

# An analysis of disclosure obligations in respect of custodians and agents (BES v Cheshire West)

01/04/2020

**Dispute Resolution analysis:** This case provides a useful reminder of the relevant issues relating to requests for further disclosure in a complex multi-party case. It remains the position that a parent company does not merely by virtue of being a 100% parent have control over a document of its subsidiaries. Each instance will be judged on a case by case basis taking into account a number of factors and, while the absence of any genealogical corporate relationship between the parties may not be fatal for an application for disclosure, it is distinctly unhelpful.

It also reconfirms that an agent of a company involved in litigation will be required to 'produce to the principal upon request, or to a proper person appointed by the principal, all books, correspondence and documents (including emails and other electronic material) under his control relating to the principal's affairs'. Written by Georgia Whiting, barrister, 4 King's Bench Walk.

*BES Commercial Electricity Ltd and others v Cheshire West and Chester Borough Council*  
[\[2020\] EWHC 701 \(QB\)](#)

## What are the practical implications of this case?

This case considers the importance of parties seeking to narrow the issues between them in respect of disclosure, or risk facing additional costs by the requirement of further case management hearings. It is clear that, in a case with lengthy pleadings and numerous issues, this will not always be an easy task, certainly where there is limited trust between the parties as a result of the allegations included within a claim. Early communication is absolutely key in such circumstances.

Where such agreement cannot be reached, it may be necessary for judicial intervention and for the timetable to be varied, which will inevitably lead to delay and additional cost.

The case also serves as a reminder that, an agent of a company involved in litigation will be required to 'produce to the principal upon request, or to a proper person appointed by the principal, all books, correspondence and documents (including emails and other electronic material) under his control relating to the principal's affairs.' Former agents of such companies should be aware of their duties in this respect and may well be required to make such disclosure long after their engagement with the company ended.

## What was the background?

This decision was in respect of a dispute regarding the defendant's duty of disclosure following an earlier case management hearing, in which the judge requested that the parties engage further to reach agreement or, at least, narrow the broad range of issues still outstanding between them. Agreement was not possible, and the judge noted the dispiritingly labyrinthine path which had led to the present position.

Some idea as to the complexity to the background can be gleaned from the fact that the particulars of claim (in their fourth amended form) spanned some 51 pages, the defence amounted to 30, and a reply had also been filed. A lengthy request for further information had also been made, as well as a request to admit facts.

The defendant was undertaking an ongoing investigation into a suspicion that the claimants had been fraudulently trading. Essentially, following the abolition of the Office of Fair Trading in 2012, its strategic functions had been distributed to a number of new statutory bodies. Responsibility for securing consumer protection at a national or regional level was bequeathed to National Trading Standards (NTS). NTS did not conduct its own investigations or engage directly with the work of trading standards, rather, it commissioned and funded Regional Investigation Teams.

While it was the Lancashire County Council (the council) who conducted the preliminary investigation into the claimant, in around 2014, it was decided that it was no longer appropriate for it to be dealing

with the same, and referred the investigation in its entirety to the NTS with a view to being taken over by the Regional Investigation Team. NTS subsequently agreed to fund the investigation which commenced prior to 2014 and required the defendant (in its capacity as the North West Regional Investigation Team) to conduct the investigation.

The claimants contended that the defendant's investigation was deeply flawed, pointing in particular to the alleged conduct of one of the defendant's former employees, Mr Bourne, contending that he had deliberately and in conspiracy with others, traduced the reputation of the claimants to further his own improper ends during the course of investigation.

The key issues for the judge to decide were three-fold:

- whether four named individuals who were employed, not by the defendant, but by Lancashire County Council should be treated as custodians
- the extent of the list of the electronic repositories to be searched with respect to each custodian
- more specifically, the extent of the list of the electronic repositories to be searched with respect to Mr Bourne

### **What did the court decide?**

In respect of the first issue, the four individuals named had never been employees of the defendant, and the first question to be determined accordingly in respect of the documents as to which they were custodians was, whether or not they had been in the control of the defendant. If not, the obligation to make disclosure did not arise, and the claimant's application must fail.

The claimants instead contended that the relationship between the defendant and the council who employed the individuals in question was such that the four should be treated as custodians of the documents falling within the scope of the defendant's disclosure obligations. The judge opined that, as in this instance, the fact that A may delegate the performance of its functions to B does not automatically entitle B to exercise control over all documents in A's possession relating to A's conduct before such a function has been delegated. The judge considered that there was no formal legal obligation on the council to relinquish control of the relevant documents to the defendant, but that the likelihood was that it would provide them on request. This raised issues as to whether this state of affairs was such to bring the relevant documents within the scope of [CPR 31.8](#).

After a consideration of the case law relevant to this question, the judge was not satisfied that the defendant had the requisite degree of control over the council documents. Firstly, although the defendant and the council had a common interest in the investigation of suspected regulatory misconduct within the context of their framework, their shared aim remained one that subsisted between two separate legal identities. The absence of any genealogical corporate relationship between them may not be fatal to the claimants' argument, but it was distinctly unhelpful. The encouragement of the exchange of information and mutual assistance fell short of establishing a right or a presumption that certain categories of documents were, without more, to be provided upon request.

Turning to the second issue, the proper scope of disclosure of documents in respect of 22 employees and former employees of the defendant, the defendant did not dispute that it was appropriate for it to disclose various documents relating to the electronic devices of its employees, but it contended that it was wrong to extend the relevant search terms as requested by the claimants. The judge shared the claimants' concern that the position regarding the defendant's disclosure was unclear and had presented something of a moving target. However, and despite the delay it would invariably cause, the judge made an order for further detail and information to be provided by the defendant, including an estimation of the likely cost of the extended disclosure sought.

Turning to the third issue, Mr. Bourne was one of the custodians referred to within the second issue outlined above, however, the judge accepted that it would be disproportionate for the court to make any order in respect of sources of electronic information outside that which may be recorded on work issued devices. As the central figure relating to the claimants' case on misfeasance, the judge accepted that Mr Bourne may arguably attract a broader approach in terms of disclosure. However, there appeared to have been a mutual misunderstanding between the parties as to what was being proposed by the claimants. It was pointed out that it is the duty of an agent (as Mr Bourne was) 'to produce to the principal upon request, or to a proper person appointed by the principal, all books, correspondence and documents (including emails and other electronic material) under his control

relating to the principal's affairs.' The judge accordingly made an order essentially in those terms, noting that it was likely that Mr Bourne may not be particularly enthusiastic to comply but this, in itself, was not a reason not to try. This would not extend to personal electronic devices.

#### Case details

- Court: Queen's Bench Division
- Judge: Turner J
- Date of judgment: 25 March 2020

[Georgia Whiting](#) is a barrister at 4 King's Bench Walk, and a member of LexisPSL's Case Analysis Expert Panels. If you have any questions about membership of these panels, please contact [caseanalysis@lexisnexis.co.uk](mailto:caseanalysis@lexisnexis.co.uk).

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