



29 July 2019

PRESS SUMMARY

Cape Intermediate Holdings Ltd (Appellant/Cross-Respondent) v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK) (Respondent/Cross-Appellant)

[2019] UKSC 38

On appeal from: [2018] EWCA Civ 1795

JUSTICES: Lady Hale (President), Lord Briggs, Lady Arden, Lord Kitchin, Lord Sales

BACKGROUND TO THE APPEAL

Rule 5.4C of the Civil Procedure Rules (CPR) provides that a person who is not a party to proceedings may obtain from the court records copies of a statement of case and judgment or orders made in public, and, if the court gives permission, ‘obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person’. This appeal concerns the scope of Rule 5.4C, and whether the court has an inherent power to order access to documents for non-parties outside this provision.

Cape Intermediate Holdings Ltd (‘Cape’), a company that was involved in the manufacture and supply of asbestos, was a defendant in a trial in the High Court to claims brought by employers’ insurers. Voluminous documentation was available to the court during the trial. After the trial had ended, but before judgment was delivered, the claims were settled. The Asbestos Victims Support Groups Forum UK (‘the Forum’), which was not a party to the proceedings, applied to the court under Rule 5.4C for access to all documents used at or disclosed for the trial, including trial bundles and transcripts. The Master held that she had jurisdiction either under Rule 5.4C or at common law to grant the order sought. The Court of Appeal allowed an appeal by Cape, limiting the disclosure to the Forum to (i) statements of case held by the court pursuant to Rule 5.4C; (ii) provision by Cape of witness statements, expert reports and written submissions, and (iii) ordering that the application for further disclosure be listed before the trial judge or another High Court judge to decide whether any other documents had lost confidentiality and had been read out in court or by the judge, or where inspection by the Forum was necessary to meet the principle of open justice.

Cape appealed to the Supreme Court, arguing that the disclosure should have been limited to the statements of case held on the court file; that the scope of any inherent jurisdiction of the court was very limited and could only extend to skeleton arguments or written submissions relied on in court; and that the Forum did not have a legitimate interest based on the public interest in open justice in the content of the documents it was seeking. The Forum cross-appealed on the ground that the Court of Appeal had been wrong to limit the scope of Rule 5.4C in the way that it did.

JUDGMENT

The Supreme Court unanimously dismisses the appeal and cross-appeal. In a judgment of the court, the Supreme Court upholds orders (i) and (ii) of the Court of Appeal and replaces (iii) with an order that the application be listed before the trial judge (or another High Court judge if he is unavailable) to determine whether the court should require Cape to provide a copy of any other document placed

before the judge and referred to in the course of the trial to the Forum (at the Forum's expense) in accordance with the principles laid down in the judgment.

REASONS FOR THE JUDGMENT

Rule 5.4C refers to the records of the court. The CPR do not define this term or provide what the records of the court are to contain. The essence of a record is something which is kept. It must therefore refer to documents kept for the court's own purposes, presently at least the claim form and the judgments or orders which resulted, but not every document lodged or held for the time being at court. However current practice in record keeping cannot determine the scope of the court's power to order access to materials to non-parties, which is informed by the principle of open justice, not the practical requirements of running a justice system [19-24].

The constitutional principle of open justice applies to all courts and tribunals exercising the judicial power of the state. They all have inherent jurisdiction to determine what that principle requires in terms of access to documents or other information placed before them. The extent of any access permitted by the court's rules is not determinative (except where they contain a valid prohibition) [41]. The principal purposes of the open justice principle are two-fold: to hold individual courts and judges to account, and to enable the public to understand how the justice system works and why decisions are taken. Now that much more of the argument and evidence is reduced to writing before a hearing it is difficult for non-parties to follow what is going on without access to the written material, including documents [42-43]. The default position is that the public should be allowed access, not only to the parties' submissions and arguments, but also to the documents which have been placed before the court and referred to during the hearing, which are not limited to those the judge has been asked to or has said that he has read [44].

It does not follow, however, that an applicant has a right for access to be granted (save to the extent that the rules grant such a right). A non-party seeking access must explain why he seeks it and how granting access will advance the open justice principle. The court will carry out a fact-specific balancing exercise to take account of any countervailing principles, such as the need to protect national security, privacy interests or commercial confidentiality. The practicalities and proportionality of granting the request will also be relevant, especially when proceedings are over [45-47].

In the present appeal and cross-appeal, both parties' submissions are therefore incorrect. The Court of Appeal did have inherent jurisdiction to make the order it did, to support the open justice principle, and it could have made a wider order if it were right to do so. The basis for the order is not Rule 5.4C [49]. There seems no realistic possibility of the judge making a more limited order than the Court of Appeal, so the orders for access already made will stand, while the balance of the application be listed before the trial judge (or another High Court judge if that is not possible) to determine whether the court should require Cape to provide a copy of any other document placed before the judge and referred to in the course of the trial to the Forum, at the Forum's expense, in accordance with the principles laid down in the judgment [50].

By way of postscript, the Supreme Court urges the bodies responsible for framing the court rules in each part of the United Kingdom to give consideration to and consult on the questions of principle and practice raised by this case [51].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>