IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
[2017] EWHC 811 (QB)

No. HQ13X02470/HQ12X01829

Royal Courts of Justice
Strand, London WC2A 2LL

Thursday, 6th April 2017

Before:

MASTER MCCLOUD

B E T W E E N :

THE ASBESTOS VICTIMS SUPPORT GROUPS FORUM UK	Non-Party
- and -	
CONCEPT LIMITED & Ors.	Claimants
- and -	
CAPE INTERMEDIATE HOLDINGS PLC	Defendant

---

*Transcribed by **BEVERLEY F. NUNNERY & CO.***
(a trading name of Opus 2 International Limited)
Official Court Reporters and Audio Transcribers
5 New Street Square, London. EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com

MR. R. WEIR QC (instructed by Harminder Bains of Leigh Day) appeared on behalf of the Non-party.

THE CLAIMANTS were not present and not represented.

THE DEFENDANT was not present and was not represented.

JUDGMENT

(As approved by the Judge)

MASTER MCCLOUD:

1 I will do my best to give an extempore judgment. There is quite a lot there but I will set it out as best I can.

2 This is an *ex parte* application; it is not on notice for reasons I have been given. It is made by an unincorporated association, the Asbestos Victims Support Groups Forum UK. The substantive application is for the supply of documents from court records, which is a lofty expression for a simple thing. It is dealt under Rule CPR 5.4C and the normal right which any non-party to litigation has is set out in sub-rule (1), which is that a person who is not a party may obtain from the court records a copy of any statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it; and a judgment or order given or made in public (whether made at a hearing or without a hearing), subject to some powers that the court has to restrict that.

3 For anything else required by way of access to court records, the non-party may apply to the court for permission to obtain those documents and that is put in these terms: "A non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party" – not simply, if I can put it this way, court generated documents but any document filed by a party – "or communication between the court and a party or another person."

4 Such applications have to be made under Part 23 and they have to identify the classes broadly of documents that are sought. In this case the classes sought are broadly set out in the witness statement of Ms. Bains that I have before me, and the position today is that primarily what is sought from me is an order not that the documents sought should be handed over forthwith, as it were to the Applicants, but rather that I should make an order or orders to ensure that the documents that are sought are preserved.

5 This comes about in the following way. This is an asbestos case, as the name of the Applicant would suggest. There has been litigation between Concept 70 Limited and Cape Intermediate Holdings plc – I believe there are other Claimants too – that relate to the knowledge of the Cape companies as to the safety or otherwise of asbestos at different times. It is widely known, of course, that many people over the years have been exposed to asbestos and many have sadly died. I accept what counsel said to me about there being a public interest in a general sense in asbestos liability and injury litigation, given the death toll and injury toll that has arisen down the years.

6 In the 1960s there were asbestos regulations and a Technical Data Notice Number 13 has formed part of the subject matter of various bits of litigation

and it purports to set standards for asbestos dust concentration, which are appropriate for use with those asbestos regulations; and it is argued in some quarters that that is an indication of what might be said to be either a safe or an acceptable or tolerable, competent, whatever else you might want to call it, level of asbestos exposure by the standards of the day. That is a subject of hot debate and legal controversy; and part of what underlies the background to this application is the question whether in reality TDN Number 13 is not the independent guidance that it has been taken to be, but in fact was put together by or at the behest of with very great influence from the asbestos industry. Hence there are questions about its background.

7 In the litigation between Concept 70 and Cape Intermediate, that is a contribution claim brought by, as I understand it, the companies who have been held liable for exposure of their employees, or those for whom they are responsible, to asbestos, and its product liability case in respect of the safety or otherwise of asbestos.

8 The matter was listed before Mr. Justice Picken for a very lengthy trial recently. The trial progressed, I understand, fairly far through but was compromised before reaching its conclusion and before any judgment was given.

9 In the course of that one would naturally expect that there would be skeleton arguments, witness statements, court bundles, disclosure documents and so on all placed before the court, including expert reports – possibly contemporaneous expert reports – going to the nature of asbestos and its safety or otherwise at the relevant times.

10 The essence here is that The Asbestos Victims Support Groups Forum UK would like to see that material on the footing that it was before the court; it became, they say, public material to which the court should allow access because it was deployed, it was there as bundles in the court and, to varying degrees, put explicitly when witnesses were called and so on.

11 I have the witness statement of Ms. Bains that I need not read aloud in full but I will read the relevant paragraphs that are used for present purposes. I start at paragraph 6:

> "The case had been set down for a lengthy trial which commenced in January 2017 and which I had believed was still ongoing. However, on Friday 31 March 2017 I discovered that the case had, in fact, settled on a confidential basis.
>
> On Monday 3 April I spoke to Mr. David Pugh, the Partner at Keoghs who represented Concept 70 Limited, and requested confirmation as to

how I could obtain the public domain documents. He informed me that part of the confidential settlement agreement was that the documents were to be destroyed, and that the destruction was imminent. I advised Mr. Pugh that I had been instructed by the Forum to obtain the documents and requested that they not be destroyed. He said that he could not agree."

12 There is then an outline of some, if I can put it this way, to-ing and fro-ing which resulted on 4 April in an email from Christopher Foster of Holman Fenwick and Willan, LLP – paragraph 11 of Ms. Bains' statement – in which he stated:

> "I am instructed by each of the insurers involved in the recent litigation against Cape, and have been passed a copy of your email below. I am informed that Cape will be retaining copies of all the documents, and will be taking discussions on access forward with you. In the meantime, I am unable to provide you with any comfort on insurers' documents which will be destroyed in early cause."

13 It is an ambiguous sentence but I accept that on any basis the context here is information having been provided that a part of the confidential settlement is the destruction of documents, implicitly the documents which are sought, and which are regarded by these Applicants as, firstly, very greatly significant; and, secondly, potentially that (even if not irrevocably destroyed such that there might be further copies somewhere else) there would submissions about proportionality of a search and so on if litigation were brought and these documents were not preserved in their current, already searched and prepared state. So there is a future proportionality argument, but also just the basic principle as to whether these documents will in fact cease to exist. It is believed that these may not be paper copy documents, they may be on a USB stick but it is not known for sure.

14 In terms of the principles that apply here, at the forefront of my mind I have to have in mind two things especially in my judgment. The first is the principle of open justice and I cannot do any better than to quote the words of Lord Justice Toulson from *Guardian News and Media v Westminster Magistrates' Court* [2013] QB, starting at page 630 and I will read that – it was cited to me by counsel Mr Weir QC for the Applicants.

> "Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? It is an age old question. *Quis custodiet ipsos custodes* – who will guard the guards themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in

the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse. Jeremy Bentham said in a well known passage quoted by Lord Shaw of Dunfermline in *Scott v Scott*: 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.'"

15 Paragraph 2 of the judgment:

> "This is a constitutional principle which has been recognised by the common law since the fall of the Stuart dynasty, as Lord Shaw explained. It is not only the individual judge who is open to scrutiny but the process of justice."

16 That principle of open justice in reality is what underlies rules such as Rule 5.4 in the Civil Procedure Rules, which provides a mechanism whereby non-parties, as of right, have access to certain documents and whereby there is a fairly liberal regime of authority to the court to grant access to any others.

17 The *Guardian* case actually did involve the question of access to court documents so it is relevant not only because it refers to open justice but because of the rule in which it was being made. The question which may be live in this case is to what extent is a document amenable to the disclosure rule, whereby the court can grant access to the court record if it has not, for example, been explicitly read in court or explicitly put in evidence but is in fact in court and has been filed as part of bundles?

18 Paragraph 83 of Lord Justice Toulson's judgment is indicative. I do not have to decide this now because I think the question for me is am I satisfied that an order for preservation is sufficient to hold the ring between the parties. What he says at paragraph 83 is:

> "The courts have recognised that the practice of receiving evidence without it being read in open court potentially has the side effect of making the proceedings less intelligible to the press and the public. This calls for counter measures. In *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* Lord Bingham referred to the need to give appropriate weight both to efficiency and to openness of justice as the court's practice develops. He observed that public access to documents referred to in open court might be necessary. In my view the time has come for the courts to acknowledge that in some cases it is indeed necessary. It is true that there are possible alternative measures. A court may require a document to be read in open court, but it is not desirable

that a court should have to take this course simply to achieve the purpose of open justice."

19 I will add my own parenthesis there that that would be unwieldy, clearly.

> "A court may also declare that a document is to be treated as if read in open court, but that is merely a formal device for the exercise of a power to allow access to the document. I do not see why the use of such a formula should be required. It may have the advantage of ensuring that other parties have an opportunity to comment, but that can equally be achieved if, in a case such as the present, the applicant is required to notify the parties to the litigation of the application."

20 In this case I think one has to say that something similar applies in that in this instance the Respondents to the application will have an opportunity to comment and respond to this application, and it does not seem to me that for today's purposes I need necessarily draw the line narrowly and say that documents must have been read in open court or must have been marked as read or must have been explicitly deemed as read if they were present in court. We will find out the extent to which that is challenged and we will find out the extent to which documents were or were not part of the material properly to be regarded as disposable under Rule 5.4C in due course when argument is heard.

21 For present purposes what I am satisfied is that this is a competent application under Rule 5.4C(2); that a *prima facie* argument on an *ex parte* basis has been made out that the trial documents that were lodged at court – that is to say all of them – may be part of those documents that fall within that rule and therefore may be amenable to the exercise of my discretion to order disclosure.

22 In those circumstances I must look at the second principle which in my judgment is relevant. I have referred to open justice but the second context here is what I have already alluded to, which is the public interest in openness especially in asbestos cases where we all know that there has been widespread death and injury caused by asbestos. A large number of claims have been brought. The importance of openness of justice and to disclosable court record information is all the more significant in the context where it relates to a substance such as asbestos, which is accepted as being dangerous and is accepted as causing death and injury.

23 For all those reasons it seems to me to be entirely proportionate and appropriate that I should order that the documents, files, trial bundles, any transcripts disclosed to the judge during the course of the hearing by way of live transcription, any other material that was lodged or brought into court for the purposes of the use of the witnesses or the trial judge must:

(a) Insofar as it remains within the Royal Courts of Justice be transferred to my court for safekeeping;
(b) Insofar as it has been removed must be returned forthwith to my court for similar preservation. Documents in this context, including for the avoidance of doubt, any electronic material, USB sticks or other media. That should take place forthwith on receipt of the order.

24 That the matter be:

(a) Reserved to me. This being an asbestos list I am not clear who it is now allocated to – it certainly was allocated to me to start with years ago; but I direct that it be reallocated to me if necessary. Reserved to me and that the application should come back on a return date mutually convenient to the parties for further consideration.

25 I will leave it to the parties to liaise whether they want a mini-CMC with a view to directions for dealing with the application, depending on how contested it is going to be; or whether it appears to the parties to be something that can go straight to a final determination. That all depends on the arguments, the representation and so on.

26 The order of course has to include the usual provision about liberty to apply within seven days of receipt of the order.

27 Otherwise I will simply say for the moment costs reserved.

28 I am not sure that any other directions are necessary from me at the moment.
