DISCOVERY OF DOCUMENTS FOR LITIGATION - A BROAD OVERVIEW - *(John Carr-Hartley)*

Although litigation should be a last resort, it is sometimes inevitable. Whether you are the Claimant or the Defendant, in the event that you need to resort to litigation, there are some basic things that can help you prepare for this.

It is imperative that your attorney is provided with a comprehensive set of documents relevant to the matter before your attorney prepares your claim or defence, as the case may be. Your attorney will need to read through the documents in order to get a full understanding of your claim or defence, depending on whether you are the Plaintiff of Defendant. In the event that you do not provide your attorney with a comprehensive set of documents at the outset there is a significant risk that your claim or defence may not be pleaded correctly. This may lead to amendments becoming necessary, delays or even the claim or defence needing to be withdrawn in its entirety.

It regularly happens that a witness for a party is asked in cross examination whether there is a document to substantiate something said in his evidence in chief and the answer, most often, is yes. When asked where the document is, the witness will almost inevitably respond that it is at the office or at home or that some other person has the document. This causes the attorney of the witness in question to cringe, knowing that there is a document which supports his client's case, and which has not been given to the attorney.

If a document has not been "discovered" by a party, it cannot be used by the party who ought to have discovered the document at trial. For this reason, possibly the most important aspect of preparation for litigation is the extraction, sorting and collating of documentary evidence. Almost every litigation matter requires the production of documentary evidence and its importance cannot be overstated.

A simple example which demonstrates the above is a claim for "goods sold and delivered". In a claim for goods sold and delivered, the Plaintiff will have to prove (i) the agreement in terms of which the goods were sold, (ii) that the goods were sold, (iii) the price, (iv) the delivery of the goods in question and (v) the purchaser of the goods has failed to pay. This simple cause of action requires the following documents to substantiate the claim, namely (i) a copy of the agreement, (ii) a copy of the invoices, (iii) a copy of the delivery notes, and (iv) a copy of a current statement reflecting the amount owed. Most times, however, when an attorney is instructed on such a matter, the attorney is only given copies of the invoices. If, for example, the delivery notes are not produced, delivery of the goods is not proved, and the action is likely to fail.

A cause of action is like a chain. It comprises a number of links which must be proved. If one of the links is missing the chain is broken and the claim (or defence) fails. It is therefore vitally important that all documents demonstrating the entire chain are produced as evidence in Court. Under the Rules of Court, each party is required to make "Discovery" of documents. The process of Discovery is a process in terms of which each party to litigation is required to depose to an Affidavit listing each of the documents in its possession, custody or power and which are relevant to any of the issues in dispute between the parties.

Discovery of documents requires that all documents which are in the possession, custody or power of the party be listed in the Discovery Affidavit. Documents which are in the possession or custody of a party is self-explanatory, however, the discovery process also requires documents that are “in the power” of one of the parties must also be discovered. These are usually documents which are in the possession of an agent of the party concerned. The basic rule is that, if a party exercises some form of control over the documents in question, the documents must be discovered if they are relevant to any of the issues in dispute.

Furthermore, the process of Discovery requires both parties to list all of the documents in its possession, custody or power and relating to any of the issues in dispute. This means that not only documents in support of a party’s case or defence, as the case may be, must be discovered, even documents adverse to a party’s interest must be listed in the Discovery Affidavit. It does not help anyone to hide documents which are averse to your interest. If they are discovered and provided to your attorney, your attorney can obtain an explanation for the document from the witness and that version can then be put into evidence. However, in the event that a document adverse to your interest is hidden from your attorney or the attorney for the other party, the existence of the document is almost inevitably revealed in cross examination or by another witness and a poor impression is almost always created in the mind of the Judge.

Never neglect the importance of giving all documents. The general rule is: rather too many than too few.