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# READY, SET, PLEAD—BEST PRACTICE GUIDE FOR PRE-ACTION DISCLOSURE APPLICATIONS (WANG V OTAIBI)

10/11/2021

**Dispute Resolution analysis: This Chancery Court judgment provides a helpful audit of the current test for pre-action disclosure, following recent decisions elaborating on its individual elements. Mr Ashley Greenbank, sitting as a deputy judge of the High Court, discusses in detail the two-stage test and its application to the facts of this case, which concerned anticipated claims alleging dishonesty against professional advisors, as well as offering a range of practical insights and best practice pointers for disputes practitioners. Written by Natalie Todd, partner and Anastasia Tropsha, associate at PCB Byrne LLP.**

*Wang and others v Otaibi and others* [2021] EWHC 2896 (Ch)

**What are the practical implications of this case?**

The judge reviewed recent case law and helpfully summarised the test for pre-action disclosure in a two-stage approach:

- the court must first determine whether the jurisdictional thresholds set out in CPR 31.16(3)(a)–(d) are met, these merely being pre-conditions for the exercise of discretion (as summarised in *Assetco plc v Grant Thornton LLP* [2013] EWHC 1215 (Comm) at para [17] and recited in *Carillion plc (in liquidation) v KPMG LLP* [2020] EWHC 1416 (Comm)):
    - the respondent and applicant must both be likely to be parties to subsequent proceedings. It is not however necessary to show in addition that the initiation of such proceedings is itself likely (*Black v Sumitomo Corp* [2001] EWCA Civ 1819, [2003] 3 All ER 643 at paras [71]–[72])
    - the documents sought must fall within the scope of the standard disclosure which the respondent would have to give in the anticipated proceedings
    - at the time of the application, the issues must be sufficiently clear to enable this requirement to be properly addressed
    - disclosure before proceedings have started must be desirable to:
        - dispose fairly of the anticipated proceedings
        - assist the dispute to be resolved without proceedings, or
        - to save costs
    - important considerations are the nature of the loss, the clarity and identification of the issues raised, the nature of the documents requested, the relevance of any protocol or pre-action inquiries, and the opportunity which the complainant has to make his case without pre-action disclosure
    - the anticipated claim must have a real prospect of success, and
    - in the commercial context a pre-action disclosure order is unusual
- if so, the court must then consider whether, as a matter of discretion, an order for pre-action disclosure should be made (*Smith v Secretary of State for Energy and Climate Change* [2013] EWCA Civ 1585 at para [10]). Further guiding principles in that respect are:
    - any request for pre-action disclosure must be 'highly focussed' and confined to what is 'strictly necessary'

- a CPR 31.16 order is akin to a case management decision, and
- the court must also consider the overriding objective

**What was the background?**

The applicants, Mr Chia Hsing Wang and two companies controlled by him, which are incorporated in the Cayman Islands, applied for pre-action disclosure under CPR 31.16. The respondents are Mr Hussam Otaibi, Mr Mutaz Otaibi and Mr James Wilcox and various companies, which the applicants assert, are owned and/or controlled by one or more of them. The application for pre-action disclosure relates to possible claims which the applicants say they may bring against the respondents arising from the management of Mr Wang's financial and other affairs by the investment management and advisory business known as the 'Floreat group' in 2014–20. In 2014, Mr Wang engaged the Floreat group to provide Mr Wang with family office and investment advisory services. The respondents say that the services were of great benefit to the applicants and that substantial fees are due under the relevant agreements, which Mr Wang and the other applicants have failed to pay. Steps are now being taken to commence arbitration under those agreements.

The applicants argued that under those agreements and in related transactions, assets in their portfolio were invested in structures and arrangements that were designed primarily to benefit the principals of the Floreat group or to acquire assets (principally art and real estate) for the benefit or enjoyment of the Floreat principals. This wide-ranging pre-action disclosure application under section 33(2) of the Senior Courts Act 1981 and CPR 31.16 was intended to assist the applicants in pleading their intended claim more accurately.

**What did the court decide?**

The judge applied the two-stage approach and rejected the application as, in her view, this was not an appropriate case for the court to exercise its discretion.

As to jurisdiction, the first two thresholds were not met because the anticipated proceedings would fall within the scope of arbitration provisions in the relevant agreements and therefore the High Court had no jurisdiction to order pre-action disclosure. Although, if reformulated as breach of fiduciary duty, the claims may not fall within the arbitration provisions.

Although the anticipated claims are broad and the issues, which had been less clear in the application, were clarified in the skeleton argument to a sufficient extent, the classes and types of documents sought ought to have been more focused on the issues at hand and identified more precisely by the applicant. The last threshold was met as a matter of principle.

It is at the second stage of the test that the court found itself unable to grant the application. The claims including allegations of dishonesty must be specific and focused and pre-action disclosure applications cannot be used to find out what claims can be brought. These ought to be articulated in draft pleadings as at the time of application and not, as in this case, broadly described in witness evidence. The documents requested were not limited to those strictly necessary to advance the claim and went beyond those expected to be produced during standard disclosure. From a case management standpoint, this case was not an appropriate one for pre-action disclosure at this time, given the application in the judge's view was made prematurely, before all available investigations were completed.

**Case details**

- Court: Business List (ChD), Business and Property Courts of England and Wales, High Court of Justice
- Judge: Mr Ashley Greenbank (sitting as a deputy judge of the High Court)
- Date of judgment: 29 October 2021

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