Neutral Citation Number: [2020] EWHC 1131 (QB)

Case No: QA-2020-000038

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/05/2020

Before:

MR JUSTICE FREEDMAN

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Between:

Matthew Hankin	**Claimant**
- and -	
(1) Richard Barrington	**Defendants**
(2) Dr Ademola Adejuwon	
(3) Saracens Limited	

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The Claimant did not take part in this hearing
Mr Philip Tracey of Plexus Law for the **Third Defendant**

Hearing date: 29 April 2020

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Approved Judgment

Mr Justice Freedman:

Introduction

1. The Third Defendant ("Saracens") renews orally an application for permission to appeal against a decision of Master Yoxall made on 30 January 2020. It was an order for specific disclosure made under CPR 31.12. Saracens says that there is at least a real prospect that the decision was wrong in that there was no reason to order specific disclosure and/or that a serious injustice has been caused by a serious procedural or other irregularity: see CPR 52.21.

The case history

2. This is a case of personal injuries of a former member of the Saracens 1st XV squad. The matter was summarised in paragraph 2 of Saracen's skeleton argument for the application for permission to appeal in the following terms:

   "By way of background, this is a claim in which the Claimant/Respondent alleges that he was injured during a drinking game which was being played with Mr Barrington, the first Defendant, and others on 6 September 2015. The drinking game took place in a bar in Budapest, on a trip organised by the Appellant. It is alleged that the first Defendant has caused injury to the Claimant by striking him on the head whilst he was wearing a metal helmet with a fire extinguisher. The Claimant further alleges that the Appellant is vicariously liable for the actions of its physiotherapist, Nicholas Court, in failing to properly assess the Claimant upon his return from Budapest between the 7 September to the 15 September 2015. The Claimant further alleges that, Dr Adewojun, the treating doctor was negligent in allowing the Claimant to return to play on 3 October 2015 when he alleges further injury occurred. He has not returned to play Rugby since 3 October 2015 when his employment with the Appellant came to an end in June 2018, when his contract came to an end."

3. Directions were given on 22 August 2019 as regards exchange of evidence and disclosure. On 18 December 2019, the Claimant issued an application seeking an order that Saracens disclose *"any outstanding medical records and training records as part of their duty to disclose."*

4. This application was supported by a witness statement of Natalie Fox dated 18 December 2019. She referred to training records and wage slips provided as part of standard disclosure, but from July 2015 onwards. It was indicated that the disclosure was inadequate as regards the personal records of the Claimant, and reference was made to correspondence between the parties. In a letter dated 22 November 2019, the Claimant's solicitors said that they required training records and wage slips not limited to the period post-June 2015. In letters dated 28 November 2019 and 29 November 2019, requests were made for medical records going back before 2013 and for training records prior to 2015 to show the progress of the Claimant at Saracens, and bearing in mind that the Claimant started with Saracens in 2009.

5. The order which was made at the hearing was far more detailed than the application. It was at paragraph 4 of the Order in the following terms:

   "As regards the Claimant's application made by notice dated 18 December 2019, the Third Defendant shall by 4pm on 31 January 2020 provide the Claimant with

the following documents or classes of document, or, via a statement from a proper officer of the Third Defendant, confirm that such documents or classes of document, have been searched for and do not exist:

a) All outstanding medical records relating to the Claimant;

b) All training and personnel documents relating to the Claimant from the period 2009 to 2018. Such records to include but are not limited to:

i) contractual and salary documents;

ii) records relating to any meetings between the Claimant and any coaching staff;

iii) any six monthly or other appraisal records;

iv) fitness assessments; and

v) conditioning programmes."

6. How did the order evolve from the relatively terse terms in the application? The answer is that in the course of hearing, Counsel for the Claimant explained more extensively what was sought. This was first as regards medical records, albeit that by the day before the hearing Saracens had identified more extensive medical records than those previously disclosed. Indeed, no issue is taken as regards the part of the order dealing with medical records. When the Claimant went on to deal with training records, the Master asked *"…is there a letter in which you say, 'these are the documents that I want, i.e. contract documents' which the claimant may have himself, of course but any way, that is the contract. 'And the records of meetings the coaching staff, the appraisals, fitness assessments, conditioning programmes', do you say that anywhere?"* The answer was this had not been specified in this way. The Master said that he could see why the Claimant was interested in such documents but did not see that in any order and that there was a requirement for specific disclosure to set out in terms what was needed. The Master was concerned about the precision not being identified.

7. Following and a result of argument, the Master was persuaded that he should make the above order, even although the precision was not contained in the application, and so accordingly there was no precision in the supporting evidence. Even with the documents identified, there were questions raised as to whether this was sufficiently precise for the purpose of making an order for specific disclosure. The Master said in his judgment that that which had been sought of personnel and training records was not sufficiently precise and that he was giving definition because it was necessary. He referred to an issue which had been taken that there was no reason to believe that monthly appraisals existed. The Master's approach at paragraph 4 of his Judgment was to say *"…it strikes me that with a club at this level there would be records and assessments of players and I would be very surprised if there were not."* The Master also found that it was more likely for such documents to exist than not to exist. It would have been better if such specific documents had existed. However, an order would be made in order to get on with it.

8. Saracens was dissatisfied in that (a) in the application, the documents had not been identified with any specificity, (b) even when they were identified at the hearing, there was concern that they were not adequately identified, (c) there was no evidence to support a belief that they were within Saracens' possession, (d) their relevance was not properly identified. For example, Mr Tracey on behalf of Saracens submitted that records of performance on static exercise machines would not be an indicator as to how successful a rugby career would be. Further, the Claimant was unable to assert a belief that there were training assessments. Witness statements have been prepared without the absence of this material standing in the way of presentation of evidence.

9. Saracens did serve a witness statement of Sangita Asani, Saracens' HR Manager, dated 30 January 2020 pursuant to the order of Master Yoxall, but without prejudice to the appeal. It confirmed that Saracens did not hold a document headed 'personnel or training file' for the Claimant. There were various medical records which had been located additional to those already disclosed. There were no records relating to meetings between the Claimant and coaching staff other than contained within the medical records. There were no six monthly or appraisal meetings. There were some additional contractual and salary documents. There were some documents about fitness assessments and conditioning programmes which were provided, but there was protest here both about whether this category was sufficiently precise and as to the relevance bearing in mind that they were not in the nature of assessments by a coach.

10. There has been subsequent correspondence in which Saracens has asked why the documents disclosed have been crucial and relevant (see a letter of 10 March 2020 from Saracen's solicitors), but this has not elicited a response. Mr Tracey for Saracens has expressed concern that (1) there might be an attempt in the future to say that the disclosure has not been adequate, and (2) the documents disclosed might be used by the Claimant to support a request for the case to be delayed or deferred.

11. Saracens submits that the wrong process has been adopted. The application for disclosure should have failed because (1) the documents were not properly identified in the application, (2) the document identification should not have occurred during the hearing, (3) even the documents were not were not identified with sufficient precision, (4) the corollary of the foregoing is that the application was not properly supported by evidence, and (5) Saracens has been exposed to prejudice because it did not have proper opportunity to consider the new way in which the application was formulated and to respond: instead, it has now been exposed to an order which might be used against it, alleging breach and using the disclosure given as a reason for what Saracens would be an unjustified postponement of the timetable.

12. Indeed, it was submitted that there was no evidence to support a belief that Saracens had such documents, for example appraisal documents, and no reason to support such belief in that there was no evidence that an appraisal had been signed by the Claimant. It was also submitted that if that evidence had been supplied, there would have been an opportunity to consider it and to answer it.

The law

13. The relevant law is as follows. The power to order specific disclosure appears in CPR 31.12 in the following terms, namely

"(1) The court may make an order for specific disclosure or specific inspection.
(2) An order for specific disclosure is an order that a party must do one or more of the following things –
(a) disclose documents or classes of documents specified in the order;
(b) carry out a search to the extent stated in the order;
(c) disclose any documents located as a result of that search.
(3) An order for specific inspection is an order that a party permit inspection of a document referred to in rule 31.3(2)."

14. The Practice Direction 31PD supplements the specific disclosure provision in the CPR at paragraph 5 reads as follows:

"5.1 If a party believes that the disclosure of documents given by a disclosing party is inadequate he may make an application for an order for specific disclosure (see rule 31.12).

5.2 The application notice must specify the order that the applicant intends to ask the court to make and must be supported by evidence (see rule 31.12(2) which describes the orders the court may make).

5.3 The grounds on which the order is sought may be set out in the application notice itself but if not there set out must be set out in the evidence filed in support of the application.

5.4 In deciding whether or not to make an order for specific disclosure the court will take into account all the circumstances of the case and, in particular, the overriding objective described in Part 1. But if the court concludes that the party from whom specific disclosure is sought has failed adequately to comply with the obligations imposed by an order for disclosure (whether by failing to make a sufficient search for documents or otherwise) the court will usually make such order as is necessary to ensure that those obligations are properly complied with…."

15. On this basis, it was submitted that it was mandatory to specify the documents sought and for this to be supported by evidence. Further, case law was cited by Mr Tracey. In particular, in a judgment of Sir David Eady in *Zipporah Lisle-Mainwaring v Associated Newspapers Limited* [2018] EWHC 715 (QB) (a judgment overturned by the Court of Appeal [2019] EWCA Civ 1470, but on a different procedural point not affecting the reasoning of Sir David Eady on specific disclosure) as follows:

"10. It is generally recognised that a significant change in practice was brought about following the introduction of the CPR in April 1999. A more disciplined and discriminating approach is to be applied, having regard to the overriding objective and the need to keep costs under control. It is appropriate, when determining what disclosure should be made, to pay particular attention to necessity and

proportionality. That will mean focusing upon the pleaded issues as they stand, and specifically the issues that can be seen to require resolution at trial.

…

14. Moreover, it may be said with some confidence that despite reference to the terminology of Peruvian Guano, the court will not countenance attempts to use the specific disclosure procedure for the purposes of "fishing" (i.e., pursuing a new cause of action or an opportunity to add unpleaded allegations to support an existing cause of action): see e.g. the discussion in Hollander at 8-19.

…

18. An order for specific disclosure does, as the name suggests, call for a discriminating process which narrows the scope of inquiry. It must be a reasoned process. It is not to be a scatter gun approach, but rather a focused search for materials likely to assist the court in resolving at least one identified pleaded issue."

16. Further, reference was made to *Fine Care Homes Ltd v Natwest Markets Plc* [2020] EWHC 874 (Ch) per Mr James Pickering QC at paragraph 56:

"…Disclosure - and in particular specific disclosure - is a process which, more than any other, requires the parties to liaise with a view to defining and narrowing issues. It is a process which should take place out of court with the court only being asked to intervene where no resolution of the issues has proved possible. In such circumstances, however, the outstanding issues should be clearly identified so that the court can form a reasoned view as to the appropriate order to make. It will rarely be possible (let alone desirable) for the court to use the hearing to effectively broker a negotiation between the parties as to the precise scope of any order for specific disclosure. On the contrary, the groundwork should always be done in advance so that by the time the matter reaches court, the battle lines between the parties have been clearly drawn. Only in these circumstances, will it be possible for the court to make a sensible and effective determination of whatever disclosure issues remain."

17. Mr Tracey pursuant to his duty to the Court put an earlier part of the judgment as to the meaning and effect of the mandatory PD31A and what would happen if the application notice was deficient or there was no evidence in support. At paragraphs 44-45, Mr Pickering QC said the following:

> *"44. I also bear in mind that even absent an application for specific disclosure, the court has the power to give directions and make orders for disclosure. In short, therefore, if I were to form the view that the Bank had failed to disclose documents which it ought to have disclosed, it would be open to me - even without Fine Care's application - to make orders to ensure that the Bank complied with its disclosure obligations.*
>
> *45. Overall, therefore, while the Bank is technically correct in its submission that Fine Care has failed to follow the mandatory terms of PD31A, it seems to me that I should be slow to refuse to make such an order on that basis alone."*

18. Mr Tracey sought to say by reference to a decision in *Hutchison 3G UK Ltd v EE Limited* at paragraphs 30-32 (Sir Ross Cranston) that there was no discretion to depart

from the mandatory effect of PD31A. In fact, that case was to the effect that one could not make an application for specific disclosure under some other more general power. In my judgment, that which was said by Mr Pickering QC in the passage above represents the law. The Court may depart from the mandatory terms of PD31A in an appropriate case where it is necessary in order to procure that a party complies with its disclosure obligations and where the justice of the case requires. However, the usual position is that in an application for specific disclosure, the formalities should be observed, and the Court ought to be slow, in my judgment, to depart from the mandatory requirements. Mr Tracey also referred to pre-CPR cases as to specific disclosure, but I did not find it helpful to look in the wing mirrors to the prior law (against which Lord Woolf MR counselled in *Biguzzi v Rank Leisure Ltd* [1999] EWCA Civ 1972), not least when the overriding objective is specifically referred to in PD31A at paragraph 5.4.

Discussion

19. The concerns of Saracens about the way in which the application was made are justified. The Claimant should have set out the documents sought in the application in the specific terms in which they were subsequently ordered. The general terms of the application were inadequate. The evidence in support should have been far fuller than simply referring to the correspondence. The explanations as to relevance and belief that the documents were in the possession of Saracens should have been set out in the evidence. None of this was done. It was unsatisfactory for this to emerge in the proceedings in the way in which it did.

20. Indeed, it was submitted that there was no evidence to support such belief, and no reason to support such belief in that there was no evidence that an appraisal had been signed by the Claimant. It was also submitted that if that evidence had been supplied, there would have been an opportunity to consider it and to answer it.

21. Despite the foregoing, the Master had jurisdiction to receive this information at the hearing. He had a discretion to reformulate the definition of the documents required without the requirement to insist on written evidence to support the reformulated case. The definition of the categories happened in the course of oral argument, and the new categories were "*identified with sufficient particularity, just about*" in the words of Mr Justice Jay, refusing permission to appeal on the written application.

22. Nonetheless, the Master had to be slow to allow the identification of documents in the course of the hearing. In a sense, this is worse than brokering a position during a hearing, because at least in that case, there may be sufficiently clear identification of the categories of documents at the outset. However, even in this case, in my judgment, it is still available for the Court, however unsatisfactory the failure of the Claimant to identify the documents sufficiently in the application, for the documents to be identified properly in the course of the oral submissions. This must be allowed only with great caution and always provided that the Court is satisfied that this can be done with sufficient particularity and dealing with the case justly in accordance with the overriding objective.

23. In the particular circumstances, the Master was entitled to depart from the formalities and the approach commended in the paragraphs above cited from *Zipporah Lisle-Mainwaring* at first instance and from paragraph 56 of the Fine Form case. It is clear

from his remarks in the transcript and from the judgment that he was troubled by the position in respect of the shortcomings of the application. However, in the circumstances of the particular case, the Master took a pragmatic view in accordance with the overriding objective, deciding that the Court should make progress in the action rather than have to leave specific disclosure to another time with a properly formulated written application. This was an exercise of his discretion which was available to him, and there is no reason for an appellate to interfere with the exercise of that discretion.

24. A part of the decision related to medical records. Here too, there could have been precision in the definition of what was required and proper evidence in support. Nonetheless, what was provided was inadequate, and, entirely realistically, no application is made for permission to appeal against that part of the order.

25. In respect of training records as more precisely formulated in the course of oral submissions, the Master was entitled to conclude that these records were likely to be in the possession of the Defendants, particularly six monthly or other training appraisals. I do not accept that absent evidence from the Claimant as to his signing such documents that the belief in their existence was not proven to the extent required for an application for specific disclosure. The Master was entitled by reference to what one would expect in the ordinary course of things that a rugby club like Saracens was likely to have the training records identified in the order, including specifically records relating to meetings between the Claimant and coaching staff and six monthly or other appraisal records about a member of their first XV squad. The fact that, according to the evidence of Sangita Asani, it is now said that such information does not exist does not invalidate that belief at the time of the making of the order.

26. As regards the criticisms about relevance, it is of course right to say that such appraisals if they had existed would have been more probative than the results of static training. However, on balance the results of static training may be of use at trial in assessing the career which the Claimant may have had if he had not suffered the injuries. I do not accept the submission that such information is irrelevant or that the Master was wrong in ordering the disclosure which he did.

27. I return to the terms in which Mr Justice Jay refused permission to appeal. In my judgment, he was entirely correct in his assessment when he said: *"The Master's reasons were brief but they need to be read in conjunction with the oral argument, which I have considered. The documents sought were identified with sufficient particularity, just about, and the Master was entitled to conclude that the sub-categories of documents he specified in his ruling were likely to exist and were relevant to the claim that was being advanced. In the light of the overriding objective, this was an order the Master could make".*

28. This was an exercise of a discretion on the part of the Master, and he reached a decision which was within the range of decisions available to him. There was no error of principle. The decision was not wrong or irregular. There is no real prospect of success of an appeal against this order, nor is there any other compelling reason to give permission to appeal.

Appeal against case management decision

29. The foregoing suffices to dispose of the application, and the decision rests on the above basis. That which follows is an additional matter which I am entitled to take into account in the decision which I make. Following the order, Saracens provided disclosure through the witness statement above referred to of Sangita Asani of 30 January 2020. There has been subsequent correspondence between the parties. Whilst the Claimant has not admitted that there has been full compliance, nor have there been steps taken to challenge the disclosure. Saracens has sought information as to how the disclosure was crucial and has not had a response. This is in the context of the possibility that the Claimant will use this disclosure to postpone the case. In that context, Saracens will be able to submit that the disclosure was at best marginal, if that is its submission.

30. All of this begs the question as to the purpose of the appeal. There has been apparent compliance with the order of Master. The advantages of having it set aside seem at this stage a little ephemeral, namely in case there is a subsequent allegation of non-compliance and in case it is used to support an application to postpone the case. In my judgment, this raises the question as to whether the appeal is of sufficient significance to justify the costs of an appeal. In the permission application, this matter was raised with Mr Tracey. In particular, he was asked to consider the impact of the Practice Direction 52A at paragraph 4.6 in respect of an appeal in relation to a case management decision which reads as follows:

"Where the application is for permission to appeal from a case management decision, the court dealing with the application may take into account whether –
(a) the issue is of sufficient significance to justify the costs of an appeal;
(b) the procedural consequences of an appeal (e.g. loss of trial date) outweigh the significance of the case management decision;
(c) it would be more convenient to determine the issue at or after trial.

Case management decisions include decisions made under rule 3.1(2) and decisions about disclosure, filing of witness statements or experts' reports, directions about the timetable of the claim, adding a party to a claim and security for costs."

31. Mr Tracey submits that this is not a case management decision. That relates to standard directions of the kind dealt with in a typical case management conference such as standard disclosure. If the Court does not accept this, he says that this is a significant matter of principle about failure to comply with the rules and the jurisdiction of the Court to make an order for specific disclosure in these circumstances. He also submitted that it was important going forward for the reasons that he gave about the possibility of having to face an allegation of being in breach of the Court order and of the specific disclosure being used to support a postponement.

32. Mr Tracey was unable to provide any authority to support the submission that this was not a case management decision. He sent a supplemental note following the hearing, as he had been invited to do if he wished. The fact that there are appeals against such decisions does not take the point further because once the case gets beyond the permission stage the rule in PD52A paragraph 4.6 does not apply. At the permission stage, it is something which might be taken into account if the Court chooses to do so. In my judgment, this specific disclosure decision was a case management decision. The

Practice Direction specifically provided that disclosure was such a decision and specific disclosure is one kind of decision. It is evident that the Court of Appeal in *Zipporah Lisle-Mainwaring* case above at paragraph 24 treated the specific disclosure application in that case as a case management decision for the purpose of the permission to appeal provisions. There may be cases where the principle at stake in the appeal is significant and where paragraph 4.6 would not in any way disinhibit permission to appeal. Each case turns on its own facts.

33. In the instant case, in my judgment, in addition to the matters which lead to the refusal of permission, the Court should take into account whether the issue is of sufficient significance to justify the costs of an appeal. In my judgment, it is not of sufficient significance, bearing in mind (a) the fact that even if a correct procedure had been followed, it is quite likely that such documents would have been ordered, (b) the documents have been provided and it seems hypothetical only that there will be an allegation of breach and/or that the order will by itself be a significant obstacle to resisting a postponement, and (c) the case does not give rise to some important new matter of principle, but relates to the exercise of a discretion. In my judgment, it is much more probable that the appeal will be out of all proportion to the costs incurred in it.

Disposal

34. For these reasons, the oral renewal of the application for permission to appeal is refused.