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Supreme Court sets out test for disclosure of court documents to non-parties (Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK))

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Dispute Resolution analysis: Harminder Bains, partner at Leigh Day, and Harry Sheehan, barrister at Devereux Chambers, examine the Supreme Court's decision in Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK) that, following other proceedings involving the appellant asbestos manufacturer but not the respondent, the Court of Appeal had been correct not to limit disclosure to the respondent to just the statements of case held on the court file, and it had also been correct not to allow the respondent access to the whole trial bundle. However, the Court of Appeal had been wrong to order that there could only be disclosure of those documents which the judge had read or been asked to read—disclosure should be of those documents which had been placed before the judge and referred to during the hearing.

Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK) [2019] UKSC 38, [2019] All ER (D) 161 (Jul)

For initial coverage of this judgment, see: LNB News 29/07/2019 57

What are the practical implications of the judgment?

The Supreme Court's decision has brought much needed clarity to the ability of non-parties to access court documents relied upon in the course of litigation. It is now abundantly clear to practitioners exactly what the scope of the court's inherent jurisdiction to provide access to documents is. It is also clear what test the court should apply when asked to act in accordance with that jurisdiction. The test described by the Supreme Court is clear and broad and will be of great assistance to practitioners with an interest in litigation to which they were not a party. A non-party with a legitimate interest will now be able to inspect and obtain documents much more easily than before. Non-parties can include non-governmental organisations, potential litigants and academics who have a strong interest in understanding litigation.

The judgment is also of great importance to practitioners involved in industrial diseases, and asbestos-related diseases in particular. The respondent, who was acting for the organisation representing asbestos victims support groups, is due to receive the documents as ordered by the Court of Appeal within a matter of weeks. These include the pleadings, statements and experts' reports. The respondent will apply for the remainder of the documents in Bundle C to Picken J, who was the judge in the earlier case involving the appellant but not the respondent, or to another High Court judge in Michaelmas term. If the documents obtained make it clear that the appellant was aware of the dangers of asbestos while still producing it, and took steps to obfuscate that fact, then it will become much easier to bring claims in negligence against it for those injured by the products that it produced. The judgment therefore gives hope for practitioners, as well as claimants, who may be unable to pursue other parties for compensation for asbestos-related injuries.

What was the background?

At the beginning of 2017, the appellant was the defendant to an action brought by the insurers of employers which had paid compensation to their employees who had come into contact with the appellant's products and, as a result of the asbestos, they developed mesothelioma. The insurers claimed contribution from the appellant on the basis that it had been negligent in the manufacture of asbestos insulation boards, known as Asbestolux, knew the risks of asbestos, failed to make those risks clear and even went so far as to obscure and understate information that it provided, giving false reassurance while manufacturing dangerous products. Given the financial resources available to the insurers to pursue disclosure, vast numbers of documents were disclosed by the appellant—documents which had never been disclosed prior to this case.

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The trial concluded, and the judgment was reserved. However, prior to the judgment being handed down, the parties agreed confidentially between themselves that the disclosed documents were to be destroyed. Following a tip-off about the imminent destruction, the respondent applied for an injunction and preservation order. The documents having been preserved by an order of Master Victoria McCloud, the case then proceeded to a three-day hearing in which the respondent applied for the entire trial bundle, known as Bundle C. This application was contested by the appellant, but the master ordered disclosure of the entire trial bundle as sought.

The appellant appealed against this order, and the appeal was leapfrogged to the Court of Appeal. That court, with Hamblen LJ delivering the leading judgment, held that the order made by the master was outside her jurisdiction to make and it made a more restricted order which would only permit access to documents that the judge in the proceedings brought by the insurers had 'read' or which the judge was 'specifically invited to read'.

The appellant appealed again, this time to the Supreme Court, on the basis that the Court of Appeal did not have jurisdiction to order disclosure of those documents. The respondent cross-appealed on the basis that the jurisdiction of the court was in fact much wider.

What did the Supreme Court decide?

The respondent's case was on two alternative bases:

- the court did have jurisdiction under CPR 5.4C(2) to order disclosure of documents filed at court to a non-party to proceedings
- the court had discretion to order disclosure of the documents under its inherent jurisdiction as the disclosure was required to further the principle of open justice

The Supreme Court dismissed the appeal, holding that the Court of Appeal did have jurisdiction to make the order that it did. However, significantly, the Supreme Court also held that the Court of Appeal did have jurisdiction under the inherent jurisdiction of the court and in fact had the jurisdiction to make a wider order if it was right to do so (para [49]).

The Supreme Court endorsed the guidance given in *R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, [2012] 3 All ER 551 that the default position is that access should be permitted where documents have been 'placed before a judge' and 'referred to' in the course of proceedings (para [38]). The judgment specifically states that access should be allowed to documents placed before the court and referred to during the hearing and should not be limited to what the judge has read or been asked to read (para [44]). Therefore, the Supreme Court expanded the scope of the documents that the respondent should be able to obtain. It will no longer have to show what the trial judge had read and will now have the much simpler task of showing what was referred to in the course of proceedings.

The judgment covers a number of different matters of principle. It explains that the 'records of the court', a term that had been disputed throughout the proceedings, must refer to the documents which the court itself keeps for its own purposes (para [23]). It states that the purpose of the open justice principle is that it enables public scrutiny of the way in which courts decide cases (para [42]), and that it enables the public to understand how the justice system works and why decisions are taken (para [43]).

The leading case on the principle of open justice has, until now, been the century-old *Scott v Scott* (1913) FLR Rep 657. This decision of the Supreme Court firmly establishes the meaning of open justice and the importance of the principle in the modern day and provides valuable guidance to 'all tribunals exercising the judicial power of the state' (para [36]).

Harminder Bains and Harry Sheehan acted for the respondent

Interviewed by Robert Matthews.

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