

Thinking litigation



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THINKING LITIGATION

Chris Serow & Richard Morris

When alternative dispute resolution such as mediation, assisted negotiation, arbitration or collaborative law cannot resolve matters in dispute, a party may decide to seek relief by way of litigating their matter.

What is litigation?

Litigation is where one or more parties ask a Court or Tribunal to decide the outcome of their dispute with a binding and enforceable decision. Litigation is commenced by way of an initiating application. Preparing such a document requires careful attention, skill and expertise. Legal proceedings are often very complex and while individuals may represent themselves, it is prudent to retain a solicitor to process the plethora of forms, research case law and legislation, ensure compliance with Court procedures to be adhered to, and prepare court documents in admissible form.

Litigation may require parties to complete many pre-trial procedures before the matter is decided at a hearing. It is usually at least six (6) months before a matter is determined from the date that proceedings are commenced. Proceedings can often stretch to twelve months or even several years, depending on the nature and complexity of the proceedings, the conduct of the parties and the caseload of the Court or Tribunal.

When should a party litigate?

If matters cannot be resolved in any other way, a party may seek to litigate their matter. If you have decided to stand your ground adopting a position of unwavering tenacity, then retaining professional support and at least initial advice from your solicitor is essential. Often clients are faced with the prospect that their opponent is unresponsive, fails to comply with orders, refuses to accept documents or is not able to be found. Legal practitioners have access to experts and other professional services and experience and skill within the legal system to apply for subpoenas and make other interim applications as part of the litigation process. When faced with a recalcitrant opponent, a party may have to litigate if they want to receive compensation, damages, specific performance, injunctive or other relief.

Careful planning and preparation must be undertaken in order to lay down solid foundations before processing through the Court. There is no such thing as a certain outcome in litigation; however, the prospects of success can be greatly improved with the benefit of professional assistance.

Retaining Legal Practitioners

It is often necessary for your solicitor to retain Counsel (a Barrister) on your behalf to advise on your matter and assist in preparing pleadings before embarking on filing proceedings. The relationship

between a solicitor and barrister is similar to that of a medical GP and medical specialist. A solicitor may take instructions from you, note observations and legal issues that may apply and prepare a brief with relevant documentation for Counsel to consider in preparing your case. Counsel will continue to be assisted and instructed in Court by your solicitor. Not surprisingly, litigation can be very expensive due to its complexity and time-consuming nature. Unless a party is entitled to Legal Aid, there is no Medicare equivalent in the legal system.

Preparing to meet with your Solicitor

To assist your solicitor in preparing and presenting your case to a Court or Tribunal, there are many things that one can do. Such action may reduce the time involved for a solicitor and lead to savings in costs, as well as increase the likelihood of achieving your desired outcome. Some things you can do include:

- Prepare a chronology of important dates and events relevant to the matter – this can be extremely useful when trying to remember dates from months past and provide the ground work for your statement.
- Prepare a statement of what happened from your point of view – this should ‘flesh out’ your chronology and provide quotes as to what was said during important conversations and greater detail about what you saw, heard, smelt, tasted or physically felt in relation to the matter.
- Collect all relevant documents and organise them in a clear and easily navigated manner. Documents that collaborate and provide proof of your version of events may increase your chances of success.
- Collect the names and contact details of any witnesses to the incident(s) or events.
- In the case of any matter involving an injury to you, collect the names and contact details of any doctors, therapists or other medical practitioners you have been treated by in the past, as well as your previous employers and their details.

If you have suffered a wrong or loss as a result of another person or entity's conduct, or if a dispute or claim is being made against you that cannot be resolved, you should contact your solicitor as soon as possible. Statutory time limits apply for all claims, with some as short as 21 days. Early action may enable you to recall events more clearly and when combined with careful preparation, your rights have the best chance of being protected.

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