SIMPSON GRIERSON

Litigation Outlook

January 2025

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Introduction

As we head into 2025 we have identified five key litigation themes as courts and regulators continue to face a full caseload:

1. Continuing high levels of regulatory enforcement
2. Growth in class actions and funded litigation
3. Heightened risks from AI, cyber attacks and data breaches
4. Ongoing review of directors' duties and liabilities
5. Development of climate-related claims.

Last year saw a raft of enforcement by our two main commercial regulators, the Commerce Commission and Financial Markets Authority, with significant penalties and fines ordered against major corporate entities for a wide range of contraventions. That pattern appears likely to persist, particularly with the spotlight on key business sectors such as grocery, building supplies, construction, insurance, and banking and financial services. And, of course, all eyes remain on the continuing investigations into Du Val Group.

There is also legislative reform on the cards for the Commerce Act and the Credit Contracts and Consumer Finance Act, and the Conduct of Financial Institutions (CoFI) regime is due to commence on 31 March 2025. Directors' duties and liabilities are also up for review by the Law Commission. Additionally, there are significant changes ahead for the High Court Rules that look set to reshape the litigation process for all court users.

All of this is occurring in a legal environment that is now highly attractive to litigation funders. In the absence of statutory reform of class actions and litigation funding law, the courts have made clear the significance they place on access to justice and have confirmed the availability of both opt out class actions and common fund orders at the commencement of a proceeding. These changes will further entice an already eager Australian funding market into New Zealand as well as local funders.

Corporates continue to face risks in respect of AI, cyber attacks and data breaches, with the Privacy Commissioner due to release findings this year of an inquiry into the trial use of facial recognition technology at Foodstuffs North Island's stores. That decision will have broader implications for New Zealand's retail environment. We are also keeping a close eye on the Medibank and Optus data breach class actions in Australia given the potential for comparable actions here.

Climate change remains an enduring litigation trend. While *Smith v Fonterra* is unlikely to reach a conclusion anytime soon, greenwashing claims are increasing (both in New Zealand and overseas) and are a claim available to a broad range of plaintiffs, including competitors. We expect ongoing close scrutiny of climate-related disclosures.

We explore these key trends and developments in more detail below. Please get in touch if you would like to discuss any of these issues further.

Nina Blomfield, Partner
Head of Litigation

High levels of regulatory enforcement set to continue

01

Two of New Zealand's major economic regulators, the Commerce Commission (**Commission**) and the Financial Markets Authority (**FMA**), were highly active in 2024. We fully expect heightened activity to continue in 2025.

Commerce Commission

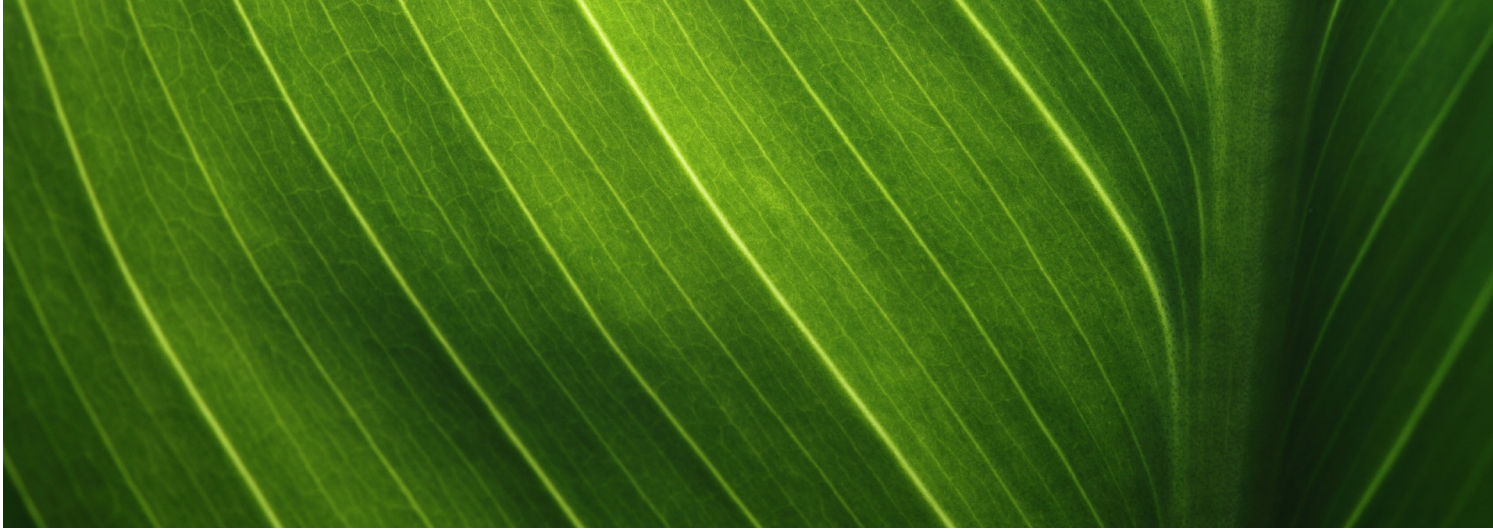
The Commission took a broad range of enforcement activities last year, in many cases challenging the actions of some of New Zealand's largest corporates in key sectors, including:

- Declining merger clearance applications in respect of Foodstuffs' North and South Island entities, as well as the proposed acquisition of Serato by Alpha Theta – the first time clearance applications have been declined in six years
- Completing its market study into personal banking services, which concluded that the four major banks do not face strong competition when providing personal banking services, and made a range of recommendations to correct this (including capitalising Kiwibank and accelerating open banking)
- Obtaining penalties and fines in respect of conduct in breach of a range of legislation, including:
  - $3.25 million penalty against Foodstuffs North Island for anti-competitive restrictive land covenants
  - $51,000 penalty[1] against Canterbury Industrial Scrubbing for cartel conduct that had been running for nearly 20 years
  - $2.47 million penalty against TSB under the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**) for overcharging 42,000 credit contract customers by $3.6 million
  - $1.5 million fine against Kiwibank after it pleaded guilty to 21 criminal charges under the Fair Trading Act for overcharging customers a total of $6.8 million
  - $500,000 fine against MaxBuild and a sentence of community detention and community service against its director in New Zealand's first criminal prosecution for cartel conduct
- Obtaining declarations that Viagogo had engaged in conduct that was likely to mislead and that it had made false or misleading statements in breach of the Fair Trading Act 1986.

Both the Foodstuffs merger clearance decision and the Viagogo judgment are now subject to appeal and will be key cases to watch in 2025. The Commission also has other proceedings underway that will continue to progress, or will come to a head, this year including:

- The prosecution of criminal charges against another construction company and director for alleged bid-rigging of publicly funded projects is headed to trial in October 2025 (being the other party to the alleged cartel with MaxBuild)
- Proceedings against GIB manufacturer Winstone Wallboards, for alleged anti-competitive use of rebates
- Criminal charges filed against Woolworths NZ and two Pak'nSave stores for alleged inaccurate pricing and misleading specials.

1. *The Court noted that, but for the financial position of the defendants and their co-operation with the Commission, it would have imposed a penalty of $750,000 to $1.25 million against the company and $50,000 to $70,000 against the director.*



Commerce Commission's priorities for 2025

Businesses can expect to see the Commission taking targeted action in the following areas this year, which have been identified as specific priorities:

- Bid-rigging cartels, with a particular focus on infrastructure projects and those that rely on public money
- Non-compete agreements
- Illegal online sales conduct, such as fake reviews and subscription traps
- The grocery sector
- Unconscionable conduct
- The telecommunications industry
- Motor vehicle financing, particularly with regard to vulnerable consumers

Of course, those are in addition to its enduring priorities which remain a core focus – namely cartels, anti-competitive conduct, product safety, vulnerable consumers, and other actions that support market and economic regulation functions.

Review of Commerce Act 1986

The Government announced late last year that it will carry out a targeted review of the Commerce Act to ensure New Zealand's competition settings are keeping pace with market developments. This will cover the merger control regime, options to improve beneficial collaboration, anti-competitive concerted practices, and industry codes or rules.

Financial Markets Authority

Like the Commerce Commission, the FMA continues to be firmly focused on taking enforcement action where it considers financial markets legislation has been breached and holding those it identifies as being most culpable to account.

Key enforcement action during 2024 included:

- Multiple actions against banks and insurers alleging breaches of the fair dealing provisions in the Financial Markets Conduct Act 2013 (**FMCA**) resulting from failing to apply discounts, overcharging customers, and false or misleading representations, including:
  - Obtaining pecuniary penalties of $6.175 million against AA Insurance and $3.9 million against Vero Insurance
  - Filing separate civil proceedings against ASB Bank and Tower Insurance
  - Obtaining admissions from Westpac (with a penalty hearing to follow);
- Securing a 9-year banning order against Wei Zhong following breaches of market manipulation and disclosure provisions in connection with shares in Oceania Natural Limited
- Obtaining a $1.4 million pecuniary penalty against Peter Harris, the former Managing Director of CBL Corporation, in respect of multiple continuous disclosure and fair dealing breaches (having earlier obtained separate penalties against the company and four other directors on the board)
- Filing civil proceedings against Booster Investment Management alleging breaches by the company, and certain directors and senior managers, arising from investments into a related limited partnership.

But the FMA's most highly publicised action in 2024 was its successful application to place the Du Val Group (and associated entities) as well as its directors Kenyon and Charlotte Clarke into interim receivership, and its subsequent recommendation to the Minister of Commerce and Consumer Affairs to appoint Statutory Managers.

Statutory Managers were appointed in August 2024 and are currently investigating the actions of the directors and the affairs of the Du Val Group to identify if there are any voidable transactions or breaches of law which may be referred to authorities for further investigation. The FMA also has ongoing investigations into the Du Val Group, and the outcome of those investigations are keenly awaited.

Looking ahead to 2025

Du Val remains the FMA's most significant matter to watch in 2025, with the scope of any further action by the Statutory Managers and/or the FMA yet to be determined. The FMA is also taking a relatively rare "case stated" to the High Court seeking clarity on the use of eligible investor certificates in the wholesale investment sector.

In addition, the FMA will be continuing to progress the proceedings it filed last year (particularly, its extensive allegations against Booster Investment Management), and we expect that any further fair dealing transgressions by banks and insurers will face a similar enforcement response.

The FMA also continues its ongoing enforcement action in relation to former NZX-listed CBL Corporation following its collapse in 2018. To date, the FMA has obtained total pecuniary penalty orders of $11.28 million against the company and five of its directors in respect of continuous disclosure and fair dealing contraventions.[2] A separate trial relating to alleged misleading and deceptive disclosures at the time of CBL's IPO in 2015 is set down for April 2026.

Outside these traditional enforcement areas, we anticipate any cases involving blatant breaches of legislation within the FMA's remit (such as greenwashing, audit standards, and climate reporting obligations) will face close scrutiny by the regulator.

Enforcement of CCCFA on the move

This year should also see the long-awaited transfer of CCCFA oversight from the Commission to the FMA, which requires legislation to formally effect the change. The precise timing for this switch, and how the transfer will work, is yet to be confirmed but we can expect it to form a natural expansion of the FMA's existing regulatory mandate.

2. *As CBL is in liquidation, the FMA and CBL have agreed that the FMA will not seek to enforce payment of the penalty against CBL in the liquidation (except in limited circumstances), so that CBL's assets are used to repay creditors and investors as much as possible.*

Class actions and other funded litigation expected to grow

02

There continues to be strong interest by overseas and domestic litigation funders in the New Zealand market, with recent case law further developing a favourable funding environment.

Legal & market developments

Not only do we have certainty around the availability of opt-out class actions, which have the potential to offer funders the benefit of a significantly higher number of class members, we now also have confirmation that common fund orders can be made at the start of a class action.

Such orders provide funders with certainty of a return from any claim proceeds as they require all members in an opt-out class action to contribute to the funding costs (if the claim is ultimately successful) regardless of whether they have signed the funding agreement. As a jurisdiction, this makes New Zealand highly attractive for funders looking to underwrite class action litigation.

> "Market developments also mean we can expect to see new funded claims being filed this year. In the last 18 months, New Zealand's largest domestic funder – LPF Group – has resolved its CBL and Intueri class actions and has also obtained a successful outcome in the long-running Mainzeal litigation.
>
> "That would appear to leave the banks class action, which is jointly funded by LPF and Australian-based CASL, as LPF's main proceeding. We therefore anticipate it will be actively looking for new investment opportunities."
>
> **Nina Blomfield**, Partner

Additionally, ASX-listed OmniBridgeway now has an established presence in Aotearoa and other Australian funders are actively looking for opportunities here. There has also been some expansion in the market for plaintiff-focused class action law firms.

Active proceedings

The banks class action remains the one to watch, however, given the ongoing heightened regulatory enforcement and broader economic pressures that exist, we anticipate further funded litigation to arise where there are alleged regulatory failures. Whether this aligns with sectors that have come under increasing pressure from regulators remains to be seen, but there would appear to be an increased risk in this space. Listed entities and major product manufacturers also continue to be on notice.

Offshore developments also have the potential to land here, particularly data breach and climate class actions.

Litigation finance

While litigation funders are traditionally associated with class actions and liquidator claims, their offering extends beyond that. Litigation financing is becoming increasingly popular, particularly overseas, in large-scale commercial disputes where the plaintiff remains solvent and might otherwise have the financial means to fund the claim itself. But instead of self-funding, those plaintiffs are using litigation finance to preserve cashflow and mitigate risk associated with the claim. The New Zealand market for this structure is in the relatively early stages of development but is likely to grow as the mechanism becomes more widely known and understood.

AI, cyber attacks and data breaches remain a key risk

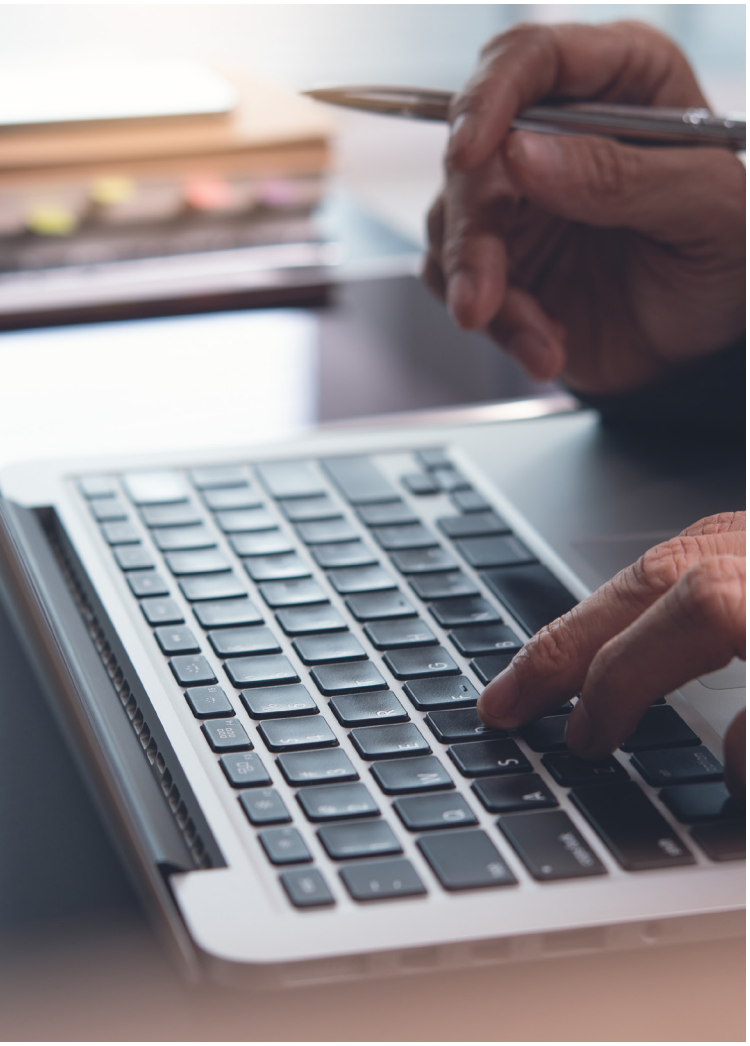
03

Overseas courts continue to grapple with a wide range of disputes relating to GenAI as well as litigation arising from cyber attacks and data breaches. While New Zealand courts have yet to deal with cases of this nature, this is likely to change in the near future.

AI-related litigation and regulatory action

AI-related regulatory investigations and prosecutions are also on the rise internationally. Privacy is a particular area of focus for regulators, including in Australia, where the Office of the Australian Information Commissioner (**OAIC**) recently found that the use of live facial recognition technology (**FRT**) in retail stores breached the Australian Privacy Act. The New Zealand Privacy Commissioner has indicated that FRT and similar technologies are a key priority for his office and we expect the outcome of the Commission's inquiry into the trial use of FRT at Foodstuffs North Island's stores to be released in 2025.

> "Litigation relating to the use of GenAI continues to proliferate around the world spanning a wide spectrum of legal issues including IP, privacy and product liability. We expect to see judgments in these cases being released over the next year, which will inform the approach of our courts to this developing area of law."
>
> **Jania Baigent**, Partner



Cyber attacks and data breaches

Increase in cyber crime

Latest figures from the National Cyber Security Centre record financial losses of $6.8 million from cyber-crime in Q2 2024, a 61% increase over the same period in 2023. Further increases are likely in the year ahead due to advances in GenAI and the additional scope it offers for scams and frauds. This will likely also generate litigation and regulatory action.

Urgent injunctions and ransomware payments

In the short term, we expect to see continued use of urgent interim injunctions to prevent any use and publication of lost or stolen data by anyone in New Zealand. Organisations are also increasingly willing to pay ransoms to mitigate these risks, making ransomware a key risk and loss driver for cyber insurance providers.

Class actions

The Australian trend towards class actions by organisations and individuals affected by data breaches is likely to reach Aotearoa. Notable Australian cases include two consumer class actions, a shareholder class action and a civil penalty action by the OAIC against Medibank. These all arise from the cyber attack on Medibank affecting the data of 9.7 million Australians. Telecommunications company Optus is also facing class actions in relation to its own data breach, which affected nearly 10 million current and former customers, including 10,000 whose personal information was published online by the hacker. Success in any of these and comparable class actions is likely to encourage plaintiffs – and litigation funders – to pursue similar proceedings in New Zealand.

Director liability

Directors need to be aware that a failure to deal adequately with cyber risks at board level increasingly gives rise to potential liability for breach of directors' duties. This is well-established in the US, where in 2019 Yahoo's directors and officers agreed to pay US$29 million to settle claims for breach of fiduciary duties by failing to implement appropriate safety measures and making false and misleading statements about their knowledge of data breaches.

Closer to home, the Australian corporate regulator ASIC has warned that failure to give sufficient priority to cyber security and cyber-resilience creates a risk of foreseeable harm to the company. This exposes directors to potential enforcement action for breach of the duty to exercise their powers with due care and diligence. ASIC is reportedly already investigating bringing proceedings on this basis.

While New Zealand's regulators and courts have yet to issue such specific warnings, the breadth of directors' duties under the Companies Act 1993 means that considering and mitigating the risks of cyber threats is a necessary part of directors' obligations. These issues are on the radar of the Institute of Directors, which has issued guidance for boards.

Privacy breaches

On the regulatory front, we expect complaints to the Office of the Privacy Commissioner regarding privacy breaches arising from cyber attacks to increase. The Commissioner will continue to use the limited tools currently available to deter and sanction organisations which fail to promptly notify breaches likely to cause serious harm. These include imposing a $10,000 fine and publicly naming non-compliant agencies. It remains to be seen whether Parliament will heed the Commissioner's repeated calls for greater enforcement powers.

Trans-Tasman developments

New Zealand businesses operating across the Tasman also need to be aware that in December 2024, the Australian Parliament passed amendments to the Australian Privacy Act, which include an expansion of OAIC's powers, new civil penalties and the introduction of a statutory tort of invasion of privacy. The Australian Cyber Security Act came into force on 29 November 2024. It includes a mandatory ransomware and cyber extortion reporting obligation for certain businesses to report ransom payments and establishes a Cyber Incident Review Board to conduct reviews of significant cyber incidents and share lessons learned.

Directors' duties and liabilities up for review

04

This year will also see the Law Commission commence a significant review of directors' duties and liabilities, at the request of the Minister of Justice.

While the terms of reference are yet to be released, initial indications from the Law Commission are that the review is likely to include:

Companies Act duties relating to reckless trading and incurring liabilities, which the Commission has said "are particularly unclear and difficult to apply as they are currently framed and may discourage directors from taking legitimate business risks"

The broader overall burden on directors given their liability under a wide range of legislation, and the extent to which this impacts on their willingness to take legitimate business risks

Enforcement of directors' duties, whether the current modes of enforcement are effective, and who should be responsible for that enforcement.

The review comes on the back of the Supreme Court endorsing the Court of Appeal's view in the Mainzeal litigation that "[t]he legislation governing insolvent trading in New Zealand is unsatisfactory in a number of respects [and the] Act should be reviewed". It is also supported by other stakeholders such as the Institute of Directors and the legal community more generally.

The Law Commission announced its review only days after the conclusion of the trial of former Ports of Auckland Chief Executive, Tony Gibson, on health and safety charges brought by Maritime New Zealand following a workplace fatality in 2020. Mr Gibson was subsequently found guilty in a landmark decision that captured the attention of directors and officers nationwide.

As directors increasingly find themselves personally named as defendants in a wide range of litigation, and their actions (or inactions) around the board table closely scrutinised, the review is sure to attract significant interest and detailed submissions as it progresses.

Climate-related claims will continue to develop

05

Boards and businesses remain concerned about climate change risks, and rightly so. This year we expect to see:

- More claims against large corporates in relation to greenwashing, with the potential for these to be brought by regulators, competitors, social and industry groups, and individuals
- Increasing focus on the scope and accuracy of climate disclosures, both by regulators and end-users
- Shareholders endeavouring to use climate change as a tool to hold companies to account.

While not expected in the short-term, the court's ultimate decision in *Smith v Fonterra* will have far-reaching consequences for climate litigation in New Zealand and potentially worldwide.

Greenwashing

Greenwashing has been the focus of increasing regulatory and private action worldwide, and we anticipate this will continue over the next 12 months and beyond.

The Australian Securities and Investments Commission (**ASIC**) and the Australian Competition and Consumer Commission (**ACCC**) have identified greenwashing as a continuing enforcement priority for 2025. Both regulators have been active in this space over the past 12 months, with ASIC securing landmark penalties for greenwashing against Vanguard Investments (A$12.9 million) and Mercer Superannuation (A$11.3 million). The ACCC also issued its first greenwashing civil proceeding for some time against Clorox Australia (the manufacturer of GLAD-branded kitchen and rubbish bags) and has stated that it is working on a number of "in-depth greenwashing investigations".[3]

3. *Committee for Economic Development of Australia (CEDA) speech 2024 | ACCC*

Closer to home, the FMA censured Pathfinder just before Christmas in relation to misleading statements about the nature of its KiwiSaver Funds' ethical investments. Pathfinder ran two advertisements on social media and its website between 2021 and 2024, which the regulator said contained representations that its funds did not invest in companies involved in fossil fuels or animal testing when there were exceptions to those statements. While greenwashing is not listed as a specific enforcement priority for either the Commerce Commission or the FMA in New Zealand, we expect that enforcement action will be taken in respect of any clear breach.

In addition to regulatory risk, key private actions continue in the High Court. First is the claim filed by Consumer New Zealand, Environmental Law Initiative and Lawyers for Climate Action New Zealand against Z Energy in November 2023, challenging the accuracy of its advertisements about its emissions reduction initiatives (and specifically its claim that it is "in the business of getting out of the petrol business").

More recent is the claim by Greenpeace against Fonterra in September 2024 in relation to its labelling of butter as '100% New Zealand grass-fed'. These claims highlight the ongoing risk for corporates and the importance of accurate representations, particularly in an environment where litigation funders are actively seeking out new opportunities. We have also seen examples overseas of large corporates taking action against competitors for alleged greenwashing, and similar action remains a possibility here.

Climate reporting

The first climate statements under New Zealand's mandatory climate-related disclosure regime were released in 2024. For many Climate Reporting Entities, these disclosures were the first time the public could test whether the entities' actions are aligned with their stated climate and sustainability goals.

The FMA's recent report on the first year of climate disclosures identified several areas where improvement was required across the board and the FMA has said it expects to see improvements in future statements, in line with the feedback provided in its report. The FMA has indicated a limited grace period for the first few years of the climate reporting regime while companies navigate their new obligations. Enforcement action by the FMA in this area in 2025 is therefore likely to be limited to seriously misleading conduct. However, the information continues to be available for use by activists and/or competitors looking to gain strategic advantage.

Shareholder action

To date, shareholders have been unable to get traction using the derivative action procedure to advance claims against directors in relation to their climate-related decisions. The most prominent action in this area was the unsuccessful UK case by ClientEarth against the directors of Shell. The UK High Court dismissed the derivative action and an application for leave to appeal the High Court's decision was dismissed by the UK Court of Appeal (read our earlier article here). Similar actions against directors of other corporates have been unsuccessful in both the UK and the US.

Despite this, climate change litigation will remain a tool for shareholders looking to make change and hold companies to account. While there have been difficulties in obtaining a successful judgment in this area to date, reputational challenge is sometimes enough – and its detrimental impacts on companies should not be underestimated.

Climate-related litigation

The Supreme Court's decision last year to allow the novel tort claim in *Smith v Fonterra* to proceed to trial leaves open the possibility of corporates facing tort-based liability in New Zealand in respect of damage caused by greenhouse gas emissions produced by their activities. The trial in that case will be closely watched worldwide for how it deals with the question of climate claims against private emitters. The decision could have significant implications for climate-related claims against corporates both in New Zealand and offshore.

Late last year, the Dutch Court of Appeal ruled in favour of Shell and overturned the lower court's 2021 ruling that ordered Shell to reduce its greenhouse gas emissions (including end-use emissions) across its global operations by 45% from 2019 levels by 2030. While the Court of Appeal considered that corporates (including Shell) do have a "special responsibility" to reduce their emissions generally, Shell did not have an obligation to do so by 45% (or any other specified percentage).

Internationally, climate-related claims against governments continue to be made in almost every jurisdiction. Significant overseas judgments issued in 2024 are likely to have implications here, including the decision of the European Court of Human Rights which found that the Swiss Government had positive obligations to protect the claimants from the adverse effects of climate change.

Closer to home, we await the Court of Appeal's decision in the appeal of the High Court's decision to dismiss a judicial review challenge by Lawyers for Climate Action New Zealand to the Climate Change Commission's May 2021 advice to the government on the level of ambition in New Zealand's emissions reductions targets. The appeal was heard in late 2023 and, if successful, could have potentially significant implications for the approach to climate policy analysis in New Zealand.

Contacts

For more information on expected litigation trends this year, or to discuss any dispute resolution issues more generally, please get in touch with one of our experts.

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