GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: FEBRUARY 2020

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James Ross, Ruth Bala, Thomas Samuels and Lee Finch are all specialist consumer credit counsel at Gough Square Chambers. On a regular basis, they will share their views with Practical Law Financial Services subscribers on topical developments or key issues relating to consumer credit.

In the February 2020 column, Lee Finch considers pre-action disclosure requests under the Civil Procedure Rules (CPR) and the potential legal grounds on which to refuse them.

by *Lee Finch*, *Gough Square Chambers*

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PRE-ACTION DISCLOSURE REQUESTS

Introduction

It is becoming increasingly common for consumers, or at least their representatives, to seek the production of documents from financial service providers before beginning proceedings for, by way of example, a misselling claim. These requests are often framed as requests for pre-action disclosure, following which a formal application for such disclosure would be made. Firms often comply with such requests, but for firms who do not wish to comply (whether as a result of the volume of requests, their fishing nature or for some other reason), there are often good legal grounds for refusing to do so and tactical advantages to taking such an approach.

Pre-action disclosure applications

The legal test

Applications for pre-action disclosure are in the Civil Procedure Rules (CPR) under CPR 31.16. CPR 31.16(3) provides that a court may only order pre-action disclosure where:

- The respondent is likely to be a party to subsequent proceedings.
- The applicant is also likely to be a party to those proceedings.
- If proceedings were started, the documents sought would fall within the scope of standard disclosure.
- Pre-action disclosure is desirable to:
  - dispose fairly of the anticipated proceedings;
  - assist in resolving the dispute without proceedings; or
  - save costs.

The court must therefore adopt a two-stage approach. First it must determine if all four jurisdictional requirements set down in CPR 31.16(3)(a)-(d) (as listed above) are met, and then it must decide whether to exercise its discretion (*Smith v Secretary or State for Energy and Climate Change [2013] EWCA Civ 1585*).

Applicants can usually satisfy the first two requirements reasonably easily as the bar is set relatively low: the applicant or respondent is considered likely to be a party to subsequent proceedings where the applicant demonstrates that they may well be a party if subsequent proceedings are started. The applicant does not have to establish that subsequent proceedings are likely (although if they are unlikely a court will be more reluctant to exercise its discretion), and does not have to demonstrate that they have reasonable prospects or even a prima facie case in the potential proceedings. However, again, if there is no prospect of the applicant being able to bring a valid claim, the court would no doubt refuse to exercise its discretion to order disclosure.

The third requirement can present greater difficulties for applicants. To satisfy this limb and pass the jurisdictional threshold, the applicant must demonstrate that the documents sought will, on the balance of probabilities, be within the scope of standard disclosure should proceedings be brought. Further, courts will not accept attempts to obtain non-disclosable documents by calling for categories in which some documents will be disclosable (*Hutchinson 3G UK Ltd v O2 (UK) Ltd [2008] EWHC 55 (Comm)*), and the documents or classes of document sought should be carefully constrained and the application limited to what is strictly necessary (*Snowstar Shipping Co Ltd v Graig Shipping plc [2003] EWHC 1367 (Comm)*). In short, fishing expeditions will not be tolerated. This will provide a degree of reassurance to firms in receipt of widely drafted requests or applications that encompass non-disclosable but commercially sensitive documentation.

Turning to the fourth requirement and whether disclosure is desirable, it must be remembered that there is a jurisdictional hurdle which must be cleared before discretion is considered, even though judges on occasion find it difficult to delineate the two factors. In *Black v Sumitomo Corp [2001] EWCA Civ 1819*, Rix LJ emphasised this two-stage approach and stated:

> "... for jurisdictional purposes the court is only permitted to consider the granting of pre-action disclosure where there is a real prospect in principle of such an order being fair to the parties if litigation is commenced, or of assisting the parties to avoid litigation, or of saving costs in any event. If there is such a real prospect, then the court should go on to consider the question of discretion, which has to be considered on all the facts and not merely in principle but in detail".

The jurisdictional threshold on the fourth limb is a low one but should not be overlooked or readily conceded. For example, an order that satisfies the first three limbs may still fall foul of the jurisdictional threshold in the fourth one if the request is too wide. Likewise, something more than "refinement of the pleadings" is likely to be required to fall within the fourth limb, and where an applicant already has sufficient information to plead a case that could not be struck out under CPR 3.4(2)(a), this limb may not be met (*Attheraces Ltd v Ladbrokes Betting and Gaming Ltd [2017] EWHC 431 (Ch)*).

Even if the four jurisdictional limbs are met, the court may still refuse to exercise its discretion which is "not confined and will depend on all the facts of the case" (*Black v Sumitomo* (above)). However, it is noteworthy that courts have refused to exercise their discretion to order pre-action disclosure where:

- The parties had reached an entrenched position and the prospect of disclosure resolving the dispute without proceedings was negligible (*Ittihadleh v Metclafe [2016] EWHC 376 (Ch)*). This can often be the case when a financial services firm is faced with a large number of alleged misselling complaints being driven by a claims management company (CMC) or claimant firm of solicitors.

- The applicant already possessed sufficient material to plead a claim (*First Gulf Bank v Wachovia Bank National Association [2005] EWHC 2827 (Comm)* albeit, other factors for refusing disclosure were also identified by Christopher Clarke J). Depending on the potential allegation faced by the financial services firm, this is often a good reason to argue against the court exercising its discretion. In many cases, the material required to plead a misselling claim is already possessed by the customer (or their advisers) and the request is actually an attempt to bolster the proposed claim, refine the pleadings or obtain evidence at an early stage.

- The applicant has failed to show a prima facie case (*Mars UK Ltd v Waitrose [2004] EWHC 2264 (Ch)*).

For the reasons set out above, applications for pre-action disclosure can often be defeated and that is one good motivation for refusing to comply with a request and opposing any formal application. A second, equally important, factor that may weigh in favour of non-disclosure and opposing an application is the costs position.

Costs position

In applications for pre-action disclosure, the usual starting point that the unsuccessful party shall be ordered to pay the costs of the successful party (CPR 44.2(2)(a)) does not apply. Rather, the general rule is that the applicant shall pay the respondent's costs of the application (and of complying with any order made) irrespective of whether the application is successful or unsuccessful (CPR 46.1(2)): instead of loser pays, it is applicant pays regardless of outcome.

Of course, this is only the general rule, and the court retains a discretion to make a different costs order (CPR 46.1(3)). However, for the court to depart from the usual position, the respondent's conduct will need to have been unreasonable - either in electing to oppose the application or the manner of that opposition. By way of example, in *SES Contracting Ltd v UK Coal plc [2007] EWCA Civ 791*, the Court of Appeal confirmed that it would not usually be inappropriate for a respondent to oppose an application and make the applicant persuade the court that disclosure was warranted. It even held that although the respondent had acted unreasonably by presenting an intimidating wall of witness statements without any supporting documentary evidence, which unnecessarily prolonged the hearing, the judge had gone too far in ordering the respondent to pay the applicant's costs and substituted no order as to costs.

This different starting position and the level of unreasonable conduct required to depart from it, is often overlooked by applicants and those representing them, but presents a significant advantage to firms who have applications made against them. The application can be defended with very limited costs risk and, even if the applicant is successful and obtains the documentation, it is likely to have cost them significant sums to do so (especially important when facing multiple requests from CMCs or claimant law firms).

What about subject access requests under the DPA 2018?

An alternative approach sometimes taken by consumers and their representatives is to seek the same documentation by making a subject access request under section 45 of the Data Protection Act 2018 (DPA 2018).

Such attempts are fundamentally flawed. The subject access rights under the DPA 2018 serve an entirely different purpose to the pre-action disclosure rules and the focus is on the customer's personal data rather than documents that might be relevant to the customer's potential claim. Accordingly, section 45 of the DPA 2018 provides data subjects with a right to their personal data, but does not provide any right to documentation. Also, in responding to a subject access request, firms are entitled to extract any personal data from the documents that the customer is seeking and provide that data in another form (discussion of what constitutes personal data and the extent of disclosure required is beyond the scope of this column). Moreover, it is not uncommon for the key documentation sought not to contain any of the customer's personal data whatever.

Conclusion

To conclude, customers are not entitled to pre-action disclosure as of right, orders for pre-action disclosure are the exception not the norm and there are strong tactical reasons for opposing such disclosure. Further, despite common misconceptions, the DPA 2018 is unlikely to assist the customer in obtaining the documentation via alternative means.

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