

Discoveries In Maritime Claims: (Part Two) Pre-Action Discovery

Introduction

In [Discoveries in Maritime Claims: \(Part One\) Pre-Trial Discovery and Specific Discovery of Documents](#), we discussed the legal armouries available to a litigant within the Malaysian legal regime to gain access to **relevant** and **necessary** documents and/or information to support his case and/or undermine his adversary's in Court **after** a claim has been filed in Court.

In this Part Two of the series, we will discuss what **a intended claimant can do to obtain documents/information to formulate a claim if the intended claimant still does not know:**

- a. whether he has a valid claim; or
- b. who to sue.

Imagine this

Mr. A is a prime mover driver. He was driving a prime mover within the port premises on a rainy morning.

Mr. A received instructions from his supervisor to pick up a container unloaded from a ship.

Mr. A then drove his prime mover to the designated area and he was waiting for the container to load onto his prime mover.

Suddenly, a container fell on the driver's cabin of Mr. A's prime mover and the cabin was crushed. Lucky for Mr. A, he survived but unlucky for him, he suffered severe injury.

As Mr. A was put on a stretcher and rushed to hospital, Mr. X came to him claiming that he was there when the accident had happened. He claimed to have witnessed it all and most importantly, he had recorded the incident on his phone.

After Mr. A returned from the hospital, he was determined to sue the person who had caused his injuries.

Only problem is, he does not know who or what caused the accident or even whether he is entitled to sue for his injuries.

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To compound matters, when he approached Mr. X asking him for details of what he had seen, Mr. X flatly refused to assist and he declined to show Mr. A the recording he had on his phone.

Now, what can Mr. A do?

Pre-Action Discovery: Legal Know-How

In Malaysia, if someone has been wronged by another person and he suffers damage or injury, the former may sue the wrongdoer in Court.

But things become complicated when the intended claimant does not know who to sue and/or whether he has the right to sue (cause of action) (like Mr. A's situation above). This is when the law on Pre-Action Discovery comes to that person's assistance.

Putting it simply, if an intended claimant believes that a third person has some documents/information which could help him identify (a) **who he should sue** (b) **whether or not he has a right to sue (cause of action)**, then an application for Pre-Action Discovery could be filed in Court against that third person to seek discovery of those documents/information.

However, similar to an application for **pre-trial discovery**, the person marshalling the application must also demonstrate to the Court that those documents sought are **necessary** (a) to do justice or (b) to save costs.

Recently, we represented a client in the High Court to resist an application for Pre-Action Discovery.

In that case, the applicant allegedly suffered injury in our client's seaport when he was unloading containers from a vessel. The applicant applied to obtain documents from our client which he claimed could:-

- a) identify who or what caused the injury.
- b) whether he has a right to sue for his injuries.

At first blush, it would appear that this was a straightforward case for Pre-Action Discovery. However, when we detailed the applicant's affidavit, we discovered that the applicant had asserted to the Court that:

- a) the applicant knew who was responsible for his injuries.
- b) the applicant knew what caused his injuries.
- c) the applicant knew he had a claim in tort.

In his affidavit, the applicant said that the reason he was asking for those documents was so that he could file a “sure-win” claim against the client.

At the High Court, the learned Judge sympathised with the applicant but His Lordship agreed with us that the application must be determined in accordance with the established principles of law. The legal armoury of Pre-Action Discovery is not a device for an intended claimant to “fish for evidence” to formulate a watertight case. If the intended claimant already knew (a) **who to sue** and (b) **what his cause of action was**, the intended claimant should proceed to initiate a claim against the would be defendant.

As such, the learned Judge dismissed the applicant’s application for Pre-Action Discovery.

In another recent matter, an application for Pre-Action Discovery was brought against a shipper and the shipper’s surveyor. In that matter, the applicant wished to sue for the damage occasioned to its cargo shipped on board a vessel. However, the applicant did not know who to sue or whether the applicant had a right to sue.

As such, the applicant applied for Pre-Action Discovery of documents that included the survey report investigating the damage to the cargo and as well as those documents that may point finger at the person who had “*dropped the ball*” .

After hearing the parties, the Court ruled that the requested documents were crucial for the applicant to identify who is to be held accountable for the damage, what had caused the damage and whether the Applicant had a right to sue.

In the upshot, the Court allowed the application for Pre-Action Discovery.

Can Mr. A Apply for a Pre-Action Discovery?

In Mr. A’s situation, if Mr. A believes that a third person has those documents and he requires those documents to identify (a) **who to sue** and (b) **his cause of action**, he should be advised to apply to Court for a Pre-Action Discovery of the requested documents/information.

Prior to the Rules of Court 2012 coming into force, the procedure and law on Pre-Action Discovery were governed by the Common Law principles as established by the English House of Lord’s speech in **Norwich Pharmacal Co. v Customs and Excise Commissioners [1974] AC 133**.

Similar to an order for Pre-Action Discovery under Order 24 Rule 7A of the Rules of Court 2012, an order for discovery pursuant to the Norwich Pharmacal principles

dictates a third party to provide documents/information to assist an intended plaintiff to ascertain if he has a cause of action and against whom that cause of action lies.

What About Mr. X Who “Saw It All”?

If Mr. A initiates a claim, Mr. X may be called as a witness during the trial to give evidence. When Mr. X is put on the witness stand, he will be under oath to tell the Court the truth, and through that process, Mr. X will be required to reveal to the Court what he had seen during the incident.

At the same time, Mr. X may also be subpoenaed to produce the phone to show the recording to the Court.

Conclusion

To sum it all up, if you (a) **have been wronged** and (b) **have suffered losses** but you **do not know who to sue or what cause of action to invoke**, fret not, Pre-Action Discovery is here at your aid.

What's up next?

Thus far, we have discussed:

- a) what to do if someone has filed a claim but he requires specific documents to prove a point.
- b) what to do if someone requires documents/information to identify who to sue and what cause of action to invoke.

In Part Three of these series, we will discuss the following areas of discoveries from a different perspective: -

- a) documents referred to in a Statement of Claim or affidavit.
- b) discovery by interrogatories.

More specifically, in Part Three, we will explore both the significance and utility of those methods of discovery in an Admiralty Claim founded on the tort of mis-delivery and/or the tort of conversion of cargoes carried by seas.

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