

Non-party disclosure orders: the correct application of the test under CPR r.31.17(3)

By [Dr Tagbo Ilozue](#)

3PB Barristers

***Sparkes v London Pension Funds Authority and Leigh Academies Trust* [2021] EWHC 1265 (QB)**

A Master's decision to dismiss an application for an order for disclosure from a non-party was set aside where Murray J was forced to the conclusion that the Master was wrong in his application of the test under CPR r.31.17(3) to the relevant facts, took into account irrelevant factors, gave insufficient weight to relevant factors, and failed to balance the relevant factors fairly in the scale.

The non-party was responsible for the school in which the Appellant's deceased wife had worked at the time the Appellant claims she was negligently exposed to asbestos that caused her to contract mesothelioma. Documents relating to building and maintenance works from before and after that period of employment were potentially relevant to the claim and were necessary to dispose fairly of the claim and/or to save costs. Moreover, the scope of the material requested was not unreasonably broad. The non-party was ordered to disclose the relevant documents within 14 days.

Further, as the non-party had not put forward any good reason for its failure to engage with the appellant's reasonable requests for disclosure, and the appellant should not have had to make the application in the first place, the non-party would pay the appellants costs of the application and the appeal.

Overview

On 14 May 2021 Murray J handed down judgment, setting out the reasons for his decision on 1 December 2020 to allow Mr Sparkes' appeal against the Master's Order of 12 June 2020 dismissing Mr Sparkes' application for an order for third-party disclosure from Leigh Academies Trust ("the Trust").

Mr Sparkes (“the Appellant”) is the personal representative of Ms Pauline Sparkes, who died on 10 March 2015 after contracting mesothelioma. His claim alleges that her disease resulted from occupational exposure to asbestos between 1970 and 1975 while working at a school that is now run by the Trust.

The Pension Funds Authority (“the Defendant”) is the successor to the liabilities of the education authority which was responsible for the school at the time. Neither the Defendant nor the Trust attended or were represented at the appeal hearing.

Background

The Appellant initially requested disclosure from the Trust in 2018. In July 2018 the Trust’s Premises Manager informed the Appellant that there were boxes of old documents relating to building and maintenance works at the school. The Appellant asked for the documents to be copied or for on-site inspection to be allowed.

After this the Appellant made seven further requests for the documents to be disclosed:

- On 13 March 2019 the Trust was asked to produce the documents identified by the Premises Manager; the Appellant requested disclosure or the opportunity to attend for inspection.
- On 27 June 2019 a chasing letter was sent.
- On 4 October 2019, after some material was disclosed by the Trust, a letter was sent suggesting that there may be other relevant documents, and the Appellant’s representatives confirmed they were prepared to attend to inspect the documents on site.
- On 14 October 2019 the Appellant’s representative spoke to the Trust’s business director; she informed him she would come back to him after discussions with counsel if they thought it would be helpful to see additional documents.
- On 28 October 2019 the Trust was informed that further disclosure was required; once again making an offer to visit the school to inspect the documents or to pay copying costs.
- On 23 December 2019, 6 January 2020, and 26 February 2020 chasing letters were sent.

The Trust initially engaged with the requests, sending about 46 pages of documents on 2 July 2019 and calling the Appellant’s representative on 14 October 2019 to explain that the documents that had been sent were the only ones from the 1970s, which was the period of relevance. However, the Trust sent no further acknowledgments or responses to the Appellant’s four subsequent letters from 28 October 2019 to 26 February 2020.

The Appellant's initial request, in the letter of 13 March 2019, was for documents pertaining to the structure of the school and building work, including documents that might relate to the disturbance, addition, and/or removal of asbestos during Mrs Sparke's period of employment. In the letter of 28 October 2019, the Appellant explained that additional documents, regarding works at the school before and after Mrs Sparkes' period of employment, were required.

At first instance the Master considered this further request to be a very wide request that would necessitate a considerable amount of research and consideration spanning potentially decades. He concluded that it was hopelessly vague and lacking in specificity, that it was unworkable for the respondent and disproportionate to expect a third party to try to respond, and he was unable to identify a shape or form of an order that could be intelligible.

Grounds of Appeal

In advancing the Appeal the Appellant criticised the Master's Order on the grounds that:

- he failed to apply the appropriate test under CPR r 31.17;
- he failed to consider the potential importance of the objective documentary evidence;
- he considered irrelevant matters and failed to consider relevant matters; and
- he erred in the exercise of his discretion.

Analysis and Disposal

Murray J reviewed the legal framework establishing the test for interference on appeal with the discretion by a judge of first instance and the test for non-party disclosure. Applying those principles, he held that all four grounds of the appeal were made out, essentially for the reasons put forward in the submissions made on the Appellant's behalf.

Murray J ruled that the Master's decision was wrong and the Order had to be set aside because, notwithstanding the broad discretion the Master had to be accorded in making a case management decision, the court was forced to the conclusion that the Master had erred in the following four ways:

- he was wrong in his application of the test under CPR r.31.17(3) to the relevant facts
- he took into account irrelevant factors
- he gave insufficient weight to relevant factors
- he failed to balance the relevant factors fairly in the scale

Although the initial request for disclosure did appear to be limited to the period of Mrs Sparke's employment, and the Trust was responsive to this, it was understandable that the Appellant was sceptical that all relevant material had been located, given what had been said by the Premises Manager about boxes of materials.

The Appellant's subsequent broader request, made in October 2019 after consulting counsel, was still reasonable. Documents regarding works at the school both before and after Mrs Sparke's period of employment were potentially relevant.

The test in CPR r.31.17(3)(a) restricts third party disclosure orders to documents which are likely to support the applicant's case or adversely affect one of the other parties. That test is met where documents "may well" support the case (*Three Rivers DC (No 4)* at [32]-[33] as cited by Eady J in his detailed discussion of third-party disclosure in *Flood v Times Newspapers Ltd* [2009] EWHC 411 (QB) [22]-[36]), and it was satisfied in this case by the potential relevance of the wider material sought. As the Appellant submitted, documents from an earlier period, when asbestos material may have been installed, or from a later period, for example, an asbestos survey showing its removal, *may well* have supported the Appellant's case.

Further, the application did not seek to require the Trust to undertake a disproportionate, onerous, vague, or unfocussed search. All the potentially relevant documents were in boxes at the school's premises and the Appellant's representatives had (repeatedly) offered to pay copying costs or to attend and physically inspect the boxes themselves.

CPR r.31.17(3)(b) limits third party disclosure orders to circumstances where disclosure is necessary in order to dispose fairly of the claim or to save costs. Here, it was clear that there was a reasonable possibility that there would be documents in the boxes that would be decisive of the claim one way or the other, therefore the disclosure was necessary to dispose fairly of the claim and/or to save costs.

The Master did not exercise his discretion on a proper basis and made the wrong decision because he appeared to have misunderstood the scope of what was requested in the Disclosure Application. That scope was clear from the statement supporting the application. The Master's decision therefore had to be set aside and Murray J replaced it with new directions under CPR r.31.17 to the Trust to disclose relevant documents at the school within 14 days.

Costs

Murray J also considered it appropriate to disapply the normal rule under CPR 46.1 that the third party would be awarded the costs of the application for disclosure and the costs of complying with any order made on the application.

The Trust had not put forward any good reason why, from the end of October 2019, it failed to engage with the appellant's reasonable repeated requests for disclosure. The appellant would not have had to make the application if the Trust had engaged properly with the request and, although the Trust did not actively oppose the application, the appellant should not have had to make the application in the first place. The amount sought in the appellant's statement of costs was reasonable and was allowed in full.

23 June 2021

The information and any commentary within this document are provided for information purposes only. Every reasonable effort is made to ensure the information and commentary is accurate and up to date, but no responsibility for its accuracy, or for any consequences of relying on it, is assumed by the author or 3PB. The information and commentary does not, and are not intended to, amount to legal advice. If you seek further information, please contact the [3PB clerking team](#).



Dr Tagbo Ilozue

Barrister

3PB Barristers

0330 332 2633

Tagbo.ilozue@3pb.co.uk

3pb.co.uk