that a regulator establishes that there is a breach, the regulatory response may include a requirement to establish and monitor an in-house compliance regime – essentially requiring the market participant to self-regulate. In the case of the FMCA, such an approach is "baked in" to the statute. Crafting a robust compliance regime is not simple. Based on the UK and US experiences, we expect that corporates will require increasingly specialised assistance to design and test such regimes, and to satisfy the requirements of the regulators.

Class actions

Class actions have not been a feature of the New Zealand legal landscape. Our general prohibition on personal injury litigation stunted early opportunities for group claims, and our procedural framework remains slight – essentially a single provision in the High Court Rules governing "representative actions".

But recent years have seen an increase in activity in this area, including: the class action brought by former Feltex shareholders (dismissed last year, with an appeal now lodged), the so-called "bank fees" litigation, the proceedings lodged by a group of disgruntled kiwifruit growers over the arrival of PSA in New Zealand, and media reports of a prospective omnibus leaky building class action against various cladding manufacturers.

The litigation ecosystem is responding to this growing appetite in a variety of ways. Chief among these is the rise of the litigation funder – which we detail below. But the Courts are also showing a willingness to fashion procedural devices to enable class actions, despite New Zealand's continuing lack of a developed set of class action rules. The Bench as a whole is generally unwilling to allow unnecessary procedural barriers to stand in the way of the efficiencies and economy of group actions. This includes the Supreme Court, which has encouraged a permissive approach to the representative action, except in circumstances where its use will cause injustice.

Whether the development of a local class action market is a net benefit remains to be seen. The perils of class actions are well-publicised overseas, particularly in the US: increased litigation, cost to business in defending speculative or meritless claims, and risk of abuse of process. So far there has been little sign of such risks emerging here, but it is very early days.

Either way, in the short term there will almost inevitably be an increase in interlocutory skirmishing around proposed representative actions as defendants look to test the boundaries of what is permissible from plaintiff groups. If nothing else, the Feltex experience shows us this.

We therefore expect to see further refinement of the rules for representative proceedings as more of these cases make their way through the Courts. It remains unclear whether the representative action procedure will prove sufficiently adaptable and fit for purpose. Ultimately, the pressure for legislative intervention may see a revival of the draft Class Actions Bill which has lain dormant in the Ministry of Justice since 2009.

Litigation funding

The entry of litigation funders onto the New Zealand litigation scene is both a symptom and a cause of the rise of representative actions. Representative proceedings tend to be expensive, particularly where expert witnesses need to be engaged. The presence of third party funding helps overcome these barriers.

A litigation funder chooses court cases to "invest" in by providing the financing to run the litigation in return for taking a cut of the damages obtained if the claim is successful. But there is no reward without risk: a litigation funder investing in an unsuccessful claim will also pay costs to the successful defendants. In the *Feltex* litigation, the High Court recently ordered the litigation funder to pay a large part – reportedly around $5 million – of the successful defendants' costs and disbursements.

The Courts have shown a relatively permissive approach to litigation funding. Funding will be permitted provided it does not amount to a full-scale assignment of the plaintiffs' claim – something that remains unlawful in New Zealand. Tactically sensitive details of litigation funding agreements need not be disclosed unless relevant to a specific issue. And the Supreme Court has rejected the submission that the Court should exercise a general supervisory jurisdiction over litigation funding.

As with representative actions generally, the outworkings of the emergence of a market for litigation funding remain to be seen. Plaintiff groups with relatively clear claims and a favourable ratio of claim quantum to litigation cost will benefit. Plaintiffs with just, but difficult or uneconomic claims, not so much. And the Courts will be keeping a weather eye on distortions and conflicts of interest where there is a funder in the background.

Courts reform

The Judicature Modernisation Bill, currently before Parliament, will rewrite the legislation relating to the District Court, High Court, Court of Appeal and Supreme Court. While much of the Bill will simply re-enact existing provisions in more modern language, there are also some substantial changes. Key reforms include:

- increasing the civil jurisdiction of the District Courts from $200,000 to $350,000
- enacting an Interest on Money Claims Act, with an interest rate that more fairly and realistically reflects the cost to a creditor of the delay in payment of a money claim
- establishing a "commercial panel" in the High Court, comprised of Judges who will specialise in commercial disputes, with machinery for other specialist panels of Judges to be convened.

We expect the Courts to move towards a more national approach when scheduling High Court fixtures so that spare courtroom capacity (and Judges) can be more efficiently deployed to reduce the caseload burden in more congested registries (such as Auckland).

Chapman Tripp's Litigation and Dispute Resolution Practice

Chapman Tripp "has huge depth, and is top of the market" – The Legal 500 Asia Pacific 2015, Dispute resolution, Tier 1

Chapman Tripp is New Zealand's market leader for commercial litigation and dispute resolution. Our national team of more than 70 dispute resolution specialists across Auckland, Wellington and Christchurch advise on New Zealand's most significant, high stakes and complex commercial disputes, and represent New Zealand entities in international proceedings. We are also unique among New Zealand firms in offering dedicated international arbitration expertise, acting in proceedings seated in New Zealand and elsewhere, with a focus on the Asia-Pacific region.

Handling complex regulatory actions is a mainstay of the practice. New Zealand's largest blue chip companies from a variety of sectors call on Chapman Tripp to represent them in proceedings involving all of the country's main regulators including the Commerce Commission, the Financial Markets Authority, Serious Fraud Office, Inland Revenue, the Reserve Bank and the Overseas Investment Office.

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