

Court upholds non-party's right to access various documents disclosed at trial (Cape Intermediate Holdings Ltd v Dring)

17/08/2018

Dispute Resolution analysis: The Court of Appeal has ruled that while a master had not had power under the Civil Procedure Rules 1998, or the High Court's inherent jurisdiction, to permit the respondent access to all of the trial documents in other proceedings involving the appellant but not the respondent, the High Court's inherent jurisdiction would permit the respondent access to most of the documents filed at court in those proceedings. Harminster Bains, partner at Leigh Day, examines the decision.

Cape Intermediate Holdings Ltd v Dring (for and on behalf of the Asbestos Victims Support Groups Forum UK) [\[2018\] EWCA Civ 1795](#), [\[2018\] All ER \(D\) 16 \(Aug\)](#)

What are the practical implications of the judgment?

As to the principles to be applied when the court is considering whether and how to exercise its discretion to grant permission for copies to be obtained by a non-party of the records of the court under the Civil Procedure Rules 1998, [SI 1998/3132](#), [CPR 5.4C\(2\)](#), the court has to balance the non-party's reasons for seeking copies of the documents against the private interest of the party to the proceedings in preserving their confidentiality. Relevant factors are likely to include:

- the extent to which the open justice principle is engaged
- whether the documents are sought in the interests of open justice
- whether there is a legitimate interest in seeking copies of the documents and, if so, whether that is a public or private interest
- the reasons for seeking to preserve confidentiality
- the harm, if any, which may be caused by access to the documents to the legitimate interests of other parties

What was the background to the claim?

The appellant had manufactured products containing asbestos. A number of employers had paid compensation to their employees who had come into contact with the products and developed mesothelioma, a fatal disease. The employers' insurers brought a claim against the appellant, seeking contributions from it towards the damages they had paid out.

The claim was tried in the High Court but was settled by way of a confidential agreement before the judgment was handed down. Part of the confidential agreement was to destroy historical documents regarding the knowledge of the dangers of asbestos, which had played a key part in the trial.

The respondent, acting on behalf of an organisation which represented asbestos victims' support groups and which had not been involved in the trial, applied under [CPR 5.4C\(2\)](#) or the court's inherent jurisdiction to obtain all the documents used at, or disclosed for, trial.

After a three-day hearing, the master dealing with the application made an order allowing the respondent to obtain copies from the court's records of the witness statements, including exhibits, expert reports, transcripts, disclosed documents relied on by the original parties at trial contained in the paper bundles only, written submissions and skeleton arguments and statements of case, to include requests for further information and answers if contained in the bundles relied on at trial, ie the entire trial bundle. This was as a result of the appellant arguing that partial disclosure of documents could create a public image which was biased or incomplete by way of 'cherry picking'.

The master therefore concluded that it would serve no purpose to 'fillet' the documents. They were all before the court and relied on, by definition.

The appellant appealed and argued, among other things, that:

- the master had failed to identify correctly which documents she had jurisdiction to permit a non-party to copy, having regard to [CPR 5.4C](#) and the limited nature of the court's inherent jurisdiction
- to the extent she did have jurisdiction to grant access to any of the documents, she applied the wrong discretionary test when determining whether the respondent should be given access to them

What did the Court of Appeal decide?

Although the Court of Appeal overturned the decision to allow the respondent a copy of the entire trial bundle, it nevertheless upheld his entitlement to copies of a large range of key documents. It was held that a non-party was entitled under the court's inherent jurisdiction to copies of all documents read by the trial judge, or which they were invited to read, or to which access was necessary to meet the needs of open justice.

Jurisdiction

Under [CPR 5.4C\(1\)](#), anyone who is not a party to proceedings can, in principle, obtain from the court records copies of a statement of case and of a judgment or an order given or made in public. Under [CPR 5.4C\(2\)](#), a non-party seeking copies of other documents from the records of the court must seek the court's approval.

The Court of Appeal found that the critical issue in relation to a court's jurisdiction under [CPR 5.4C\(2\)](#) was the meaning of the 'records of the court', which was not defined by the CPR but which the Court of Appeal held to be the documents kept by the court office as a record of the proceedings, many of which would be of a formal nature. The Court of Appeal concluded that the court records did not generally include the trial bundles, witness statements, expert reports, skeleton arguments, opening or closing notes or submissions or transcripts. Thus the only category of document to which the respondent had been entitled was statements of case, which could be obtained without permission under [CPR 5.4C\(1\)](#).

The Court of Appeal went on to consider the court's inherent jurisdiction, and found that there was no such jurisdiction to allow non-parties to inspect trial bundles or documents which have been referred to in skeleton arguments, written submissions, witness statements, experts' reports or in open court simply on the basis that they had been so referred to.

However, it found that there was inherent jurisdiction to allow non-parties to inspect witness statements and experts' reports which stood as evidence in chief:

- documents which were read out in open court, which the judge was invited to read in open court, which the judge was specifically invited to read outside court, or which it was clear or was stated that the judge had read
- skeleton arguments and written submissions or similar advocate's documents read by the court and deployed at an effective public hearing
- any specific document or documents which it was necessary for a non-party to inspect in order to meet the principle of open justice

Thus the master had lacked jurisdiction to allow inspection of a number of the categories of documents identified in her order. The documents for which it was likely that there was jurisdiction

were the witness statements (but not exhibits), expert reports and written submissions and skeleton arguments.

The Court of Appeal accordingly allowed the appeal on this ground and set aside the master's order, even though there might have been some documents covered by the order for which there was jurisdiction to allow inspection.

Discretion

The Court of Appeal held that the court was likely to lean in favour of granting permission under [CPR 5.4C\(2\)](#) where the principle of open justice was engaged, and the applicant had a legitimate interest in inspecting the identified documents or class of documents. Where the open justice principle was not engaged, the court was unlikely to grant permission unless there were strong grounds for thinking that it was necessary in the interests of justice to do so.

In relation to the court's inherent jurisdiction, the Court of Appeal held that the court was likely to lean in favour of granting access to documents falling within the categories which it had already found non-parties could inspect (eg witness statements and experts' reports) where the applicant had a legitimate interest in inspecting the identified documents or class of documents.

Harminder Bains acted for the respondent in this case.

Interviewed by Robert Matthews.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.