



SO YOU'VE RECEIVED A PRE-ACTION PROTOCOL LETTER HOW TO MANAGE THE LITIGATION PROCESS?

Jeanelle Pran

When a dispute arises between parties, nothing signals the breakdown of the relationship more than the threat of litigation (except perhaps litigation itself). The litigation process is no doubt daunting and is often times an uphill battle. It is time consuming, costly and can sever longstanding relationships. Despite the inherent challenges that come with the territory, there are a number of steps which you can take to ease the burdens posed by litigation or the threat thereof.

This article explores the initial stages of the litigation process, what to expect and some steps you may consider to manage the process.

The Threat of Litigation

If you are threatened with litigation, more often than not, you would first be served with a '*Pre-Action Protocol Letter*' from the party intending to bring a claim (or from that party's attorney). A Pre-Action Protocol Letter is a letter made pursuant to the Pre-Action Protocols of Trinidad and Tobago's Civil Proceedings Rules. Simply put, it is a letter which sets out:

- A party's claims against you;
- The remedies which that party seeks;

- An express demand for the remedies claimed;
- A timeline by which a response is expected or by which the remedies should be provided; and
- A threat that if the remedies are not provided, litigation proceedings will be commenced against you.

Apart from a Pre-Action Protocol Letter, litigation can be threatened in the form of a '*Demand Letter*'. This differs from a Pre-Action Protocol Letter in that it is not made pursuant to the Pre-Action Protocols. On the flip side, it is similar to a Pre-Action Protocol Letter as it demands some form of remedy and it usually indicates the date by which that remedy should be provided (or a response expected).

While the temptation may be to ignore the Pre-Action Protocol Letter or Demand Letter, there are important practical and strategic reasons why you should not.

As such, when served with a Pre-Action Protocol Letter or a Demand Letter, you should take the following steps:

- 1) Note the date it is received and the actual date of the letter. This will be important in determining the timeframe for your response.
- 2) Read the letter carefully to ascertain the nature of the claim being asserted, the remedies being sought and the basis upon which these remedies are claimed.
- 3) Highlight and note the prescribed deadline for issuing a formal response or for providing the remedies sought.
- 4) In most cases, if you decide to retain the assistance of an attorney, you should send the letter for the attorney's review and highlight the date of the letter, the date you received it and the deadline for responding. In most cases, it would be best to seek the advice of an attorney.
- 5) Consider whether you need more time to respond.

(cont'd on page 3)

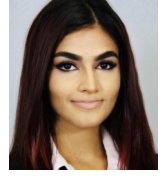
CONTENTS

- [So You've Received A Pre-Action Protocol Letter - How To Manage The Litigation Process](#)
- [NFTs: Beyond Cryptocurrency and Regulation](#)



NFTS: BEYOND CRYPTOCURRENCY AND REGULATION

Miguel Vasquez & Nikkishia Maraj



You may have seen the term ‘NFT’ in the headlines lately, mostly in relation to the astronomical sums being spent on them. Just last month, a piece of digital artwork sold for a record breaking US\$69.3 million. What exactly are NFTs? In this Article, we break down what they are and how they work.

Advancements in technology have evolved at such a rapid pace that often it fits into everyday life without even noticing it. A little over 10 years have elapsed since blockchain technology was conceptualised and introduced into the world but the strides taken by the technology have nonetheless casted a shadow over traditional financial markets.

Blockchain technology has introduced a system in which transactions across a network of systems can be independently validated and the transaction history tracked on a ledger, without relying on a central authority. The increasing curiosity in and limitless opportunities created by the technology have instigated the creation of various innovative uses. One of the uses of blockchain technology that has recently gained momentum and piqued interest are digital assets called non-fungible tokens or ‘NFTs’.

What are NFTs?

An NFT is a unique cryptographic or digital asset or content, ranging from art, songs, videos, photographs, and even memes – essentially almost any digital item that is capable of having proprietary or ownership rights attached to it. Each NFT has a unique digital identification (‘ID’) which is exclusive to that particular item and is intended to be the sole and single item of its kind. Its value is therefore inherently derived and is not directly fungible (i.e. interchangeable) with any other NFT. An NFT can most easily be likened to a painting such as the Mona Lisa by Leonardo da Vinci – the original painting by the painter derives its value inherently. This can be distinguished from Bitcoins for example, whose value is not intrinsic to any one Bitcoin, but rather each Bitcoin is of equal value and thus interchangeable.

As an asset, albeit digital, the potential commercial use of NFTs may be limitless. Some practical uses may be to generate rental income by leasing the digital asset to other users, as security to access loan financing, or it can be added to a digital portfolio that can be advertised at digital marketplaces to facilitate convenient sale of an artist’s work.

In fact, the increasing popularity and attraction to NFTs are grounded in various reasons which include the following:

a) The owner of the NFT has distinct ownership of the asset by virtue of the unique ID which cannot be copied or reproduced.

- b) The concept is intended for the intellectual property rights to remain vested in the owner of the rights.
- c) The blockchain technology that underpins an NFT allows any person to validate the originality of the NFT and to examine its transaction history.
- d) It represents an ingenious alternative for artists to sell their work digitally, and to even facilitate the payment of royalties through the retention of their intellectual property rights.

Are NFTs regulated?

From a regulatory perspective, like cryptocurrencies, NFTs represent a grey area in the law due to their digital nature. In considering whether NFTs fall within an existing regulatory scheme, you will need to consider the legislative framework of entities such as the Central Bank of Trinidad and Tobago, the Trinidad and Tobago Securities and Exchange Commission (‘TTSEC’), and the Financial Intelligence Unit of Trinidad and Tobago).

In January 2019, these entities issued a joint statement in which they informed the public that they were not of the view that virtual currency providers were supervised by them nor were there legislative provisions which provided protection to consumers. This was followed up by the TTSEC in November 2020 stating that the assessment of whether cryptocurrencies were securities would be entertained on a case by case basis. To the date of publication however, no cryptocurrencies have been registered with the TTSEC.

While NFTs can be distinguished from cryptocurrencies such as Bitcoin, the statements of the regulatory authorities, which suggest that cryptocurrencies remain unregulated for the most part, illustrate that NFTs would also remain unregulated, at least in the immediate short term.

On an examination of the current legislative framework, it is difficult to envision where NFTs can be classified. They are less likely than cryptocurrencies to be considered electronic money or currency, due to their nature being more akin to an asset. On that front, local real estate laws have not yet extended past physical property into the realm of digital property.

From a tax perspective, countries such as France have sought to counteract the challenge arising from digital assets (regulated as crypto-assets) by making legislative changes to provide clarity and certainty to persons involved in the trade of digital assets, which are deemed to create a taxable benefit as long as the digital assets are not converted into legal tender currency or to acquire goods and services. Reasonably, conversion or acquisition may lead to income tax and taxable capital gains. While it remains to be seen whether other countries including Trinidad and Tobago will adopt similar approaches,

(cont’d on page 4)

SO YOU'VE RECEIVED A PRE-ACTION PROTOCOL LETTER HOW TO MANAGE THE LITIGATION PROCESS? (CONT'D)

Jeanelle Pran



Generally, the timeline for responding is not set in stone as parties tend to be flexible and will usually allow a reasonable amount of time to respond. As such, if you are unable to respond within the deadline stipulated, your attorney may recommend issuing a ' *Holding Letter* '. This is a simple letter which indicates to the other party that you are still reviewing the allegations made against you and will require more time to respond. You can either specify a date by which you will respond or state that you will do so within a reasonable period and in any event, as soon as you are in a position to do so.

- 6) Compile as much evidence or documentation as possible in order to shed light on the allegations made and defend your position. For instance, if a claim is made against you for unpaid rent, you should retrieve and secure any evidence relating to the term of your agreement (such as the tenancy agreement and all documentation relating to your payment obligations as this will assist in determining if there is any applicable evidence that payment has been made). You should also recover the agreement between you and the other party which stipulates the terms under which rent should be paid and any subsequent written amendments to that agreement (whether in the form of a letter, email or otherwise).

Litigation

In the event that the claims made in the Pre-Action Protocol Letter are not resolved or if you fail to respond to same, the party making those claims may commence litigation proceedings against you.

In civil proceedings, litigation is commenced when a Claim Form and Statement of Case are filed in court. These are documents which highlight a party's claims against you and the basis upon which those claims are made (along with any relevant supporting documentation). When the Claim Form and Statement of Case are filed in court, it must be served on the named Defendant(s). The service of the Claim Form and Statement of Case should be accompanied by additional documents which explain what steps you are required to take in order to respond to the allegations raised against you. You should read through these documents carefully.

Generally, when a Claim Form and Statement of Case are

served on you, you are required to take the following steps:

- 1) File an ' *Appearance* ' in court. This is a simple form in which you will indicate whether you intend to defend the claim or if you admit the whole or part of it. It must be filed within eight (8) days of the service of the Claim Form on you.
- 2) File and serve a ' *Defence* ' if you intend to defend the claim. Generally, the Defence must be filed within twenty-eight (28) days after the service of the Claim Form and Statement of Case. The parties can however agree to extend the period for filing the Defence up to a maximum of three (3) months after the date of service of the Claim Form (or the Statement of Case if it is served after the Claim Form). As such, if upon review of the Defence, you determine that you will be unable to respond within the initial twenty-eight (28) days period, you should reach out to the other party and request an extension of time.
- 3) Providing an agreement is reached, you will need to file a ' *Notice: Extension of Time for Filing Defence* ' which informs the Court that the deadline for filing the Defence has been extended by agreement of the parties. It is also recommended that you exhibit evidence of the agreement with the other party for the Court's review.
- 4) Notably, it is possible for a Defendant to apply to the Court for a further extension (beyond the period agreed by the parties). This would be done by filing a ' *Notice of Application for Extension of Time For Filing Defence* ' which should be supported by an Affidavit setting out the reasons why a further extension is needed. For instance, if you are still reviewing documents in order to respond to the allegations in the Claim Form and Statement of Case, this may be grounds for a further extension.

It is important to note that if you do not defend the claim, the Claimant can apply to have default judgment entered against you. This means that the Claimant could be awarded judgment in its favour without having to go to trial and without the Court having heard any evidence from you. It is therefore crucial that you file the Defence by the deadline in order to avoid a judgment being made against you.

(cont'd on page 4)

**SO YOU'VE RECEIVED A
PRE-ACTION PROTOCOL LETTER
HOW TO MANAGE THE LITIGATION PROCESS?**
(CONT'D)
Jeanelle Pran

(from page 3)

Note that if you retain an attorney, he/she would usually assist in preparing and filing the above documents and will communicate with the other party on your behalf.

General Considerations

One important issue which is often overlooked, is whether the matter can be settled without the need for litigation (for instance through negotiation or other forms of alternative dispute resolutions). There is real value in achieving a settlement. For instance, it preserves the relationship between parties (especially where there is a longstanding relationship) and it saves time, legal costs and attorneys' fees.

In determining whether to settle, careful consideration should be given to the following points:

- A cost-benefit analysis should be done and/or requested from your attorney. This should include an examination of the potential risks of going to trial, the likelihood of success and an estimate of legal costs and attorney fees. This would be useful in determining whether the costs of defending the claim outweigh the sums being claimed which could influence whether you opt to settle.
- Even if you are successful at trial, you may not recover all of the costs expended in defending the claim.
- Court documents are generally public documents. As such, there could be reputational risks for the parties involved depending on the nature of the claim. In such circumstances, parties may be more inclined to settle the matter so as to avoid potential negative publicity.

While there is no set formula on defending claims, the above can help you cope with the initial stages of litigation or the threat thereof.

Jeanelle Pran is an Associate within the firm's Dispute & Risk Management Department and may be reached at jeanelle@trinidadlaw.com

**NFTS: BEYOND CRYPTOCURRENCY AND
REGULATION**

Miguel Vasquez & Nikkishia Maraj

(from page 2)

the InvestucateTT database of the TTSEC recognises NFTs and virtual currencies as examples of crypto-assets. Although the database is only an educational tool, it represents a window into how the TTSEC may potentially treat with NFTs in the future.

More recently, on 7th April 2021 the TTSEC published a notice indicating that a joint steering committee had been established to collaborate on matters relating to financial technology. The collaboration entails establishing a Joint Regulatory Innovation Hub and Regulatory Sandbox. The Innovation Hub is intended to provide support to individuals and entities on regulatory and registration requirements for proposed financial technology products and services, while the Regulatory Sandbox is envisioned to operate as a live testing tool which will allow entities to test financial products services, business models and delivery mechanisms prior to offering to the public.

Practical Considerations

While there are many advantages to dealing in digital assets such as NFTs, the technology and its issues have not yet been developed to a stage where it is without significant risk. Notably:

Counterfeiting appears to be a prevalent issue wherein many artists have had their works converted into NFTs without their permission.

The absence of express agreements between the parties may result in undue hardship. The counterparty to an NFT arrangement could be anywhere in the world, which may be subject to unknown regulatory requirements, or may complicate or frustrate attempts to enforce a legal right. Recent reports have even suggested that the NFT bubble might already be close to bursting. Only time will tell whether they are here to stay or a mere flash in the pan.

Conclusion

NFTs, Bitcoins and other digital assets represent a continuing movement towards the digitalization of financial markets and are a testament to the creativity and innovation that has been synonymous with the 21st century. However, we should nonetheless remain cautious of speculative investments which are largely unregulated. While NFTs can turn any item into a one-of-a-kind digital collectible item, there are vast risks in investing in this asset. There must be an alignment between the advancements made in technology and the progression of the law to regulate these activities. As such, dealing in NFTs should be approached with significant caution and legal advice should be sought before entering into an arrangement.

Miguel Vasquez and Nikkishia Maraj are Associates and they can be reached at miguely@trinidadlaw.com and nikkishia@trinidadlaw.com



The featured articles were previously published in the
Trinidad Guardian newspaper.

The Lawyers Newsletter for Business Professionals

Published by M. Hamel-Smith & Co.
Eleven Albion, Cor. Dere & Albion Streets
Port of Spain, Trinidad & Tobago

Tel: 1(868) 299-0981 / Fax: 1(868) 625-9177

E-mail: mhs@trinidadlaw.com / Web: www.trinidadlaw.com
and intended for limited circulation to clients and associates of our firm.
2021, M. Hamel-Smith & Co., all rights reserved.

Member

LexMundi
World Ready



M. Hamel-Smith & Co.