

# Pre-action disclosure: in what circumstances will an auditor be required to provide pre-action disclosure?

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Carillion Plc v KPMG LLP & Anor [2020] EWHC 1416 provides helpful guidance on the Commercial Court's approach to pre-action disclosure in the context of anticipated proceedings against auditors and other professionals. The decision reinforces that pre-action disclosure of audit working papers in relation to anticipated negligence proceedings against an auditor is "not the norm". Even though the working papers would have enabled more focussed pleadings and would likely be core documents disclosed in future proceedings, the Court refused the application.

## Legal Principles

The following thresholds must be satisfied before a court will exercise its discretion whether to grant an order for pre-action disclosure:

- CPR 31.16 (3)(a) and (b) - both applicant and respondent are likely to become parties to subsequent proceedings;
- CPR 31.16 (3)(c) - the documents must fall within the scope of standard disclosure in anticipated proceedings;
- CPR 31.16 (3)(d) - the pre-action disclosure is desirable to: dispose of the anticipated proceedings fairly; or assist the dispute to be resolved without proceedings; or save costs.

Additionally, the court will amongst other considerations consider whether the complainant can make his case without pre-action disclosure, and whether the anticipated proceedings have reasonable prospects of success.

## Decision

The judge, Jacobs J, found the thresholds were met and accepted that the disclosure would improve the focus of pleadings in the anticipated proceedings. However, he refused the application. The judgment set out five key reasons for refusing the application:

1. Carillion could satisfactorily plead its case without the documents it sought. It had already written two letters articulating its claim and supplied a lengthy witness statement in support of the pre-action disclosure application.
2. In seeking further disclosure to attempt to obtain a view on negligence which is "concluded" and "fully informed", Carillion was seeking a level of assurance and certainty which was not appropriate and did not justify the application. While pre-action disclosure could assist a claimant's expert, pre-action disclosure was not and should not become "the norm" in audit cases (*AssetCo* followed).
3. The burden that pre-action disclosure would place on KPMG would be extensive. Litigation would ensue and accordingly the normal approach of having disclosure after the pleadings should not be departed from.
4. Even if pre-action disclosure were ordered, the claim would likely develop and expand further than the issues identified in the Letters of Claim.
5. Carillion's approach was inconsistent with the spirit of the pre-action Protocol. Carillion had focussed on seeking extensive pre-action disclosure rather than complying with the Protocol and making a reasonable request for key documents, which in most cases should "*fit very comfortably within one lever arch file*". Carillion had sent a series of "partial" Letters of Claim and had reserved its position in relation to potential claims, whereas the Protocol envisages one Letter of Claim setting out all allegations against the professional. In the absence of a compliant Letter of Claim, KPMG had not breached the Protocol by declining to provide the documents requested.

## Comment

The judgment will be a helpful precedent for accountants and other professionals who receive requests for extensive disclosure before receiving a compliant Letter of Claim or the threat of a pre-action disclosure application in the future.

The decision clarifies that applications for extensive pre-action disclosure of auditors' working papers will not be entertained in all but the rarest of cases. Pre-action disclosure will not be the norm where a claimant has sufficient documents to articulate a Letter of Claim and plead its case, and the disclosure would be burdensome (i.e. over and above the "key" documents envisaged by the Protocol).

The correct approach is for the parties to properly comply with the pre-action Protocol, and if the dispute is not resolved, the claimant will obtain disclosure of relevant documents in the course of those proceedings that follow.

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