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

VOLUME 6 ISSUE 6 | The Lawyers Newsletter for Business Professionals | APRIL 2010

A CLIENT'S GUIDE TO LITIGATION

Debra Thompson & Catherine Ramnarine

In Trinidad and Tobago, the litigation process is governed by a set of procedural rules, known as the Civil Proceedings Rules ("CPR"), which set out the steps to be followed from the time a Claim is filed and the timeframes within which this should be done. In our last issue we outlined some of these steps, including pre-Claim correspondence, starting and/or disputing a Claim, Case Management, the Disclosure of Documents, the filing of Witness Statements and Trial.

In this issue, we will examine how clients can get the best value out of their legal representation and increase the chances of a successful outcome to their dispute.

Legal Costs

The losing side will generally be ordered to pay the legal costs incurred by the winning side. This does not necessarily mean that they will have to pay the exact amount of the fees paid by the winner to his attorney. Under the CPR the amount of legal costs payable to the winner is calculated using a set formula based on the value of the claim. In special cases, you can apply for a costs budget to be used rather than the prescribed formula.

Helping Your Attorney to Assist You

It can be easy, especially where you think that the claim against you is baseless or frivolous, to view litigation as a nuisance you're paying your attorney to handle so that you don't have to. Using your attorney effectively can free up your time and energy for more important things, but in order to truly maximise the benefits of legal representation you should think of it as a partnership between you and your attorney. There are several things that you can do in order to get the best value out of your attorney and improve the chances of a successful outcome.

Give your attorney all the facts

In order to properly advise you and successfully represent your interests, your attorney needs to know all the facts – even those that might be unfavourable or embarrassing to you. Avoid the temptation to overstate or understate your case. If you are not sure whether something is important tell your attorney about it anyway. Let him/her have copies of all documents that may be relevant as soon as possible. Keep your attorney informed of any developments that arise during the course of the case.

Be responsive

It is not unusual for cases to be 'dormant' for a while and then suddenly resurface with a flurry of directions from the court that need to be complied with in a short space of time. You should try to respond to your attorney's requests for information as soon as you are able to. If for some reason you are unable to meet one of the deadlines set by the Court, let your attorney know in advance – he might be able to get an extension. For larger businesses, it is often useful to designate a 'point' person for the case who will respond to requests for instructions and attend the hearings.

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In This Issue

MEDIATION: A BETTER WAY TO RESOLVE DISPUTES?

Christopher Hamel-Smith, S.C.

Litigation is expensive, time-consuming and risky. Even if you finally achieve a favourable outcome through the Courts, your reputation and commercial relationships may be badly damaged along the way. Consequently, litigation should usually be seen as a last resort and you should always consider alternatives. Today, mediation is the most frequently used alternative dispute process. It provides an inexpensive, efficient and effective way to resolve a wide range of disputes.

What is Mediation?

Mediation is a process conducted by an independent and neutral third party (the mediator) who actively assists the parties to arrive at an agreed resolution to their dispute.

Unlike a judge or arbitrator, the mediator has no power to impose a decision on the parties. The parties continue to "own" the dispute and they (not the mediator) decide whether, and on what terms, to settle the dispute. Since a decision cannot be imposed on the parties, a resolution can only be achieved through mediation if the parties voluntarily agree to it as a result of the process.

The mediator plays a key role in helping the parties to achieve a resolution to their problems by "owning" and managing the process and by facilitating the discussions between the parties. A skilful mediator can assist the parties to:

- Communicate more openly and effectively;
- Shift their thinking about the dispute and the ways in which it may be resolved; and
- Overcome the hurdles, and break the deadlocks, that stand in the way of a resolution.

What are the benefits of Mediation?

Mediation is quick and inexpensive. Despite its non-binding nature, it has achieved high rates of success. Many disputes can be resolved through a mediation that takes place over just one or two days. Even where a complete resolution is not achieved, mediation helps the parties to narrow the issues and thus to resolve them more cost-effectively.

Mediation provides the parties with a safe and constructive environment in which to listen to each other's perspectives and concerns. This can help them to smooth out personal conflicts. For this reason, it can be particularly useful where the parties have an on-going relationship and would like to continue doing business in the future.

With the assistance of the mediator, the parties can also fashion solutions which are responsive to their own needs, even though such solutions would not be available through the Courts. For example, a claim for money might be settled by one party agreeing to provide future services at a discounted price. Such a settlement might allow one party to obtain greater value at a lower cost to the other, while creating an opportunity for the parties to work with each other again, thus rescuing the business relationship.

Mediation is confidential. It can therefore mitigate reputational risks as well as the risk that sensitive commercial information may be put into the public domain.

How does Mediation work?

The first step is for the parties to agree to submit the dispute to mediation. This agreement may already exist in the contract which governs their commercial relationship. Alternatively, in the absence of such a mediation clause, the parties may still agree to send the matter to mediation after the dispute has arisen. For example, the parties may agree to mediation as soon as their attempts to resolve a dispute through direct negotiations have failed, or they may do so much later during the litigation process.

Next, the parties will choose a mediator. This may be done with, or without, the involvement of a third party organisation that administers the mediation process. Once the mediator is appointed, typically he or she will identify what information and documents the parties should provide and set a date for the first mediation session.

At the first session, the mediator will establish the ground rules, including the fact that the process is confidential and conducted on a "without prejudice" basis. This means that information generated or shared during the mediation cannot be used in Court if the dispute remains unresolved and goes to litigation. The mediator will also explain that it may sometimes be useful to meet separately with each party and that any information shared with the mediator during such a private caucus cannot be disclosed to the other party without the first party's permission.

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

Ask questions

Sometimes litigation can seem confusing. However, you should understand the legal issues in the matter and what your attorney's strategy for dealing with the case is. A good attorney will take the time to explain this to you. If there is anything you don't understand or don't feel comfortable with (including your attorney's fees), ask him to clarify or explain it. If you need to sign anything make sure you read it through carefully and understand it before you do.

Have realistic expectations

The law might not always make sense or seem fair, but it's still the law. Your attorney can only work within the boundaries of the legal system. A good attorney will tell you what you need to know – including the weaknesses and shortcomings in your case – and not just what you want to hear. If your attorney advises you that it might be in your best interests to settle or drop your case, give genuine consideration to his advice. If you do try to negotiate a settlement with the other side, remember that neither you nor your attorney can force the other side to agree with you or to be reasonable.

One unfortunate reality is that the T&T court system moves frustratingly slowly at times. Your attorney can try as far as possible to avoid delays, but the pace of litigation is generally subject to the Court's schedule and is out of his control.

Of course you should always remember that your attorney owes a responsibility to you as well to listen, be responsive and act in your best interests. If you have any concerns about the quality of service that is being provided you owe it to yourself to raise them. Adopting a few of these suggestions can greatly decrease the stress of the litigation experience, maximise the value that you get out of your legal representation and improve your chances of success.

MEDIATION: A BETTER WAY TO RESOLVE DISPUTES? *(cont'd)*

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With the ground rules established, the mediator will invite each party to describe its perspective on the situation and their ideas as to the outcome they would like to achieve. He or she will then guide the parties through a process of:

- Sharing further information and perspectives concerning the dispute;
- Shifting from the positions that they hold, towards the identification and exploration of their underlying interests;
- Developing options which might satisfy the parties' respective interests;
- Evaluating these options in the context of each party's interests and as against their alternatives to a resolution in terms of these options;
- Reaching and recording a complete, or partial, agreement;
- Narrowing any unresolved issues, and agreeing a process for continuing to seek resolution.

What steps should I take to obtain the benefits of Mediation?

The first step is to increase the level of awareness of mediation, and its benefits, within your organisation. It helps to have standard mediation (and broader dispute resolution) clauses drafted, perhaps identifying an entity (such as the Dispute Resolution Centre of Trinidad & Tobago) to administer the process. You should also make it a part of your company's routine (perhaps as part of a checklist) to consider whether to:

- include such a mediation (or broader dispute resolution) clause in any contract which you are negotiating; and
- propose mediation once a dispute has actually arisen.

What else should I consider?

When you need a fast and inexpensive resolution, or wish to preserve a relationship, you should seriously consider mediation. However, it is only one of a range of dispute resolution processes that you can use. In some situations, a different process may give you better results. For example, there are disputes where it might be important to establish a precedent, or to be publicly vindicated, through the Courts. In others, expert determination may be your best route, particularly if the dispute revolves around issues which can be specifically matched to a particular field of expertise.

In business (as in life) conflict and disputes are inevitable. It is therefore important to be aware of your dispute resolution options and to select the right process for each situation. At times, a combination of dispute resolution processes may be required to achieve your objectives most cost-effectively. To help equip you to make good choices, we have examined expert determination in our last issue and mediation in this one. We will continue to highlight other dispute resolution processes in future issues of the HS Forum.

The Lawyers Newsletter for Business Professionals

Published by M. Hamel-Smith & Co.
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Port of Spain, Trinidad & Tobago
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and intended for limited circulation to clients and associates of our firm.

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