Wigley & Company

BARRISTERS and SOLICITORS

NON-LITIGATORS WORKING WITH AND CONTROLLING LITIGATORS

Presentation to Public Sector Lawyers

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We deal with civil litigation such as damages claims and judicial review, from the perspective of a non-specialist dealing with litigation lawyers. We touch on:

- What to watch out for.
- How best to work in with and control the litigators.
- How to reduce costs.
- How to achieve better outcomes.
- Discovery.

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1. Introduction

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2. The Real Purpose of Litigation

2.1 A great majority of disputes don't end up in Court or arbitration because they don't go anywhere or are sorted out beforehand. The vast majority of cases where proceedings are issued, end up settling anyway. Only a tiny percentage go to trial. However, many don't settle until well into the procedure.

2.2 While litigators know of the likelihood of settlement, as a breed they often seem to work on the basis that their job is to go to trial. But the practical reality of their work is that the ultimate outcome in the vast majority of cases is settlement and thus settlement should be the main driver for the approach. Sometimes of course it is necessary to take a case to Court on a point of principle, because there is some sort of obligation (such as a Crown obligation) to go to Court, or the organisation wants to send out a message that it's not a soft target. Despite what many think at the start of a case, those situations are extremely rare in the commercial sector and relatively rare even in the public sector. In the public sector, even where there are points of principle involved, it is often possible to achieve some sort of lateral solution which avoids the need to go to trial. This can often be done, while meeting appropriate public sector obligations.

2.3 So the practical reality is that the real purpose of most litigation is to settle rather than go to trial. This should be at the forefront of any decision taken during the process. That's not to say that the litigation route has no purpose. It may be the only way to force the settlement (for example where the litigator on the other side is thinking only trial not settlement (a very common situation)). It may also be the only way to hone the issues so that the parties understand what's going on so that there is a basis on which to settle. Lawyers instructing litigators can help to make sure that realities are kept to the forefront.

3. Settlement

3.1 Trials are often unpleasant, messy and, even with the best judges, can have unpredictable outcomes. This is one reason why running a case as a point of principle is almost always wrong, unless there are special reasons to do so, such as establishing a precedent (and even that last point is rarely a good reason to go to trial). Parties that want to go to Court to make a point against the other party should usually be strongly counselled against that, given the reality that the vast majority of cases settle (and settlements almost always do not end up making the point of principle against the other party). Even if the parties go to trial, there is a likelihood of not getting the point of principle made in the judgment, or the precedent established (the Courts usually end up

ducking away from making those sort of points as they can achieve the outcome they seek in a different way).

3.2 One of the problems is that it is often difficult to think about what it's like down the track at trial. It's very helpful to try and do so, to stand in the shoes of someone 24 hours out from trial, and to try and face the reality early on before cost and time is incurred. It's too easy to be fully aware of the strengths of the other side's case. It's amazing how an imminent trial can "*focus the mind*", focus on the weaknesses of the case, lead to jitterbugs (for lawyers and clients alike), and drive the settlement (that's one of the reasons why so many cases coming close to trial settle at the Court door). It's really helpful to try and short-circuit things by taking different approaches.

3.3 There is a wide array of options. Often there are lateral solutions which go beyond assessing how many dollars are paid along a linear line between what either party wants. Frequently, one party's needs can be met in ways which do not disadvantage the other. It just calls for a bit of thinking.

3.4 Mediation can be a powerful means of unlocking solutions at an earlier or later stage, particularly in the hands of a great mediator. The track history of mediations is very good, and the statistics show a high chance of resolution. The choice of mediator is important. Generally a true mediator (that is, someone who helps settlement between the parties in a facilitative manner) is the best. Sometimes a judicial type of mediation is the best approach (for example a retired Judge who might make an assessment and give a foretaste of possible outcomes at trial). Mediators in relative terms cost little and so even for small cases, paying for the best mediator can be justified.

3.5 A mediation can be used as a weapon to force a recalcitrant litigator from his or her bulldog approach of simply continuing to trial (essentially by going behind that lawyer's back and getting directly to his or her clients (using the skills of the mediator)).

3.6 The mediation process is also as capable of being unfair and of being manipulated, as any other dispute resolution process. For example large organisations (whether public or private sector) can and do benefit from (and maybe even manipulate) the dynamics as between the large player and a small (and maybe underfunded) litigant. In many ways this is unfair, but it reflects the inadequacies of any dispute resolution process.

3.7 There could be other options to consider as well, such as the appointment of an independent expert to do a quick fire and inexpensive resolution process (we deal in detail with this type of option in our paper at http://www.wigleylaw.com/TyingUpLooseEndsAndDisputeResolution.html).

4. What Type of Litigator is best?[1]

4.1 There is something of a trend toward litigators making personal attacks against each other, rather than focusing on the issues. For this and other reasons, civil litigation can develop into something of a paper war, as correspondence is exchanged, leading to interlocutory applications and so on. This paper war also reflects the reality of the power of documents as evidence, ahead of oral evidence (a very important point in assessing the strength of any case: written contemporaneous material is generally far more powerful than oral evidence).

4.2 This paper war approach is unlikely to stop (and indeed it is wise to document things in disputes right from the start in a careful way).

4.3 My own view is that it is best not to instruct a "*bulldog*" type of litigator in any situation. The best are those that take all the points on the real issues, that focus on what's important, that take into account the realities of litigation as outlined above, and deal with other parties professionally (that is fighting firmly, but on the issues, and dealing professionally and courteously). Those types of litigators are also more likely to settle earlier if appropriate, and without needing the intervention of a mediator. Yes, bulldogs can succeed by wearing down other parties etc, but they generally don't get as good a result in most cases, and the judges often don't respect them.

4.4 Obviously it is generally desirable to instruct litigators who have a particular knowledge of the subject matter, although great litigators can work in with someone with specialist knowledge and pick up the points quickly.

5. What to do when the Dispute Arises?

5.1 Frequently, the documents and correspondence created at an early stage in a dispute involve making judgment calls. Early letters, emails etc to the other party often commit the sender to a particular line. A simple example is the choice between affirming or cancelling a contract. Therefore it is generally desirable to involve the litigator sooner than later (although of course there needs to be a cost/benefit analysis).

5.2 So the first step is to take real care with the correspondence with other parties.

5.3 Related is the need to tie down communications within the organisation and externally from the organisation (this may also involve bringing in the organisation's comms people). The protection of privilege between solicitor and client should be used (only legitimately of course). In broad terms, other documents and information flows are only protected by privilege where their dominant purpose relates to the proceedings and legal advice. This over-simplifies things, but highlights that it is very easy for documents to be created

[1] Crown litigation of course needs to be referred to Crown Law (see http://www.dpmc.govt.nz/cabinet/manual/appendix3.html).

which do not attract privilege. So real care is needed. Depending on the circumstances, there is also the prospect of disclosure under the Official Information Act and the Privacy Act.

5.4 The solicitor should make sure that documents are not destroyed as this can be bad news for the party when things hit the Courts (and also bad news for the solicitor who probably has obligations to try and make sure documents aren't destroyed). It's wise also to tell people to close down on communications (it's amazing how often information leaks out, and anyway, strategically there is a "divide and rule" risk if there are multiple lines of communication).

5.5 Many non-specialist lawyers simply hand the case over to the litigator to deal with. That is one option although of course it comes with its risks and cost. Generally, however, cost can be minimized with input from the non-litigator, better outcomes achieved, and any way the non-litigator may want to be involved.

5.6 What to do to minimise costs? Because civil litigation is generally document-intensive, corralling the documents is usually an important first step which the litigator would do, but it of course can be done by the non-litigator. Often, when copies of the documents are put in chronological order, the circumstances and the merits of the case become relatively clear. So this is generally a very useful first step and will certainly minimise cost, as will the non-litigator writing up the circumstances (again generally in chronological order) with initial views.

5.7 Depending on the complexity and the stage of the process, writing up a chronology is useful as well. Sometimes even doing a draft statement from potential witnesses helps although that's almost always premature at this stage. The point is that each of these steps is ultimately what the litigator will do, this makes a start and thereby minimises costs, and helps focus on the issues right from the outset. For example that chronological bundle of documents will be supplemented by the addition in chronological order of documents obtained on discovery from the other parties.

6. Discovery

6.1 The lawyer instructing the litigator is likely to be involved in this process. There are new Rules in place from 1 November 2004 (see Rules 293 onwards in the High Court Rules). Discovery of course requires an affidavit from a representative of the litigant. Solicitors acting for the parties and solicitors acting for litigants have always had a high obligation to do thorough discovery. Regrettably, that obligation is all too frequently not met by the litigant and the solicitor. And the control of this process by the Courts tends to be relatively light, even in those cases where a breach is detected. That is so despite the fact that an affidavit has to be done and despite the fact that there is a high level of obligation on the litigant and the solicitor.

6.2 The new Rules make the obligation on solicitors even more explicit (Rule 296) and also now require the litigant to set out more explicitly the steps taken to fulfill the discovery obligations (Rule 297). The Rules give more flexibility on the range of discovery required, particularly in quicker and less complex cases, to reflect pragmatism. Documents to be discovered are those that "relate to a matter in question in the proceeding".

6.3 Material to be discovered includes electronic records. Particularly in a large organisation, where many people have been involved, and/or where the case is complex, that can be quite a big and difficult exercise. The obligation to check electronic records widely enough is frequently breached. It is necessary to check not only on people's PCs but also in archived records (on current technology this can sometimes be quite difficult), the organisation's server, etc. The electronic document management systems that many organisations are installing will be helpful.

7. Conclusion

7.1 Non-litigators can help with focusing the approach of litigators, assisting them (thereby minimising cost), and help achieve earlier resolution short of going to trial.

7.2 In the vast majority of cases it's best to be pragmatic and seek resolution rather than going on to trial which so often has unsatisfactory outcomes (and doesn't achieve the points of principle or precedent which the party seeks to establish).

7.3 Such a pragmatic approach calls (where for example a dollar claim is involved) for a dispassionate analysis of what's in it for the party going forwards. Often a formulaic approach can help assess the range within which to settle, based on (using a claimant as an example):

7.3.1 the amount realistically recoverable at trial;

7.3.2 costs to be incurred by the party **from the point at which the assessment is being made** (that's important, because the costs incurred thus far are "*spilt milk*"; often this point is overlooked);

7.3.3 percentage chances of success;

7.3.4 costs to be awarded in favour if the party wins and against if the party loses.

7.4 If the other party won't settle within an appropriate range, it may still be worth settling anyway: trials are generally not a good outcome and it's worth compromising more. I'm not suggesting being a soft touch! Just injecting reality into the process.

Wigley & Company is a specialist technology (including IT and telecommunications), procurement and marketing law firm founded 11 years ago. With broad experience in acting for both vendors and purchasers, Wigley & Company understands the issues on "both sides of the fence", and so assists its clients in achieving win-win outcomes.

While the firm acts extensively in the commercial sector, it also has a large public sector agency client base, and understands the unique needs of the public sector. While mostly we work for large organisations, we also act for SMEs.

With a strong combination of commercial, legal, technical and strategic smarts, Wigley & Company provides genuinely innovative and pragmatic solutions.

The firm is actively involved in professional organisations (for example, Michael is President of the Technology Law Society and Stuart van Rij its secretary).

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