

## Summary judgment in the High Court of New Zealand

*A general explainer*

August 2026

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### Purpose of this note

1. This note explains, in general terms, the summary judgment procedure in the High Court of New Zealand. It is intended as background reading for clients and others who are considering whether to apply for summary judgment, or who have had such an application served on them. It is a general summary only. It is not legal advice, and it does not address every rule, exception or qualification that may apply in a particular case.

### Overview

2. Summary judgment allows the Court to determine a civil proceeding, or part of it, without a trial. The procedure is governed by Part 12 of the High Court Rules 2016. Its purpose is to allow claims or defences that are not genuinely arguable to be disposed of quickly and at proportionate cost, rather than being carried through discovery, briefs of evidence and a substantive hearing.
3. Two forms of application are available:
  - (a) a plaintiff's application, on the ground that the defendant has no defence to the claim or to a particular part of it; and
  - (b) a defendant's application, on the ground that none of the plaintiff's causes of action can succeed.
4. Both are made by interlocutory application supported by affidavit evidence, and both are usually heard by an Associate Judge at a short fixture. Because the application is decided on affidavit evidence, and ordinarily without cross-examination, the procedure suits disputes that turn on documents or on facts that are not genuinely in contest. It is poorly suited to disputes that turn on contested oral evidence or on findings of credibility.

### The plaintiff's application

5. Rule 12.2(1) provides that the Court may give judgment against a defendant if the plaintiff satisfies the Court that the defendant has no defence to a cause of action in the statement of claim, or to a particular part of any such cause of action.
6. The onus lies on the plaintiff throughout. The plaintiff must prove, on the balance of probabilities, both the facts necessary to establish each element of the cause of action relied on and the absence of any arguable defence: *Pemberton v Chappell* [1987] 1 NZLR 1 (CA). The principles were collected by the Court of Appeal in *Krukziener v Hanover Finance Ltd* [2008] NZCA 187.

7. In practice, the points that most often decide these applications are these:
- (a) the plaintiff's affidavit evidence must cover every element of the cause of action relied on, including quantum where judgment is sought for a fixed sum;
  - (b) the Court will not attempt to resolve genuine conflicts of evidence, or to assess credibility or reliability, on the papers;
  - (c) the Court is not, however, bound to accept uncritically evidence that is inherently implausible or that is contradicted by the contemporaneous documents: *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC); and
  - (d) a defence that is merely asserted, without an evidential foundation, will not defeat the application. Where the facts relied on for a defence lie within the defendant's own knowledge, it is for the defendant to put sufficient material before the Court to show that the defence is genuinely arguable.

### **The defendant's application**

8. Rule 12.2(2) provides that the Court may give judgment against a plaintiff if the defendant satisfies the Court that none of the causes of action in the plaintiff's statement of claim can succeed.
9. The threshold is a demanding one. The leading authority is *Westpac Banking Corporation v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA). A defendant must show that the plaintiff cannot succeed, not merely that success is unlikely. The procedure is inappropriate where material facts are genuinely in dispute, or where the outcome depends on findings that can properly be made only after the evidence has been tested at trial. It is also generally unsuitable for the determination of novel or developing questions of law, which are better decided against a settled factual background.
10. A defendant's application is often filed together with, or in the alternative to, an application to strike out the statement of claim under r 15.1. The two are distinct. A strike-out application assumes the pleaded facts to be true and asks whether the claim is tenable as pleaded; a defendant's summary judgment application permits evidence to be adduced to show that the claim cannot succeed on the facts. Each is exercised sparingly: as to strike-out, see *Couch v Attorney-General* [2008] NZSC 45.

### **Procedure and timetable**

11. **Timing of the application.** Under r 12.4, a plaintiff's application is made at the time the statement of claim is served on the defendant, or later with the leave of the Court. A defendant's application is made at the time the statement of defence is served on the plaintiff, or later with leave. Leave for a second or subsequent application for summary judgment in the same proceeding requires special circumstances: r 12.4(2AA).
12. **Supporting evidence.** The application must be supported by an affidavit which, if made by or on behalf of the plaintiff, shows why the defendant has no defence, and if made by or on behalf of the defendant, shows why none of the plaintiff's causes of action can succeed. Where the plaintiff applies at the outset of the proceeding, the notice of proceeding takes the modified form prescribed for summary judgment: r 12.6. Rule 12.5 deals with service out of New Zealand.

13. **Service.** A plaintiff's application and supporting affidavit must be served not less than 25 working days before the date allocated for the hearing: r 12.7. The Court may postpone the hearing: r 12.8.
14. **Opposition.** A party who intends to oppose must file and serve a notice of opposition and an affidavit in answer not less than three working days before the hearing date: r 12.9. That is a minimum, not a target; in practice the Court expects opposition papers well in advance, and will often make timetabling directions at a case management or first call event. A defendant may also file a statement of defence: r 12.10. Affidavits in reply are provided for by r 12.11.
15. **Hearing.** The application is determined on the affidavit evidence and counsel's submissions. There is no right to cross-examine a deponent, and leave to do so is rarely given, because the existence of a genuine conflict of evidence will usually mean that the application should be dismissed rather than resolved.

### **Disposal of the application**

16. Under r 12.12 the Court may give judgment, dismiss the application, or give judgment for part only of a claim, and may make such orders and give such directions as to the future conduct of the proceeding as are appropriate. Judgment may be given subject to conditions. Where a plaintiff's application is dismissed, the proceeding continues, and r 12.13 governs the time for filing a statement of defence.
17. Rule 12.14 provides for judgment entered under Part 12 to be set aside in defined circumstances, principally where a defendant did not appear at the hearing. Rule 12.15 deals with discontinuance, and r 12.16 applies the Part, with any necessary modifications, to counterclaims and to claims against third parties.
18. Where judgment is entered for a sum of money, interest will ordinarily be dealt with under the contract or, failing that, under the Interest on Money Claims Act 2016.

### **The Court's discretion**

19. Rule 12.2 is permissive. Even where the applicant satisfies the threshold, the Court retains a residual discretion to decline to enter judgment and to allow the proceeding to go to trial. In practice that discretion is exercised sparingly, and, absent some feature making immediate judgment oppressive or unjust, it will rarely be decisive.

### **Costs**

20. Costs ordinarily follow the event and are usually awarded on a scale basis, most commonly category 2, band B, with separate allowances for the preparation of the application or opposition and for appearance. Increased or indemnity costs are available in the usual way but are exceptional. An unsuccessful application carries a real cost, both in the adverse costs award and in the delay to the substantive proceeding, and that risk should be weighed before an application is filed.

### **Appeals and review**

21. A judgment entered under r 12.2 finally determines the proceeding, or that part of it to which the judgment relates, and may be appealed to the Court of Appeal. A decision refusing summary judgment is interlocutory, and leave to appeal is required: Senior Courts Act 2016, s 56(3). Where the decision under challenge is that of an Associate Judge, consideration should be given

at an early stage to whether review by a High Court Judge or an appeal is the appropriate course, as the two routes differ in both procedure and approach.

#### **When the procedure is worth considering**

22. Summary judgment tends to be effective where liability is documented and the defence, if any, is bare. Common examples include claims on liquidated debts and unpaid invoices, guarantees and indemnities, dishonoured instruments, loan and mortgage documents, and clear breaches of written contracts where the issue is one of construction rather than fact.
23. It tends to fail, and to be an expensive detour, where the dispute concerns an alleged oral agreement or variation, where fraud, misrepresentation or knowledge is in issue, where equitable defences such as estoppel or unconscionability are raised, where the defendant advances a substantial and connected counterclaim or set-off, or where the case cannot sensibly be assessed before discovery.
24. A further practical consideration is disclosure. An application requires each side to file its best evidence early. That can be an advantage, in that a weak defence is exposed and settlement often follows, but it also gives an opponent an early and detailed view of the case against it.

#### **Status of this note**

25. This note states the position in general terms as at August 2026. It is not legal advice and should not be relied on as a substitute for advice on the facts of a particular matter. Please contact me if you would like advice on whether summary judgment is available, or on how to respond to an application that has been served on you.