Hamel-Smith FORUM
ATTORNEYS-AT-LAW, TRADEMARK & PATENT AGENTS

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CELEBRATING OUR CENTENARY

Philip Hamel-Smith

In 1909 Michael Hamel-Smith was admitted to practice law by the Incorporated Law Society of Trinidad and Tobago. One hundred years later, I have the honour and privilege of leading the law firm that has unstintingly pursued the values and standards of the practice of law to which he committed as a young solicitor.

In an address to the Supreme Court on receipt of the news of the untimely death of Michael Hamel-Smith, he was described as "an ornament to the profession". After only 24 years of practice, the said address ascribed to him "honesty and integrity..... his industry, his strict attention to the duties of his profession, his perfect courtesy and charming manners, built up a practice second to none in the West Indies".

The core values of the Hamel-Smith firm over the succeeding 76 years have reflected those of the founder, and it is with a deep sense of pride that the present generation of attorneys and staff celebrate our centenary.

Notwithstanding our steadfastness to these fundamental values and principles, we have over the years embraced opportunities to change whenever that meant the enhancement of the delivery of the quality of legal services to our clients. We have at times been prepared to "put out into the deep" to explore new and better ways in the pursuit of excellence.

In more recent times we have, not without some level of nostalgia, left our original home at 19 St. Vincent Street, Port of Spain; and made a new place of abode at Eleven Albion— a move that it is hoped will set the tone and mood for life at Hamel-Smith over the next century.

On this very special and unique occasion, I take the opportunity to recognise the contributions of the many that have gone before us, on whose effort we continue to build our edifice, and also to salute the current Hamel-Smith 'family team' that are together turning the corner into the next century.

It would also be remiss of me if I did not also make mention of the many and varied clients of the firm (large and small) over the past 100 years who have given us the opportunity to partner with them through good as well as difficult times, to work with them through their many business challenges; and to identify with their many success stories. It has truly been a humbling experience to be part of the fabric of so many aspects of the Trinidad and Tobago community.

We all look forward to continuing with you on our journey that started 100 years ago!

DOING BUSINESS 100 YEARS 1909-2009

In This Issue:

A CLIENT'S GUIDE TO LITIGATION

Debra Thompson & Catherine Ramnarine

The litigation process (especially for a first-timer) can seem confusing, frustratingly slow, and a huge drain on one's energy and resources. Unfortunately, despite your best efforts to avoid going to Court, litigation is sometimes unavoidable. Having some familiarity with how the litigation process works can help you achieve the best possible outcome and make it a less stressful experience.

The Rules

In Trinidad & Tobago, the litigation process is governed by the Civil Proceedings Rules or "CPR". Basically, the CPR sets out the steps to be followed from the time a matter is initiated, and the timeframes within which these steps must be taken. The rules might not always seem practical, especially for people accustomed to a fast-paced, commercial environment. Nevertheless, it is essential to comply with them. You may run the risk of losing your case if you miss one of the more important procedural steps.

Before the Claim

Before initiating a claim in Court, the Claimant is required to write to the Defendant:

- Giving sufficient details of his claim so as to enable the

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ENDURING ONE HUNDRED YEARS AND BEYOND

Nicole Ferreira-Aaron

When Mikey Hamel-Smith opened his small law office in 1909, could he have foreseen that 20 years later his Firm would have had to grapple with the challenges of the Great Depression? Would he have predicted that it would not only survive, but that it would emerge to grow from strength to strength? Could he (even in his wildest dreams) have imagined that his Firm would endure to celebrate 100 years of doing business?

How does a firm endure? It does so by holding true to its principles and values, by embracing change and innovation, and by committing to deep relationships.

In my tenure over the past 18 years, I have been sustained by its deep and unstinting commitment to powerful traditions and principles – of integrity, professionalism, and service to our clients and the community. Internally, we have nurtured a culture which values the development of all our professionals. Our senior practitioners readily make themselves available to share their knowledge and expertise with the younger generation. Many of us have made life-long careers with this firm, because we have felt appreciated and respected as professionals and as individuals.

It is a changing world, and our clients' needs are also changing. Hamel-Smith has been upheld by its quest for innovation and creative problem solving. We have recognised the need to continuously retrain and retool, and embrace technological advancements – all to keep ourselves relevant to the needs of our clients.

But by far the most significant reason that we have remained in business for 100 years is the relationship which we share with our clients. Day after day for the past 36,600 days you have afforded us the opportunity to come to work, and to add value to your enterprises by doing what we love to do. We cherish the opportunity you have given us to understand your business, your opportunities and your risks. We are humbled by your willingness to take us into your most private confidences. We thank you for the privilege of being your partner, through the good and the tough times.

We face a future which is as uncertain and challenging as when Mikey Hamel-Smith took that first step 100 years ago. As a firm, as a business community and as a nation, we can draw strength from the history of those who have brought us to this day. With a commitment to deep and enduring relationships, an openness to change and innovation, and a determination to live in accordance with our fundamental principles and values, we can face the future with confidence.

Here's to 100 years of doing business at Hamel-Smith! And here's to the next 100 years together!

EXPERT DETERMINATION:
A QUICK AND INEXPENSIVE SOLUTION

Christopher Hamel-Smith, S.C.

In business, as in life, disputes and conflict are inevitable. As a way to resolve disputes, litigation is extremely costly and time-consuming. It can also damage a company's reputation and its commercial relationships, leading to a loss of future business. In today's challenging business environment, companies need to resolve disputes, and manage the associated commercial risks, as effectively and inexpensively as possible. Fortunately, there are a range of alternative dispute resolution processes which offer many advantages. Expert determination is one such process which is suitable for resolving many disputes quickly, effectively and inexpensively.

How does Expert Determination work?

In essence, expert determination is based on a legally binding contract to refer defined questions or issues to an independent, neutral third party (chosen for his expertise in the relevant subject matter of the dispute) for a final and binding determination. Unlike a judge or arbitrator who must decide based on the evidence and submissions presented by the parties, an expert is engaged to resolve the issues by:

- Making use of his own specialist knowledge, expertise and skill; and
- Conducting his own investigations and research.

What are the benefits of Expert Determination?

The first key benefit of expert determination is that it provides the parties to a dispute with a final and binding decision. This distinguishes it from many other alternative dispute resolution processes, such as mediation, which can provide parties with the opportunity to negotiate their own resolution to the dispute but which do not allow the neutral to impose a result if the parties fail to reach agreement. To this extent, expert determination is similar to court litigation and arbitration since in each case the neutral (judge, arbitrator or expert) makes a final decision which is binding on the parties.

The second key benefit of expert determination is that it is normally a short, swift and relatively inexpensive process. This distinguishes it from litigation and arbitration, both of which are usually lengthy, complicated and expensive.

The third key benefit of expert determination is that it is normally confidential, as are arbitration and mediation. This distinguishes it from court litigation where almost all of the evidence and material is put into the public domain.

Of course, the benefits which expert determination offers need to be weighed against potential risks. For example, the benefit of finality has to be weighed against the risk of being unable to appeal or otherwise challenge an unfavourable decision, save in the most limited of circumstances. The benefit of speed has to be weighed against the risks that the decision may be made:

- Without the issues being investigated as thoroughly as they might in litigation or arbitration; and
- Without the parties being given the opportunity to fully explore and understand each other's views and interests as deeply as they would with mediation.

When should I use Expert Determination?

Expert determination may be used to resolve a wide range of disputes. Whenever a fast and inexpensive resolution to a dispute is needed, you should give consideration to using expert determination. However, it is most likely to be appropriate where the dispute revolves around issues which can be specifically identified and matched to a particular field of expertise. It is thus often used to resolve disputes involving matters of valuation or technical issues. On the other hand, expert determination is not usually suitable for resolving disputes which turn on facts that are in contention. By way of example, some of the kinds of matters for which expert determination should be considered include:

- Fixing the market rent under a rent review clause;
- Establishing the market value of specified real estate;
- Putting a value on the shares in a private company;
- Determining the value of equipment;
- Establishing the sums to be paid under a building contract for variations or on termination;
- Determining whether the goods or services supplied were up to the contractual specifications; or
- Deciding if an equipment malfunction was due to a design fault, or a manufacturing fault, or misuse by the customer.

What steps should I take to obtain the benefits of Expert Determination?

There are a number of steps which you can integrate into the management of your commercial relationships and legal risks both when negotiating commercial contracts and in situations where you are confronted by a dispute.

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A CLIENT'S GUIDE TO LITIGATION *(cont'd)*

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Defendant to understand and investigate it;

- Providing copies of all the documents on which he relies; and
- Requesting copies of documents that he would like to see.

The Defendant must be given a reasonable time (usually 28 days) to respond to the Claimant's letter. If the Defendant disputes the claim, he must respond:

- Giving details reasons why the claim is not accepted, saying which of the Claimant's allegations he accepts and which he disputes;
- Providing copies of all documents on which he relies;
- Providing copies of all the documents that the Claimant asked for or explaining why they have not been provided; and
- Identifying and asking for any additional documents that he wishes to see.

The early exchange of information and documents between the Claimant and the Defendant gives each side a better appreciation of the relative strengths and weaknesses of their case and can make it easier for disputes to be resolved without having to go to Court. It also helps to speed up those matters that do end up in Court as each side and their attorneys would have a clearer idea of what exactly is in dispute.

It also means that the parties and their attorneys must have a clear appreciation of the relevant facts, issues and evidence in the case from the very beginning. This requires providing as detailed, comprehensive instructions to your attorney as soon as possible, together with copies of all relevant documents.

How to start a Claim

A Claimant starts court proceedings by filing a document known as a 'Claim Form' at the Court Registry. The Claim Form very briefly states who the Defendant is, why the Claimant is suing him and what he is asking the Court to order (e.g. payment of money, return of property etc.). Together with the Claim Form the Claimant must file a 'Statement of Case' – basically a written summary of his side of the story - the facts on which he relies to establish his case against the Defendant.

How to dispute a Claim

A Defendant who has been served with a Claim Form must, if he disputes the claim, file at the Court Registry:

- Within **8** days - a document known as an 'Appearance' giving notice of his intention to defend the Claim; and
- Within **28** days - a document known as a 'Defence'.

The Defence is essentially the flip side of the Statement of Case – a written summary of the Defendant's side of the story together with all relevant documents.

Pleadings

The Statement of Case and Defence are collectively known as 'Pleadings' and form the basis on which the case will eventually be tried. The parties will not be allowed to raise or rely on any allegation that was not contained in their Pleading. It is therefore very important to get the 'story' right the first time around and to set up as strong a case as possible in your Pleading. Try as far as possible to ensure that your attorney has all the facts when he or she is preparing your Pleading, and read it through very carefully before it is filed to make sure that it is factually correct. The latter is especially important as under the CPR you will be required to sign a 'Statement of Truth' at the bottom of the Pleading confirming that what it says is, to the best of your knowledge, true.

What is Case Management

Once each side has filed their respective Pleadings the matter will be assigned to a Judge (who will manage it from that point on until trial) and a Case Management Conference, or "CMC" will be scheduled. The CMC is, as the name suggests, a conference between the parties, their attorneys and the Judge. It does not generally take place in open Court. Before fixing a date for the trial of the matter the Judge will give 'directions' for several procedural steps required under the CPR. Perhaps the most important of these are the 'Disclosure' of Documents and the filing of Witness Statements as they relate to the evidence that will be before the judge.

Evidence and Proof

The unfortunate reality of litigation is that it's not always enough to be right. You have to be able to *prove* to the Judge that you are by presenting convincing evidence that supports your story or disproves the other side's story. The two principal forms of evidence are documentary records and testimony from witnesses. If for whatever reason you cannot produce this evidence (you didn't keep proper records, or the people that were familiar with the facts have since left the business etc.), it increases the chances of the Judge ruling in favour of the other side.

What is disclosure?

You are required to identify for the Court and the other side all the documents in your control that may be relevant to the case. This includes not only documents that support your case, but also documents that would

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EXPERT DETERMINATION *(cont'd)*

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When negotiating or re-negotiating a commercial contract:

- Make it a part of your routine (perhaps as part of a checklist) to consider whether any issues which might arise between the parties in the future may be of the type which are suitable for expert determination;
- If so, include contract terms which provide for the use of expert determination to resolve these identified categories of prospective issues;
- To facilitate this, it may be useful to arrange to have standard clauses drafted for inclusion (after they are adapted as necessary) into your main categories of contracts which you most frequently sign.

When a dispute actually arises:

- Make it a part of your routine (perhaps as part of a checklist) to consider whether there are any issues involved in this dispute which may be suitable for expert determination;
- Check whether there are any contractual terms in your existing contract which provide for expert determination;
- Even in the absence of contract terms providing for expert determination, consider whether to propose expert determination;
- Consider how to select a suitable expert and refer the issues to him, following a procedure which ensures that the expert's decision will be final and legally binding.

The foundation for expert determination is purely contractual. Accordingly, for the expert's decision to be legally binding you must ensure (with the benefit of such legal advice as may be necessary) that:

- The relevant contractual terms, as well as expert's instrument of appointment and terms of reference, are properly drafted; and
- The procedure which is followed for the selection and appointment of, and reference to, the expert is appropriate to achieve this objective.

What else should I consider?

For certain situations and types of disputes, expert determination can provide you with an effective, quick and inexpensive solution. However, it is only one of a range of alternative dispute resolution processes which you can use. In some situations, a different dispute resolution process may provide you with a better chance of achieving your objectives. For example, if a decision needs to be made as which of two versions of the facts is to believed, yet confidentiality is important, arbitration should be considered. Or, if there is a desire to try to repair a damaged relationship and restore the chances of conducting future business, mediation may be your best option.

In order to maximise your chances of achieving your objectives, and mitigating our risks, it is important to select the right process for each particular dispute and situation. To help prepare you to make the right choices, we will continue to examine these other alternative dispute resolution processes in future issues of the HS Forum.

A CLIENT'S GUIDE TO LITIGATION *(cont'd)*

harm it or support the other side's case. Certain documents (such as communications between you and your attorney) might be 'privileged' and need not be disclosed. In practice, disclosure usually means that each side files what is called a 'List of Documents'. The other side is then given an opportunity to inspect the documents on the List and request copies of them.

What are Witness Statements?

Under the CPR, parties file 'Witness Statements' before the trial. These are basically written summaries (in the Witness' own words) of the evidence they are going to give. A Witness will not normally be allowed to give evidence at trial unless he has filed a Witness Statement by the time prescribed by the Judge. A Witness is not generally allowed to give additional evidence not contained in his Witness Statement unless he is responding to questions asked by the other side's attorney, so it is important to make sure that the Witness Statements contain all the facts necessary to prove your case.

Trial

Once all the pre-trial steps have been complied with, the Judge will fix a date for the trial of the matter. At trial, the Claimant will present his case (including the evidence of his Witnesses) first followed by the Defendant, after which the other party's attorney will cross examine the witness. The attorneys then may make 'submissions' on how the Judge should decide the matter – this can be done in writing or orally. Once the evidence and submissions have been given, the case is closed and the Judge will give his decision. In practice many Judges reserve their judgment for a later date so that they will have some time to consider the evidence and arguments put before them.

How can you get the best value out of your Attorney and improve your chances of a successful outcome? In the next issue of HS Forum, we will provide some guidelines that will enable you to help your Attorney assist you effectively.

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