

# Discovery before issuing proceedings – Preliminary Discovery O 32

## Exam format –

Normally discovery is available only from parties and after pleadings have closed: 29.02

- Pleadings are the material facts that define the issue in the proceeding from the view of the P and the D. The documents will generally help with what the issues are in the litigation.
- The close of pleadings are defined as 30 days of the filing of the last pleading.

But Order 32 provides discovery –

- prior to the commencement of proceedings; or
- prior to the commencement of a third party claim

to identify a party; or

to assess whether one has a cause of action

## Miscellaneous

Definition of description: r 32.01

Description includes –

- The name
- Place of residence
- Place of business
- Occupation and sex of the person against whom the applicant desires to bring a proceeding; and
- Whether that person is an individual or a corporation

## Claiming privilege

- An order made under O 32 does not operate to require the person against whom the order is made to produce any document or answer any question which is “privileged”: r 32.02

## Preliminary discovery to identify a party: 32.03

### Exam format –

[x] may be confident that they are the victim of a civil wrong, but may not know the identity of the person at fault. A court can assist a plaintiff in these cases: r 32.03, *Norwich Pharmacal*

- Examples
  - Defamation
    - Plaintiff does not know the source of the comment
  - Being supplied with defective goods
    - Plaintiff knows the supplier, but not the manufacturer.
  - Car registration and obtaining the owner through Vic Roads

### GENERAL TEST.

#### Step 1: Rule 32.03(1)

A person may apply to the court if –

- They have made reasonable inquiries; and
  - This includes sending a letter
    - Writing to Vic Roads to ascertain the name of the driver
- Are unable to ascertain the description of the person sufficiently for the purposes of commencing proceedings against that person; and
- There is someone who has or is likely to have knowledge of facts or possession of documents which might assist in the ascertainment of the identity of the possible D
  - What does the Plaintiff actually want?

#### Step 2: Rule 32.03(2)

The court may make an order for –

- (a) An oral examination in relation to the description of the person concerned **or**
- (b) make discovery for all documents in relation to the description of the person concerned
  - Not available for P to identify the whereabouts of a named D once proceedings against the D have started
  - This rule is available for D who wants to join a third party: r 32.04
    - I.e. "Rent my car"
    - They will need to serve a 3P notice

### Step 3: Rule 32.03(3)

- (a) Where the court makes an order under paragraph (2)(a), it may order that the person against whom the order is made to produce to the Court, on the examination, any document in their possession relating to the description of the person concerned
- (b) Direct that the examination be held before an Associate Judge

## Discovery to determine if one has a case: r 32.05

### Exam format –

[x] may be confident that they have a case, but may need to seek additional documentation to ensure that they do. A court can assist a plaintiff in these cases: r 32.05

### GENERAL TEST

#### Rule 32.05: Discovery from prospective defendant

If the Plaintiff -

- (a) Has reasonable cause to believe that they have a cause of action against an ascertained party (as 32.03(1) allowed); and
- (b) After making all reasonable inquiries, the applicant does not have sufficient information to enable them to decide whether to commence proceedings; and
- (c) There is a reasonable belief that the prospective Defendant possess relevant documents that would assist the applicant to make that decision in (b),

The court may order the prospective Defendant to make a discovery to the Applicant of any document described in (c).

## Procedure

Exam format –

### Rule 32.08

- (1) An application under Rule 32.02 or 32.05 shall be made by originating motion:
- (2) An application under Rule 32.04, 32.06 or 32.07 shall be made by summons served on every party to the proceeding and personally against whom the order is sought
- (3) An order may be made by an Associate Judge.
- (4) An originating motion under paragraphs (1) and (2) shall be supported by an affidavit and served on every person who the OM or summons is served (32.08(5)) –
  - A. Stating the facts on which the application is made; and
  - B. Specifying or describing the documents or any class of documents in respect of which the order is sought

## Costs

### Rule 32.11

- (1) The Court may make an order for the costs and expenses of the Applicant, of the person against whom the order is made and of any party to the proceeding, including the costs of –
  - (a) Making and serving any affidavit of documents
  - (b) Producing any document for inspection in accordance with Rule 32.09
  - (c) Complying with any direction given under rule 32.10
- (2) The Court may make an order on condition that the Applicant give security for the costs and expenses of the person against whom the order is made