



Disclosure of Pleadings in an ongoing litigation case to a member of the public or the press

To what extent should the case papers be available to the public?

This was the question decided by His Honour Judge Wilcox QC in *Cleveland Bridge UK Limited v. Multiplex Constructions (UK) Limited* [2005] EWHC 2101 (TCC).

The Facts and the Issues

Multiplex Construction UK Limited ("MCUK") is a wholly owned subsidiary of Multiplex Limited which is ASX-listed; the Multiplex Group has interests all over the world; MCUK is main contractor for construction of the new National Stadium at Wembley Cleveland Bridge UK Limited ("CBUG") is a well-known steel fabricator, a subcontractor to MCUK on the project. Disputes between MCUK/CBUG had arisen and had been listed for a 42-day trial commencing on 24th April 2006. MCUK has filed and served its consolidated Particulars of Claim, its Reply to Defence and counterclaim and CBUG has filed and served its Defence and counterclaim.

There are many complicated factual and legal issues arising in the action requiring extensive factual witness evidence and detailed Expert evidence.

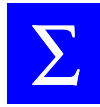
A TV journalist, C, and her employer, ABC, applied for an Order permitting them to see and take copies of the particulars of claim, the response, the consolidated defence and counterclaim and the consolidated reply and defence to counterclaim in the claim HT-04-314/HT-04-238 in the TCC. These documents fall within the provisions of CPR 5.4 in that the detailed pleadings fall within the description "other documents filed by the parties" within CPR 5.4(5) which provides, in so far as it is relevant:

"Any other person may b): if the court gives permission, obtain from the records of the court a copy of any other document filed by a party"

MCUK sought to resist the application hence the present hearing.

C was producing a programme on Multiplex which included covering the dispute relating to the Wembley project; she referred to public interest considerations in support of her application. MCUK's Solicitors explained their reasons for resisting the application as follows (extracts only):

"Our client is obliged to observe the rules of the Australian Stock Exchange, in particular chapter 3 concerning continuous disclosure. If our client were to consent to your application, documentation concerning these proceedings could become disclosable by operation to the exception to Rule 3.1 of the ASX Rules which could in turn oblige our clients to comment on any and all market or other rumours concerning these proceedings, whether such rumours emanate from the documents found at Court or otherwise. Our Client does not wish to become involved in litigating these matters in the press, not least because the proceedings are at a relatively early stage and any



speculation concerning the outcome of the proceedings would be unhelpful and more likely than not inaccurate.

There are no public interest considerations in circumstances where your programme will not be aired in this jurisdiction. More generally (and to the extent that this is at all relevant), our Client was very surprised by the statements in your fax of 15 August which imply that our Client has not cooperated with your programme.

...

"The documents relating to the Court proceedings are voluminous and the issues involved are complex, thereby necessitating a lengthy trial next year. Our Client is concerned that, notwithstanding best intentions, it would be extremely difficult for a fair and balanced representation of those proceedings to be given in a short television documentary. The consequences to our Client and its stock price of your programme falling short in this respect could be substantial and irreparable. Our Client would, understandably, prefer for the issues in dispute to be resolved in Court at the appropriate time".

There had been a great deal of press and media interest about this dispute, including national newspapers (in both sports and business sections) and in the construction trade press, in the UK, in Australia and elsewhere.

The Judgment -

HH Judge Wilcox stated that "open justice has long been a fundamental principle of English law and there is a strong presumption that cases should be heard in public and decisions made in public. ... Further, it was clear from authority such as *Barings plc v Coopers and Lybrand* [2001] 1 WLR 2353 and *Law Debenture Trust Corp (Channel Islands) Limited v Lexington* [2003] All ER 165, that pleadings ought to be treated as though being read in open court, that anyone with a legitimate interest ought to be allowed reasonable access to them in accordance with the principles of open justice."

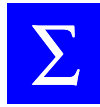
Counsel for CBUK submitted that the applicants had demonstrated clearly a legitimate interest, namely a serious journalistic interest to report on Multiplex, the Wembley project and the dispute with Cleveland Bridge UK.

This was a consequence of the primary requirement for open justice, memorably stated in *Scott (otherwise Morgan) v Scott* [1913] AC 417 and the passage at 477:

"Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity, there is no 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".

In *Attorney-General v Leveller Magazine* [1979] AC 440, Lord Diplock had said at 450:

"If the way the courts behave cannot be hidden from the public ear and eye, this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice".



Counsel for MCKUK accepted that the applicants had a legitimate interest but submitted both that the trial is the final adjudication on the merits and that all reported cases concerned public disclosure, either during or after trial or compromise.

CBUK contended that the requirement for open justice must equally apply to interlocutory proceedings; refer *Hodgson & others v Imperial Tobacco Ltd.* [1998] 1 WLR 1056 at page 1073 HH Judge Wilcox agreed:

"There can be no legitimate distinction drawn between decisions made in interlocutory proceedings and those at final trial when the requirement for open justice is considered. Interlocutory decisions may often be decisive as to the whole or a significant part of a complex case."

MCKUK further submitted that open justice and the continuing obligation of public disclosure throughout a potentially long interlocutory process may in truth be no justice at all. The ongoing provision of pleadings and other documents and the scrutiny of those pleadings and other documents by public and press would give rise to an ongoing need to respond to such scrutiny in the interests of shareholders. Should this application be permitted, floodgates would open and further applications could be made any time after new documents were filed with the court.

Judge Wilcox rejected this since an applicant would have to demonstrate a legitimate interest and the documents would have to be shown to have been judicially deployed.

Counsel for MCKUK further contended that real prejudice to its parent could flow should a disclosure order be made in this case since there would be a real risk of injustice thereto, the public perception of Wembley being out of all proportion to its role in Multiplex's business activities as whole which is apparently the subject of the ABC programme. He contended that Multiplex's ASX reporting obligations are already onerous and the spectre of a public airing of the pleadings either in Australia or in the UK would require Multiplex to answer the points raised, generating yet more material for its opponents.

Judge Wilcox considered the witness statement of an Australian commercial lawyer with extensive experience in company work and dealings with the ASX and the application of its Listing Rules; the General Rule provides:

"Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have material effect on the price or value the entity's securities, the entity must immediately tell the [ASX] that information".

Judge Wilcox accepted this Expert's evidence: it was clear that if a reasonable person would expect the information in the documents sought to have a material effect on the price or value of Multiplex's securities, it would already be obliged to disclose them to ASX in any event. He therefore did not accept that the effect of the ASX Rules would impose any additional and onerous obligation. Further, he did not accept MCKUK's submissions that because the consolidated action was complex and the pleadings long and detailed that disclosure at this stage could give rise to selective and therefore



unfair coverage. In any event, the position would be the same were the trial to be reported after the final adjudication of the issues.

The Judge continued

"The court must not put itself in the role of nanny, judging whether or not matters are too complicated to disclose. An informed press is in the position to analyse and explain. The specialist press is well able to deal with the technical issues."

He also rejected the approach that only those parts of the pleadings relevant to the particular specific disclosure application in May and June should be disclosed: the Court, considering such an application, had taken account of the whole pleaded case and it "would not be appropriate and it would be artificial, to embark upon an editing exercise, giving only partial disclosure of pleadings".

Judge Wilcox concluded that "it would be fair and just to order disclosure of the documents sought. I so order."

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