This litigation brochure is to be read in conjunction with any specific advice provided to our client's relevant set of facts. This brochure contains general information about the litigation process, including the standard steps in the process, the expected timeframes, the risks and the costs of litigation. If you have any queries or questions about the information provided to you, please call us to discuss.

Overview of the litigation process

Litigation is an adversarial process, usually determined before a judge sitting in open court without a jury. Typically, litigation matters follow these procedural steps:

- Commencement (filing a Claim & Statement of Claim);
- Defending the Claim (filing a Defence);
- Responding to the Defence (filing a Reply);
- Disclosure of documents;
- Gathering and exchange of evidence (including expert evidence / reports);
- Alternative dispute resolution (eg. Mediation)
- Trial / Hearing;
- Judgment;
- Appeal(s).

In addition to these above steps, there will commonly be a number of Mention and Directions Hearings before the Court. If during the course of the litigation, there are any disputes between the parties about the conduct of the litigation (an "interlocutory dispute"), one or other of the parties may also make an Application to the court for specific orders, usually about the future conduct of the process of the litigation. These applications typically add to the cost of the litigation, but may bring the dispute to a trial / hearing more quickly.

1. Pleadings

Both parties are required to plead the case they intend to rely upon at trial. This means the Plaintiff (who commenced the litigation) must set out in a Statement of Claim all allegations it intends to make against the Defendant. The Defendant in turn is required to set out in its Defence all the reasons it says it is not liable for the case pleaded against it. The intention is that both parties are prohibited from surprising each other at trial.

Generally, pleadings are only allowed to contain statements of relevant facts on which the party relies, but not the evidence by which those facts will be proved. The pleadings are designed to narrow and define the issues, set the boundaries for disclosure and define the scope of the relevant evidence.

2. Disclosure

Disclosure is the process of disclosing (sometimes called "discovering") documents that are relevant to an issue in dispute in the litigation.

Disclosure requires each party to assemble, list, and disclose (by inspection or exchange of copies) any documents on which it intends to rely, or which are relevant to an issue in dispute between the parties.

This means that a party cannot simply disclose those documents that adversely affect another party's case. The parties are required to also disclose relevant documents that support another party's case even if those documents may harm its own case. This is an important part of the litigation and will be discussed in more detail at the appropriate time.

3. Evidence and examination of witnesses

Generally witnesses will be called by the parties to give evidence at trial. They will then need to be available during the trial in case they are required for cross-examination or re-examination at trial. In some jurisdictions, the evidence is given prior to trial in the form of a statement or affidavit, and the witness will only need to attend court if required for cross-examination or re-examination.

Expert evidence may also be part of this process. Expert witnesses are expected to only give evidence about matters within their area of expertise, although this does include allowing them to express an expert opinion about a matter. They are expected to be impartial and not act as an advocate for the party that engaged them when doing so.

In some jurisdictions (e.g. the Planning & Environment Court of Queensland) there is a tendency to order the parties in conflict to arrange for their respective experts to meet before trial and produce a joint expert report setting out the issues they agree on and those they still disagree about. The aim of these pre-trial joint conferences between experts is to narrow areas of disagreement which may in turn help to shorten the trial.

4. Alternative Dispute Resolution (ADR)

Depending on the type of matter in dispute and the forum, the court may order the parties to participate in an Alternative Dispute Resolution process, such as a mediation or a case appraisal. While neither of those processes are binding on the parties (in the same way as a judgment), it will give the parties an opportunity to get together to attempt to resolve the matter (or at least narrow the issues in dispute) with the assistance of an impartial third party. The parties generally share the cost of engaging the mediator. Typically, mediations are conducted on a "without prejudice" basis meaning nothing said in the mediation is able to be used against the party later. Of course, it is always open to the parties to get together at any stage for a "without prejudice" conference to attempt to settle the dispute.

5. Trial / Hearing and Judgment

A trial will typically be conducted in open court before a judge. It is usual for the parties to engage a Barrister for the trial, to take advantage of their particular skills in advocacy and presenting the case as well as for their knowledge of court procedure and the rules of evidence.

The judge will hear the case, examine the admissible evidence and decide the matter by delivering a written judgment setting out his or her reasons. This requires the judge to decide on all the matters in issue.

6. Appeals

If either party believes that there are grounds for appeal (e.g. the judge has made an error of law) they may be able to lodge an appeal against the judgment. The appeal will then be determined by a higher court. Strict time limits apply to file an appeal, and the right to apply is not automatic in all jurisdictions. For example, if a party is unhappy with the judgment of the Court of Appeal and wishes to appeal to the High Court of Australia, it must first seek leave (ask for permission) and be granted it from the High Court before any such appeal will be heard.

7. Timeframes

Every case is different and it is difficult to state precisely how long a matter will take to resolve. Increasingly, the courts at all levels are becoming more pro-active in managing the lists of cases currently before them and will want to adopt an active case management approach. What this means in effect is that cases that may once have dragged on for many years if one or both parties to the dispute were slow to act are now being actively pushed along by a judge and may be concluded in much less time. To a large degree though, this is affected by the complexity of the dispute.

8. Legal Costs

After delivering the judgment, the judge will make an order about payment of legal costs. Although Costs Orders are made at the discretion of the court, generally, "costs follow the event". This means that the unsuccessful party will be ordered to pay the legal costs of the successful party, which includes lawyers' professional fees as well as other expenses such as expert and Barrister fees. Generally the court orders the costs paid on a "standard" basis. In effect, this means that the successful party will only recover somewhere between half and two thirds of its actual expenses. It is therefore common that a party can be successful at trial and yet still be left out of pocket.

Sometimes a court will order that the unsuccessful party pay the other sides' costs on an "indemnity" basis. In theory, the successful party should recover most (if not all) of the actual fees and expenses reasonably incurred during the litigation. In practice, the amount recovered will not be 100% of those costs but will be much closer to the actual costs incurred.

During the course of the litigation, it is likely that one or more parties will make offers to settle the dispute. Even if the offer is not accepted, it can still have an affect on the outcome by affecting the Costs Order made by the judge. For example, if during the litigation a Plaintiff made an offer to settle for less than it was ultimately awarded at trial, one possible outcome is that the defendant will be ordered to pay the plaintiff's costs on an indemnity basis, at least from the time the offer was rejected or not accepted.

9. Vagaries litigation and other considerations

Litigation is inherently risky and uncertain because the result is not definite until judgment is given and any appeal rights are exhausted. Although it may be possible to give an opinion about prospects of success if it goes to trial, ultimately there is no certainty because of the adversarial nature of the process. A witness who has said one thing in his statement may change his position under cross-examination or contradict himself, making his testimony carry less weight.

Furthermore, although we have explained to you how litigation is conventionally run, clients should be prepared for the unexpected, as it is quite possible that the other party will take steps, raise issues or lead evidence that was not anticipated at the outset. For example, it is not uncommon for a party being sued to bring a counter-claim of its own against the party suing it. This will often increase the risks, the cost and the time it will take to resolve the dispute, and therefore increase the uncertainty of the outcome.

In addition to the direct legal costs and expenses associated with litigation, there are often significant disruptions to a party's business interests or employment. Depending on the nature of the dispute, it may also attract unwanted publicity. Litigation is generally conducted in open court so the public and the media are free to sit in court and observe the trial. Increasingly, the pleadings themselves are often available for inspection and downloading from the Queensland Court's website. This exposure and disruption is an unavoidable consequence of litigating.

Finally, clients need to be aware that litigation can be extremely stressful and an emotionally draining process that should not be entered into lightly. Once litigation is commenced, clients will lose some of the control – and they will be subject to the processes, procedures and timetables of the Court. It is not necessarily an easy matter to stop litigation either if a client should change his/her mind or decide it is all becoming too hard or too costly. Clients may, for example, be required to pay some or all of the other party's legal costs to that point before the matter can be discontinued by the court.

10. From here:

Colville Johnstone Lawyers are experienced experts in Litigation. Contact us for *"Straight to the Point, Down to Earth Legal Advice & Representation"* in relation to your particular matter.

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