



# Should I go to Court?

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## ***SHOULD I GO TO COURT?***

Lawsuits involve money, lawyers, emotional highs, and sometimes-disappointing outcomes.

There are many factors that have to be considered when deciding whether or not to commence legal proceedings (or litigation as it is more generally called ).

### ***What do I hope to achieve?***

Get clear from the outset what you hope to achieve.

Make sure the legal system can give you what you want to achieve.

Assess the commercial reason behind the proceedings.

Outcomes are based on legal entitlements not your wishes.

Consider both long and short term goals.

Will important relationships suffer from a court case?

### ***Know your enemy***

What does your opponent want?

Do they want to fight the case?

Do they have the money and time to do so?

### ***Know yourself***

What do you want?

Do you want to fight?

Do you have the money and time to do so?

### ***Am I going to win?***

Asses your case.

The best way to deal with the dispute will vary depending on the strength (or otherwise) of your position.

In litigation, there are no guarantees

Neither the parties nor their lawyers can be certain of what will happen in court.

Sometimes, despite the best preparation of the case, you may lose.

Litigation is a little like war and a little like gambling. There is risk. You cannot be sure of the outcome.

Like war, litigation is a fight and often destructive, wasteful and expensive.

Like gambling, you don't start expecting to lose, but if you cannot afford to lose then maybe you should not play the game.

### ***How good is your Evidence?***

The result of a lawsuit is not necessarily determined by what is right, but rather by what can be proven.

Many cases are won and lost on what is in the evidence.

Where the parties give different versions of events, often the result will turn on the supporting evidence that each side have kept.

Detailed records and good paperwork make the case clearer than relying on personal recollections.

Is there a relevant agreement? Is it in writing? Does it cover this dispute?

Consider how a judge would view correspondence before you send it.

### ***It is a matter of principle!***

Not everything is about money.

Solicitors are often told: "It is a matter of principle!".

Sometimes from the outside the "matters of principle" look like matters of revenge or ego.

Think with your head as well as your heart.

Court proceedings are as much trouble and as much expense whether they are for money or for principle.

Whether for money or for principle, can you justify and afford the cost of the proceedings?

Will the costs exceed the benefit?

Will the court case fight for the principle that motivates you or will the proceedings get caught up in other issues.

Is a court case the best way to fight for a matter of principle?

### ***Review progress in stages***

There is no formula, science or standard rule for negotiations on the settlement of a dispute but there are typical patterns.

The typical opportunities for settlement are:

- before the lawyers get involved
- after the lawyers have exchanged initial letters,
- after the court documents have been lodged
- at mediation
- pre-trial
- by court decision

As each stage passes, the parties tend to need to complete the move through to the next stage before there is another opportunity to settle.

To some extent, if you get on the litigation train, there are a number of stations at which you can get off, if parties are able to so resolve. If the parties are unable to so resolve, the train might need to go all the way to the end of the line. There is usually uncertainty of destination and the time, cost and heartache to get there. The uncertainty reduces and the cost increases as the matter progresses. Some uncertainty often remains right until the end of the line.

Review and consider at each stage the strategic issues. At each stage, take account of the extra expense likely to be required if that opportunity to settle is not taken. As you progress through each stage, review the cost incurred in the dispute, make fresh estimates of the likely costs ahead and reassess the cost benefit analysis of alternatives to resolve the dispute.

### ***Who pays the Costs?***

The costs of a court case include the costs of the various parties in the action and the costs of the court itself.

Court cases can be expensive.

Financial costs are hard to estimate. The complexity of the case and the amount of money at stake, have a direct relationship to the final cost of the proceedings.

The personalities involved may add to costs. The costs of matrimonial proceedings are sometimes dramatically out of proportion to the complexity and amount involved because the issues are so personal.

Typically the losing side is ordered to pay the winning side some costs. This discourages court cases, particularly by a party with a weak case.

Usually, the winning party is not able to recover from the losing party the full amount of their own solicitor's costs, and has to pay the shortfall out of their own pocket.

Sometimes the costs exceed the monetary worth of a case. A party may even win the case, but lose more in court costs than the amount in dispute.

### ***How much does a case cost?***

The court charges different fees for different types of cases and different stages. These vary but are usually in the hundreds of dollars rather than thousands.

The cost of the lawyers is usually a large part of the cost of the case.

Usually those costs will be time based. Your lawyer will give you details with their standard retainer information.

Because cases vary so much it is only possible to estimate likely costs in very broad ranges in a typical case.

Costs keep rising the longer the matter continues.

It is useful to break down likely costs into the various stages and commit and review future commitment in stages.

#### ***Pre Court Proceedings***

If you reach quick agreement before court proceedings are started, a typical lawyers bill for each party would be between \$1000 and \$4,000. A settlement at this stage is more often than not calculated as 'all in as to cost', that is an all inclusive figure on the basis each party pays their own expenses.

#### ***Court Proceedings- Pre Mediation***

Court proceedings may need to be started to force serious negotiation

Typically the first stage of the court proceedings would be for one party to issue formal court documents summarising their claim. The other party then responds with a formal document summarising their answer.

The parties may then need to lodge more details of the dispute with the court.

The further costs to you for this stage, in addition to the figures already mentioned are likely to be \$2,000 to \$5,000 if the matter proceeds typically.

#### ***Court Proceedings- Mediation***

The next stage would often be a formal mediation conference.

The costs to you for this stage, in addition to the figures already mentioned, are likely to be \$1,000 to \$6,000 if the mediation proceeds smoothly.

### ***Court Proceedings- Hearing***

Most matters are resolved without a court hearing but if a full court hearing is required, your costs, in addition to those already mentioned, are likely to be more than \$5,000 and could be measured in the tens of thousands of dollars for an extended hearing.

### ***Do I need a lawyer? Can I do it myself?***

Ordinarily, if the other party has a specialist advocate representing them, you will be disadvantaged by your lack of experience and lack of expertise if you are not legally represented.

Regardless of experience and expertise, having an independent detached view can be critical to making the best case and making the best decisions. Lawyers themselves have a truism “the lawyer that acts for himself has a fool for a client”.

Parties to court proceedings are entitled, ordinarily, to be legally represented but are not bound to be legally represented.

The Courts protect the litigation process and litigants by tight regulation over who can represent parties in Court.

Ordinarily only legal practitioners are entitled to charge for appearing in Courts and tribunals as advocates. Some tribunals have special rules so they are more flexible, for instance planning bodies, sports and employment tribunals and tribunals dealing with low value claims.

For substantial matters, ordinarily, the cost of representation is a necessary expense.

### ***What about low value matters?***

Often where the value of the matter does not justify the cost of lawyers, parties need to consider whether they can go to Court without the protection of an advocate or representative.

The Magistrates Court has special rules to enable and facilitate dealing with what they call Minor Civil Claims quickly and cheaply.

A Minor Civil Claim is:

- Any dispute claiming \$5000 or less.
- A claim arising out of a Residential Tenancy or Lease Agreement.
- A claim to access neighbouring land.

Usually neither party may have a lawyer represent them in court for a Minor Civil Claim, unless the other side agrees.

See the website, [www.magistratescourt.tas.gov.au](http://www.magistratescourt.tas.gov.au) for details of fees payable to the Court, the abbreviated procedure and the forms that are required to be used. Also on that website is some advice to parties acting for themselves to conduct minor matters.

### ***Are there other Costs?***

Take account of the time and energy and the “emotional cost” taken by court proceedings.

Court hearings and giving evidence are stressful.

Do you want to fight?

Do you want the stress?

Litigation extracts an emotional toll.

Litigation is by its very nature adversarial.

The parties may give different versions of the same facts and the case may turn upon who is believed.

It is hard not to take personally attacks upon your credibility and your word.

Legal proceedings exact a time commitment. Self employed people have the double burden of time away from productive work and the cost of the proceedings.

### ***Will my reputation be damaged?***

Court proceedings may damage your reputation.

Sometimes issues you would prefer to remain private are made public by court proceedings.

### ***Alternatives to Court***

Most court proceedings get resolved by agreement before the actual hearing.

Consider exploring alternative dispute management methods such as mediation, arbitration, expert determination and neutral evaluation.

#### ***What is Meditation?***

Mediation is a voluntary process in which a mediator independent of the disputants assists their negotiation to find their own solution to the dispute.

The participants meet in a voluntary and confidential conference to cooperate in good faith to try and resolve the dispute between them.



The underlying philosophy of mediation is that the parties can be assisted to find their own agreement. That agreement may not necessarily confirm with legal precedent, or with community standards but is one which resolves the problem to the satisfaction of the parties.

Mediation is a more 'user-friendly' than litigation. It has a proven success rate. It is informal and, if successful, provides a cheaper and quicker means of settling a dispute. It is flexible.

Mediation can help the relationship between parties to survive the dispute because it allows them to find their own solutions.

In the absence of a complete agreement, mediation can clarify and narrow disputed issues to reduce the time and expense of litigation.

Mediation is increasingly a required step before court proceedings can be dealt with by a judge. Often it is worthwhile before court proceedings start.

### *What is Arbitration?*

Arbitration grew up due to the need to have a forum for resolving international trade disputes, for example shipping and carriage of goods. It is only usually relevant in high value cases, as it can be just as expensive as a court action.

Arbitration is similar to court proceedings. The final decision, known as an award, is final and binding, and enforceable through the courts. Arbitration has the advantage that it is consensual, so can only be used with the agreement of all parties and it's private and confidential. It is ideal for the kind of commercial dispute that you don't want in the public domain.

Arbitration agreements can be found in all sorts of business arenas.

### *What is Expert Determination?*

Expert Determination is a confidential and binding process which is agreed by the parties to the dispute, either in the original contract documentation, or in a subsequent agreement. An appointed expert will reach a decision which will be binding on the parties.

It has the advantage that it is confidential, carried out in private, and so can protect commercial confidences and sensitive subjects. It is also fast and far less formal compared to other dispute resolution processes, and is ideal for multi party disputes.

Expert Determination is most suitable for technical disputes where the help of an expert is required. For example the expert may be an engineer, IT consultant, or valuer of certain types of property or goods.

As far as costs are concerned, it is usual for the parties to agree that they will meet their own costs and share the fees of the expert. Unless the parties have agreed in their terms of reference, the expert cannot award costs against another party.

### *What is Neutral Evaluation?*

Neutral Evaluation is non-binding assessment of the dispute from an independent expert.

A strong indicator of the likely outcome of a matter going to trial, from someone who has legal expertise and experience, such as a judge or a QC, can be very useful when deciding on the best course of action.

### *What is your Plan?*

Plan your campaign. Think strategically.

- What do I want?
- How can I get it?
- What is the best and worst case outcomes?
- What are the chances and the risks?
- What tactics would be best to achieve the outcome you want?
- What methods do you want to use?

Once you form a view about where you are heading and how you are going to get there, you may need to review the plan but it is critical to set a strategic direction and follow it.

### *Should you Sue?*

Disadvantages of court resolution include:

- The cost
- The escalation of the dispute
- The court proceeding place the conduct of the matter in the court and to that extent, the parties themselves loose some control of the fate of the matter.

The principal advantage of referring the matter to court is that it sets up a structured process to force a mater forward to resolution with deadlines.

Sometimes the other party is so reluctant or unreasonable, court intervention is required to force a fair resolution or at least negotiation.

There are times to sue. There are times to cut a deal and run. There are times when you should just let the matter drop.

Kenny Rogers sang:

“Sometimes you have to fight, if you’re a man” but he also sang:

“You’ve got to know when to hold ‘em , know when to fold ‘em.”