Non-Party Disclosure and CPR 31.17: Sparkes v London Pension Funds Authority & Leigh Academies Trust

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A good month for claimants in historic asbestos claims continues.

Coming shortly after *Scarborough College Ltd v Winter* [2021] EWHC 1549 (QB), in which a Show Cause finding in a claimant's favour was undisturbed on appeal (as discussed by Philip Godfrey and Alexandra Pountney recently on this blog), *Sparkes v London Pension Funds Authority & Leigh Academies Trust* [2021] EWHC 1265 (QB) saw Murray J overturn the decision of Master Thornett, and order a non-party to make extensive disclosure in a fatal-asbestos related injury claim.

The Facts

The Claimant's late wife contracted mesothelioma and died in 2015. It was alleged that she was negligently exposed to asbestos while working for the Defendant's predecessor in the early 1970s. The contentions were that asbestos was incorporated into the fabric of the building in which she worked (in the form of floor and ceiling tiles, wall panels, and lagging), with a particular allegation of "almost inevitable" exposure during construction works in 1973.

The Defendant put the Claimant to proof of this contended exposure. After making enquiry, the premises manager at the school told the Claimant that there were "boxes of old documents" relating to building and maintenance work at the school which had been saved from destruction in the 1990s. The Claimant asked for copies of these documents, or facilities to inspect them on site.

In due course, some 46 pages of documents were provided. The Claimant felt this was inconsistent with the reference to "boxes of old documents", and said so, offering to attend to inspect, and reassuring Leigh Academies Trust (the non-party holder of the documents) that no proceedings were contemplated against it.

The Trust told the Claimant by telephone that the 46 pages represented "all of the documentation relevant to the 1970s". The Claimant did not accept this, having been told about the "boxes", and asked for disclosure of building, maintenance, renovation and demolition works both before and after the index employment period, making clear that the request was for documents beyond merely the period of employment.

Answer came there none, and the Claimant duly applied for an order under CPR 31.17.

The Proceedings Before the Master

The Trust did not attend the hearing of the application (later saying it did not receive notice of the hearing), yet nonetheless prevailed.

The Master's concern was that the scope of the application was too broad, vague and unfocused, and granting it would impose a disproportionate and unfair burden on a non-party: "it would seem to be a very wide request that would necessitate a considerable amount of research and consideration spanning potentially decades". Relying on the test for disclosure (the documents had to be likely to be support a claimant's case and were necessary to dispose of the claim fairly and save costs), and that some time had passed since the first request and that some documents had been provided), he dismissed the application.

The Master particularly criticised the Claimant's lack of focus in identifying what had been already provided, and why there was likely to be further documentation outstanding. This seems at first sight a surprising criticism given that the

Claimant necessarily did not know what might be outstanding, save that 46 pages were patently not the entirety of the "boxes".

Appeal to the High Court

Murray J recognised from the outset the Claimant's difficulty in appealing a case management decision given the reasonable range of discretion allowed in making such decisions.

He then reviewed the five principles for non-party disclosure:

1. This is an intrusive jurisdiction and it should not be used inappropriately.
2. There is a discretion even if the threshold criteria for disclosure are met.
3. An order is the exception rather than the rule.
4. Where a class of documents is sought, the test must be met for each document within the class.
5. The test for documents being "likely to support the case" is met if they "may well" do so, falling above the "real prospect" test, but below the balance of probabilities.

Somewhat surprisingly, the non-party respondent to the appeal again did not attend, apparently by reason of cost. While its absence might have made no difference given the findings, it might equally have proved costly.

The grounds of appeal were a failure to apply the proper test, failure to consider the potential importance of the documents, the consideration of irrelevant matters, and the non-consideration of relevant matters.

In reality, the most forceful point made by the Claimant was that he had been told there were boxes of documents, but only a fraction of them had been disclosed. He wanted to see that which he had been told existed, and had repeatedly offered to attend to do so. In addition, the Trust had been wrong to assume that only documents created during the index employment period were potentially relevant, given that pre-employment installation of asbestos and its post-employment removal "may well" have supported the claim.

Murray J agreed with the Claimant: the Master had been wrong in his application of the relevant test to the facts, took into account irrelevant factors, gave insufficient weight to relevant factors, and failed to balance the relevant factors accordingly.

There was a sting in the tail for the Trust, too. While CPR 46.1 will usually allow a non-party its costs of the application and its costs of complying with the application, a different order made be made, and was – further to the Trust's failure to comply with reasonable requests for disclosure or physical inspection. The usual order was entirely reversed, and the Trust was ordered to pay the Claimant's costs of the application and the appeal.

Practice Points

The review of the five core principles of non-party disclosure is a very helpful *aide memoire*, particularly that the order is the exception, and not the rule. The test for disclosure – whereby likelihood within the wording of the Rule is reduced to "may well", and so expressly from probable ("likely") to possible – is also crucial to an understanding of this jurisdiction. This is very helpful to claimants, and operates as something of a balance against such orders being the exception rather than the rule.

In asbestos litigation more generally, the case provides a helpful reminder that disclosure against defendants and non-parties should be sought for periods both before and after the relevant period of contended exposure (particularly if the claimant has not worked directly with asbestos, but merely in its vicinity), in order to consider evidence of its earlier introduction, and/or its later removal. One of the difficulties which arose in this case is a potential ambiguity in the original request for documents, which the Trust believed it had complied with, namely for documents relating to the employment period alone (which yielded the 46 pages).

Finally, as to costs, two points. The first is that a non-party can usually expect its costs of any such application for

disclosure, along with the costs of compliance. As commented above, the Trust's absence from the appeal hearing might have made no difference, but it certainly can't have helped its position. Indeed there was no order made in its favour even for the costs of compliance with the order, which would usually be expected under CPR 46.1.

It goes (almost) without saying that if a non-party *does* object to disclosure and/or seeks its costs of disclosure (as would usually be ordered), attending any hearing in relation to the issue would be prudent.