

Pre-Action Disclosure

In *Dellner Woodville Ltd v Blackman* (13 January 2012), the High Court held that pre-action disclosure orders are only to be granted in exceptional circumstances. The claimant must identify the legal basis for its claim and it is not for the prospective defendant to assist the claimant by providing evidence that the claimant would not have otherwise discovered.

What Is Pre-Action Disclosure?

In certain circumstances, a party can apply to the court for an order requiring the disclosure of documents relevant to a potential claim **before** proceedings have started.

In the employment context a successful application for pre-action disclosure can be of considerable assistance to an employer who suspects wrongdoing on the part of an employee or ex-employee — such as breaches of restrictive covenants or misuse of confidential information — but may not have sufficient actual evidence upon which to base actual litigation without risk of being struck out for lack of evidence with the associated costs risks.

Whilst prospective defendants may be concerned that pre-action disclosure allows potential claimants to go on a fishing expedition, there is no automatic right to an order for pre-action disclosure and, as the Blackman case demonstrates, the application of the rules governing the granting of such orders limits their availability.

When Will Pre-Action Disclosure Be Granted?

An application will only be granted if the following jurisdictional tests set out in the Civil Procedure Rules ("CPR") Part 31.16 are satisfied:

- The parties against whom pre-action disclosure is sought must be **likely** to become a party to proceedings and the applicant for some disclosure must also be likely to be a party to those proceedings. This has been interpreted to mean that there must be more than a faint possibility that litigation will ensue between the parties. There must be a real prospect, if not a certainty or likelihood, that there will be proceedings between the parties.
- The documents must fall within the ambit of **standard disclosure**. Standard disclosure requires a party to disclose only the documents which he intends to rely on to support his case or which adversely affect his case, or which support or adversely affect another party's case. The application must therefore be focused to the issues relevant to the potential claim.
- Disclosure of documents before proceedings have started must be **desirable** in order to dispose fairly of anticipated proceedings, assist the parties in resolving the dispute without litigation, or to save costs.

Even if the jurisdictional tests are satisfied, the court has the discretion as to whether or not to grant the order. Important considerations include the nature of the documents requested and the opportunity which the applicant for pre-action disclosure has to make his case without such disclosure.

The Blackman Case

Mr Blackman was employed as Managing Director of Dellner Woodville Ltd (“DW”). In May 2011, he resigned on three month’s notice to expire in August 2011, during which he was placed on garden leave. Mr Blackman was subsequently employed by a competitor of DW.

In November 2011, DW discovered that Mr Blackman had copied information from his work computer to a personal computer during his notice period. DW applied to the court for an order that Mr Blackman deliver up its property and not destroy or use any of its confidential information.

As part of the requested order, DW applied for pre-action disclosure requiring Mr Blackman to explain the use he had made of the information copied from DW’s files during his employment. DW submitted that this would assist the future progress of the litigation.

The Decision

The High Court refused to order pre-action disclosure. There was no evidence that Mr Blackman had made any use whatsoever of the information he had obtained. The court therefore decided that it was inappropriate to require Mr Blackman to provide DW with evidence of wrongdoing which it had not already obtained.

The court reiterated that jurisdiction to grant such an order requires special circumstances and is not

to be exercised as a matter of routine. In this case, there were no special circumstances justifying the order sought. It was for DW to identify the legal foundation for its claim and not for Mr Blackman to assist by providing evidence that DW would not otherwise have found.

Comment

Pre-action disclosure can be a useful tactic for an employer looking to establish whether it has grounds actually to take action against a former employee for breach of duty or otherwise where the employer suggests there is a claim but does not necessarily have significant evidence to confidently commence proceedings. Such disclosure can facilitate the gathering of important evidence, as well as provide an opportunity to fully assess the merits of making a claim before investing time and money in doing so. The Blackman case does, however, demonstrate that pre-active disclosure may not be easy to obtain.



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