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Key Information on the Litigation Process

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Key information on the Litigation Process

This document is intended to assist clients and potential clients of Laytons' dispute resolution team who may be involved in the litigation process (and its associated aspects such as mediation and arbitration).

The aim is to provide useful background information to assist understanding of what influences our advice and what might happen in the dispute resolution process.

This note cannot be fully comprehensive. However, we hope it might focus on issues where further questions might be usefully raised.

The fundamental importance of costs

Even if disputes are resolved without litigation, the threat or use of formal procedures is often part of the overall strategy.

The legal fees involved in most contested cases are likely to be significant. The starting point is that we can only represent you if our fees are funded and paid. There may be alternative funding options available (a summary of the options is set out at Appendix A) but essentially the starting point is that our fees are based on the time we spend.

The approach of the courts

The litigation system is founded on "costs shifting": the unsuccessful party pays a contribution as assessed by the court to the successful party's actual costs. Engagement in litigation means that, whilst there is a prospect of recovering a contribution towards the costs you incur, there is a countervailing risk of having to contribute to your opponent's costs.

The approach of the courts is to use their powers so as to ensure that parties:

- do as much preparatory work as possible to avoid commencing proceedings

- settle cases through alternative processes such as mediation.

The rules applicable mean that parties have to incur necessary costs at an early stage in order to avoid being penalised if proceedings do ensue.

The ultimate purpose of this approach is to discourage the use of litigation. That is a fundamental point that will inform much of our advice to you.

The tools used by the courts to underpin this approach

Managing costs shifting

The courts are increasingly controlling the behaviour of parties by restricting the recoverability of costs.

The latest emphasis is on "proportionality": the courts will only allow costs which they accept are proportionate to the matters in issue. The relevant test is based mainly, if not exclusively, on a comparison of the costs incurred with the sums in issue.

Budgeting and costs capping

The court requires the preparation and filing of detailed budgets covering the future conduct of the case. There are sanctions for non-compliance and the court has power to restrict the costs recoverable.

Whilst budgeting can be a helpful process, there are difficulties arising from the court's involvement which have yet to be tested.

Reasonable behaviour

The courts' approach is governed by detailed guidelines set out in what is called "the overriding objective". This is a prescription to ensure that cases are dealt with justly and now specifically includes the requirement that cases should be dealt with at "proportionate cost". It is important to understand what the overriding objective means in practice.

The courts expect litigants to behave "reasonably" and assist them in delivering the overriding objective. This involves being seen to be co-operative, not taking every point and making appropriate concessions.

One of our major contributions is to enable you to comply with these requirements whilst advancing your interests as positively as possible. This can be a difficult balance to achieve.

"Pay as you go"

On the course to a trial, there are often "interim" hearings to deal with specific points that arise.

If you lose on an issue you have raised, or are found to have behaved unreasonably, there will often be an order that you pay the other side's costs of that application.

Reasonably substantial applications, lasting a day or two, have the potential to produce costs orders that can be significant relative to the amount in issue, particularly for more modest claims.

Thus, applications can be used primarily for tactical reasons and every engagement with the court process bears considerable risk.

Cost significant settlement offers

The applicable rules enable settlement offers to be made in prescribed form, acceptance or rejection of which has a bearing as regards the costs payable or recoverable. Essentially a party who ignores such a "part 36" offer will suffer adverse consequences in terms of costs, interest and even may be liable to pay an additional sum in damages.

Some fundamental points

The points made above will influence our own approach and advice. We draw your attention to the following specific issues:

Need for early investigation and planning

Litigation can no longer be seen as a series of discrete stages which can be planned in sequence. If you are contemplating court proceedings, it is generally preferable to plan the entire project before you are committed to the court's onerous processes and rules. Inevitably, costs have to be incurred at an earlier stage than you might wish.

Cost benefit analysis and project management

Litigation should be entered into with the best possible information about likely costs, risks and benefits. However, precise cost/benefit analysis and risk assessment is difficult. This is because court proceedings are adversarial and therefore unpredictable and difficult to plan and budget for.

As time passes, circumstances tend to change and new information comes to light which may affect the prospects of success (for example, in the opponent's documentation). This may call into question the initial cost/benefit analysis and require re-assessment throughout the progress of the case.

From a purely commercial perspective, and because of the risks, costs, uncertainties and timescale associated with litigation, the ultimate goal is usually a cost-effective and satisfactory early settlement (if at all possible) rather than a court hearing.

We will need to update you on these considerations, on a continuing basis, with regularly updated reports, summaries and advice. We aim to produce these at appropriate intervals but these will be flexible depending on the development of the case.

Recoverability of costs

As mentioned, it is generally accepted that due to the assessment system used by the courts, the costs recoverable by a successful party from their opponent will not fully reflect the costs the successful party is required to pay to their own lawyer. There will be a shortfall which will have to be borne by you in any event. In some cases, this could be a very significant element of the costs you have incurred.

A further factor which will always need to be considered is the ability of an opponent to discharge an order for costs.

Use of counsel and third parties

Specialist advocacy services, both oral and written, are usually outsourced to barristers ("counsel") retained by us: this provides specialist third party support and a lower cost base. Counsel's fees are charged to us as our responsibility but are billed on to you in our interim invoices as expenses (or "disbursements").

We may also need to retain on your behalf the services of other third parties such as expert witnesses, to prepare appropriate reports, and costs draftsmen to advise on the technicalities of costs recovery and preparation of the necessary forms.

"Alternative dispute resolution"/mediation

Parties are well advised to consider the possibility of settlement, whether by direct negotiation or through structured procedures such as mediation, on a continuing basis.

Brief outline of the litigation process

Pre-action protocols

As a dispute emerges, the parties put their respective cases in pre-action correspondence (known as complying with the protocols). This is an important part of what the court expects because such communications can identify and isolate relevant issues and make early settlement a more realistic possibility.

As mentioned, the expectation of the courts is that:

- the start of proceedings should be very much a last resort.
- parties should consider settlement opportunities such as engaging in mediation or some other form of "alternative dispute resolution".

So far as possible, it is important to ensure that points are raised, arguments aired and issues narrowed before the courts dictate the pace of proceedings.

Whilst "disclosure of documents" was traditionally considered to be a discrete stage in an action which would take place following the exchange of "statements of case", issues relevant to disclosure will need to have been thoroughly considered in considerable detail prior to the commencement of an action.

As mentioned, this is a vital part of the process and we cover it in detail in separate documents.

Case management

Once a claim is issued, the parties exchange detailed written "statements of case": ("Particulars of Claim"; "Defence"; "Reply"). The court may order that these be supplemented by "further information".

If interim applications are necessary, then written evidence will be served in the form of witness statements.

Following the filing of a "Defence", the court will take steps to manage the process, normally entailing a "case management conference".

In preparation for this, the parties are required to discuss and file detailed budgets for the project management of the case.

Exchange of evidence: documents and witnesses

The next formal stage is the completion of "disclosure": the parties must make all their documentary information available to the other side in accordance with the directions of the court.

Sometime after disclosure, the parties will finalise exchange witness statements (including finalised experts' reports. In an ideal world, work will have commenced on the preparation of those statements at a far earlier stage.

Trial

The parties then prepare documentation and arguments for the eventual hearing.

Any hearing, whether an application or a final trial, represents a huge concentration and commitment of effort and resource. This should not be under-estimated.

APPENDIX: Funding information

N.B. This document provides information rather than specific advice. We do not undertake any responsibility to give you "best advice" on financial or funding products or that the means of funding adopted will necessarily be the most suitable to your needs.

For many reasons, the likely overall costs of a matter which involves litigation are difficult to predict. There are risks and variable outcomes arising from:

- the complex relationship of fact and legal principle -all the facts relevant to a court at a future date may not be available or may alter in significance with the passage of time;
- the conduct, capacity and competence of other parties who do not share common goals with you.

Yet professional fees involved in presenting a case in its most effective manner must be funded. We normally presume that you will be funding your own case.

There are however a number of options which might be considered, for example:

- funding from third parties;
- risk sharing: If a third party funds you, with any aim beyond the merely charitable, they hope to share any rewards.

Any sharing in private funding arrangements will involve sharing both risk and rewards.

The principal sources of risk-sharing partners are:

- litigation funding companies;
- insurance companies
- lawyers;

Obviously, some cases may be more suitable for risk sharing than others.

Litigation Funding

There are commercial companies which invest in litigation with the hope of a return. They generally seek up to 50% of the damages recoverable. They have very stringent case assessment and control procedures.

Risk sharing with insurers

"Before the Event"

There are insurance products which may provide cover for future legal disputes. They are often sold as adjuncts to home or motor policies. If you have any documentation which might be relevant to this, you should produce it to us.

"After the Event"

These are policies which fund litigation once a dispute has arisen. Generally, the premium is based on the amount at stake. The policies are aimed at providing "peace of mind" and can act as a mechanism for putting a cap on potential exposure. They are not a panacea for the problems of funding the litigation process.

Insurance cover can be purchased to protect against:

- your possible liability to pay an opponent's costs;
- "disbursements": expenses such as experts' and counsel's fees which we incur on your behalf;
- your solicitors' charges.

The trigger for payment-out by the insurance company is "failure" in the litigation; that is the case must be lost in accordance with specified criteria.

Downsides in insurance

The downside of all these policies is the level of the premium as compared to the benefit which might be gained by a "partial success" (in which case the insurance company will not pay out) - this is the general result of the vast majority of cases. Factors to consider are:

- even if the premium is only payable if the action is successful, it can be significant relative to the amount claimed;
- in substantial commercial litigation, costs may approach seven figures, resulting in a very substantial premium; and
- premiums are generally not recoverable by the successful party from the unsuccessful party, save in very limited circumstances.

Risk sharing with lawyers

When lawyers participate in risk sharing ("contingency fees", sometimes known wrongly as "no–win, no-fee"), this can generally be done in two ways:

- by a properly regulated conditional fee agreement
  – where standard costs are uplifted by an agreed percentage in the event of "success"; or
- by a damages based agreement.

Downsides in risk sharing with lawyers

Under a policy of insurance, the main disadvantage is clear and obvious: a premium has to be paid.

The conditional fees option for legal advisers is clearly a useful option but you must consider its disadvantages.

There are certain realities to be faced:

- You may still need to acquire insurance against liability for your opponent's costs.
- Generally, neither the uplift element in the conditional fee nor the insurance premium will be recoverable from your opponent.
- If we undertake a risk/reward sharing arrangement with you, we are entering into a commercial transaction with you under which you sell us a part of your prospective benefit from the case and incur certain obligations to us.
- Our relationship will take on the characteristics of a joint venture in addition to that of client and independent adviser. We will be entitled to control aspects of the decision-making process and to require you to provide information and assistance.

- Many cases are not suitable for contingency fees and our own risk assessment procedures will lead us to reject them.

- We will not undertake a case on a conditional fee basis simply to retain a client's business or to maintain a relationship.

- Whilst sophisticated risk sharing or conditional fee arrangements may seem superficially attractive, you may be best served, in many cases, by agreeing a fee structure under which you are confident that you retain control and pay for independent advice.

- The introduction of "Damages Based Agreements" is only recent. They are subject to considerable uncertainty. The circumstances in which it would be appropriate to consider such an arrangement are likely at present to be rare.

The initial stages of a case

In the absence of any specific arrangement, we shall work on the basis of time charges as outlined in our terms of business and retainer letter. This is the least complex option and may well be the best option.

Alternative funding arrangements

It may be possible for cases to be broken down into project components. We can then consider fixed or capped fee arrangements for particular milestones or activities. Any such arrangements will require specific discussion.

APPENDIX B | Disclosure Obligations

The nature of disclosure

"Disclosure" is the process which ensures that the Court is able to consider all relevant documentary evidence in order to make a decision. It ensures that the Court is not restricted to that material which a particular party would like it to read.

The process aims to ensure that the best informed decision is made by the Court. It is part of a litigant's duty to the Court to ensure that all documents are made available. Lawyers owe independent duties to the court to ensure that disclosure is carried out properly.

There is the possibility of sanctions and adverse consequences if disclosure is not carried out properly.

Advice on dealing with documents

We stress that there is a duty on litigants and prospective litigants to ensure that any possibly relevant documents are preserved for this purpose.

Normal disposal procedures and documents retention policies should be reviewed to ensure that documents which may become relevant are not destroyed.

Further, you should be careful to avoid:

- creating new documents
- amending or annotating existing documents
- receiving documents from third parties

that may touch upon the issues in the dispute without considered advice.

The meaning of "document"

This means anything in which information of any description is recorded. It thus goes beyond paper records and it covers all means of permanent recording: in particular mechanical and electronic. It thus covers computer memory, disks, tapes and all electronic documents and communications, word processed documents and electronic databases, and in particular emails: including emails stored in the directories and disks of all relevant personnel. It also includes all forms of instant messaging, text messaging and social networking accounts to which you have access. It covers electronic

documents which may still be stored on servers and back up systems even though they have been 'deleted'. Additional information stored and associated with electronic documents, known as "metadata", is also covered by the definition. Metadata may, for example, comprise details of who has accessed or edited a document and when, or, in an email, the author's name, and details of when and to whom it was sent.

What documents should be disclosed

Recent rule changes mean that this is tightly controlled by the court.

The first part of the process involves preparing to tell the court, before the first case management conference, what documents exist and are relevant.

A formal report (a "disclosure report") must be lodged not less than 14 days before the first case management conference which describes the existence and location of possibly relevant documents. It must also estimate the costs which might be involved in giving what is called "standard disclosure" (see below). It must propose the type of disclosure order sought (there is a "menu" ranging from "no disclosure" to "standard disclosure" and possibly even more onerous requirements.

The parties must also discuss the issues which arise in relation to the disclosure of electronic documents and complete what is called an "Electronic Disclosure Questionnaire".

Not less than 7 days before the first case management conference, the parties must, at a meeting or by telephone, seek to agree a proposal for disclosure which is reasonable and proportionate.

The process of disclosure: standard disclosure

"Standard Disclosure" under Rule 31.6 requires you to search for and disclose not only the documents on which you rely to establish your case, but also any documents which either:

- adversely affect your case;
- adversely affect another party's case; or
- support another party's case.

Searching for documents

You are required to make a "reasonable" search for documents. The extent of the search which must be made will depend upon the circumstances of the case. You need to take into account: the number of documents involved; the nature and complexity of the proceedings; the ease and expense of retrieval of any particular documents; and the significance of any document which is likely to be located during the search.

The process requires you to take into account what is known as the "overriding principle of proportionality" - i.e. steps must be taken which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party.

The court requires co-operation and early discussion between the parties to assist in the efficient management of the process and to ensure that the best use is made of available technology. The parties are required in particular to discuss the scope of the search and the use of agreed keyword searches and software tools.

Carrying out steps before such discussion or before the approval of the court to the steps to be taken is not advisable. In cases involving voluminous electronic documents or the

need for detailed forensic searches of electronic media we may recommend the use of external agents with expertise in the retrieval and management of electronic data to assist us in the required discussions with other parties and to retrieve and manage electronic documentation and to control costs.

Copies of documents

You do not need to disclose all copies of a document save that any copies which contain modifications, obliterations, or other markings or features which may have a bearing on either party's case should be treated as separate documents. Your electronic storage media may retain copies of earlier versions of documents or documents bearing alterations using track changes or otherwise which should be treated as separate documents.

Continuing duty during proceedings

The duty of disclosure continues until the proceedings are concluded and if anything comes to your notice at any time during the proceedings you must immediately notify the other party.

Withholding disclosure or inspection

We will advise you of your rights to withhold disclosure, the most common ground being that the document relates to legal advice you have been given ("privilege").

Consequences of failure to disclose documents

This may mean you cannot rely on a document that you have failed to disclose, unless the Court gives permission.

Further, failure to disclose a relevant document may lead to a costs sanction and may also undermine the credibility of your witnesses.

Subsequent use of disclosed documents

In principle, you cannot use another party's document for any purpose other than within the proceedings in which it is disclosed.

The disclosure statement

You will be required to sign a "disclosure statement" certifying the extent of your search for documentation. The disclosure statement currently required by the court is set out below for your information:

Text of disclosure statement

Note

- The rules relating to standard disclosure are contained in Part 31 of the Civil Procedure Rules.
- Documents to be included under standard disclosure are contained in Rule 31.6
- A document has or will have been in your control if you have or have had possession, or a right of possession, of it or a right to inspect or take copies of it.

I, the above named claimant [or defendant] [if party making disclosure is a company, firm or other organisation identify here who the person making the disclosure statement is and why he is the appropriate person to make it] state that I have carried out a reasonable and proportionate search to locate all the documents which I am required to disclose under the order made by the court on
[ ] day of [ ]. I did not search:

1. for documents predating...,
2. for documents located elsewhere than ...,
3. for documents in categories other than ...,
4. for electronic documents
   I carried out a search for electronic documents contained on or created by the following:
   [list what was searched and extent of [search]

I did not search for the following:

1. documents created before...,
2. documents contained on or created by the Claimant's/Defendant's PCs/portable data storage media/databases/servers/back-up tapes/off-sitestorage/mobile phones/laptops/notebooks/handheld devices/PDA devices (delete as appropriate),
3. documents contained on or created by the Claimant's/Defendant's mail files/document files/calendar files/spread sheet files/graphic and presentation files/web-based applications (delete as appropriate),
4. documents other than by reference to the following keyword(s)/concepts... (delete if your search was not confined to specific keywords or concepts).

I certify that I understand the duty of disclosure and to the best of my knowledge I have carried out that duty. I certify that the list above is a complete list of all documents which are or have been in my control and which I am obliged under the said order to disclose.

May 2015

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