[2017] EWHC 2103 (QB)

Claim numbers HQ12X01829, HQ13X02470 and others

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

BEFORE MASTER MCCLOUD

IN THE MATTER OF AN APPLICATION BY Mr GRAHAM DRING for and on behalf of THE ASBESTOS VICTIMS SUPPORT GROUPS FORUM (UK)

IN RELATION TO CERTAIN DOCUMENTS PRESENTLY IN COURT IN CLAIM NUMBERS HQ12X01829, HQ13X02470 AND OTHERS BETWEEN Cape Distribution Limited, Cape Intermediate Holdings Limited, Concept 70 Limited (and others) and Aviva Plc

BETWEEN

Mr GRAHAM DRING for and on behalf of THE ASBESTOS VICTIMS SUPPORT GROUPS FORUM (UK)

Applicant

and

Cape Distribution Limited,

Cape Intermediate Holdings Limited

Concept 70 Limited (and others)

Aviva Plc

Interested parties

MR. ROBERT WEIR QC (instructed by Harminder Bains of Leigh Day) appeared on behalf of the Applicant.

MR. GERAINT WEBB QC (instructed by Jonathan Isted of Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Cape.

MR. CHRISTOPHER FOSTER (of Holman Fenwick Willan) appeared on behalf of Concept 70 (and others) and Aviva Plc.

JUDGMENT

1. This is my judgment in the above matters after hearing oral argument on 26 June 2017 and receiving written submissions thereafter. The matters for decision by me are (1) what directions to make governing the incidence of the interested parties' costs in relation to the Applicant's application to the court for copies of documents from the court record (2) case management in relation to hearing the Applicant's application and any submissions which the interested parties make on that application and (3) whether any degree of immediate access to a limited subset of documents falling within the scope of the application should be given to the Applicant.

2. The Applicant and Concept 70 have agreed that there should be no order as to costs between them in any event, and that Concept 70 Ltd. The issues essentially therefore are now only those in relation to the Applicant's application for copy documents from the court file insofar as the Cape parties wish to make any points relevant to that.

Background

3. Under CPR rule 5.4C the general rule is that a member of the public who is not a party to litigation is, without requiring the court's permission, entitled to obtain (at their own copying cost) the following categories of document from the court file in litigation:

    - A statement of case but not any documents filed with it or attached to it or intended by the party filing it to be served with it. (r.5.4C(1)).

      A different rule applies to statements of case filed before 2nd October 2006 which need not be considered here.

      Statements of case may only be obtained without permission if the Defendants have all acknowledged service or filed defences, or the claim has been listed for a hearing, or judgment has been entered in the claim (r.5.4C(3)).

    - A judgment or order given or made in public (whether made with or without a hearing).

    - The 'general rule' is subject to exceptions in the case of mediation settlement enforcement orders, documents and applications, which do not apply here (r.5.4C(1B)).

4. Under 5.4C(2) "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, or communication between the court and a party or another person."[1]

[1] Note that in some cases (typically where a case is sensitive for some good reason) the parties to litigation typically apply at the outset for an order under CPR r5.4C(4) restricting the class of persons who may obtain copies of statements of case, or ordering that a person or class of persons may only obtain a copy of a statement of case if it is edited in accordance with the directions of the court, or such other order as the court thinks fit. If an order is made under r5.4C(4) then a non-party wishing to obtain a copy of the

5. The Asbestos Victims Support Groups Forum (UK) are the effective Applicant in this application albeit that nominally the application before me is pursued by Mr Dring who is a member of the public and an officer of the Applicant, on behalf of that forum, because that forum does not have a legal personality.

6. In this case on 5th April 2017 the Asbestos Victims Support Groups Forum (UK) via Ms Bains of Leigh Day administratively (ie without formal application for permission, none being required) obtained copies from the court file of all the documents which could be found in it which fell within rule 5.4(1).

7. This judgment relates to case management in an application issued the next day, 6 April, by the Applicant by which it seeks the court's permission under r. 5.4C(2) to obtain from the court record, copies of other documents filed by the parties in the claims to which this relates and for which r. 5.4C requires permission to be obtained.

8. There is no order under r.5.4C(4) in place restricting access beyond the usual requirements of r.5.4C and as far as I am aware no such order was sought from this court at any stage in the, now concluded, litigation.

The underlying litigation

9. I need not say much about the underlying claims but will give a general picture. There were two sets of claims which were tried together. These have become known as the Product Liability ("PL") claims and the "CDL" claims (so named because they were claims brought by Aviva on behalf of its insured customer, Cape Distribution Limited).

10. In the PL claims a consortium of insurers brought subrogated claims seeking contributions from Cape Intermediate Holdings PLC arising from insurance policies which the PL claimants had written regarding employee liability insurance for various clients, mainly building companies. The insured employers were sued or received notices of claims from former employees in respect of mesothelioma contracted by them due to occupational asbestos exposure. The claims were settled by the insurers and that gave rise to the subrogated PL claims by which the insurers sought contributions from the Defendants.

11. The basis for the PL claims was that the claimants alleged that the employees in question had been exposed to dust from 'Asbestolux' and 'Marinite' boards manufactured and supplied by members of the Cape group of companies, and that Cape and/or its subsidiaries had failed adequately to warn of the risks of occupational asbestos exposure at the time.

12. Briefly, Asbestolux insulating board (AIB) was a fire resistant board which was first produced I believe in the 1930s and production ended in the 1980s. It contains a mix of types of asbestos fibres, which can vary from product to product. Marinite for the purposes of this case was likewise an asbestos fire resistant material (but nb the word continues in use now for some products which in the modern era no longer contain asbestos).

---

statement of case, or an unedited copy of it, may apply (on notice to the party or person who requested the order) for permission.

13. In the CDL claims, CDL sought a contribution from Cape Intermediate Holdings PLC in relation to damages claims which it had settled arising from the terminal illness mesothelioma caused by exposure of CDL's employees to asbestos at work between 31 December 1956 and 31 December 1966.

14. The two sets of claims were tried by Picken J. at a trial which started on 16 January 2017 and ended on 23 February 2017 when judgment was reserved.

15. Whilst Picken J. was considering his reserved judgment, retiring with the various trial bundles one typically has in such a case, the parties reached an out of court settlement and as a result the reserved judgment was never produced.

The Trial Bundles

16. As one would expect, during the management of the PL and CDL cases leading up to trial, a process of standard and more specific disclosure took place between the parties, at various stages. Disclosure included for example documents such as inter-company indemnities, insurance arrangements, marketing materials relating to the products in question, historic technical information about the materials, and codes of practice. This principally concerned the period from 1948 to 1982 and given the age of the documents the exercise was mostly done on paper.

17. For the purposes of the trial the parties produced agreed trial bundles based on the documents. As far as I can tell there may have been no special order in relation to the bundles and hence the default provisions of rule 39.5 and PD39A would have applied namely that:

"39.5 (1) Unless the court orders otherwise, the claimant must file a trial bundle containing documents required by –

(a) a relevant practice direction; and

(b) any court order.

The claimant must file the trial bundle not more than 7 days and not less than 3 days before the start of the trial."

Practice Direction 39A 3.1-3.10 sets out a list of categories of documents which must be included in trial bundles, and the proper format for trial bundles.

18. I need not list the categories under PD 39A3 but for present purposes can assume the bundles included what was required by the rules. As an observation from looking at the bundles, most of them appear to fall within PD49A(2)(11) ie 'any other necessary documents', as one would expect given the large quantity of underlying disclosure which was carried out prior to trial between the parties, but for this judgment nothing turns on that.

The events leading up to the Application

19. The PL claim (especially) was, from the evidence I have, seemingly of interest to lawyers and members of the public interested in asbestos safety and the related topic of asbestos-related disease, and to the Applicant in this case.

20. I have evidence before me (w/s of Ms Bains for the Applicant, 8/6/17 exhibit HZB3) that for example on 5 April 2017 (after the claims had settled) staff or members of 12 Kings Bench Walk chambers tweeted a running commentary of numerous tweets from an educational conference event, which attribute various statements by Mr Michael Rawlinson QC and Ms Gemma Scott (barrister speakers at the conference) about the litigation. Mr Rawlinson QC and Ms Scott had represented Concept 70 (one of the consortium of insured claimants suing in the PL litigation) at trial. The observations attributed to them are to the effect that the documents in the litigation were 'crucial knowledge docs' (ie, in relation to what was known, by whom, and when, about the risks of asbestos exposure historically) and were 'now in public domain') and for example that "court documents show extremely high levels of exposure even from eg unloading of Asbestolux".

21. I also have in evidence copies of Powerpoint presentation slides by Concept 70's former counsel presented at the conference, about the case. Those slides allege for example that the disclosure in the claims 'revealed':

    - Cape was 'still selling Asbestolux in 1980'
    - 'Significant omissions in previous cases'
    - 'Handling AIB produced dust levels much higher than anticipated'
    - 'May become the single most important weapon against TDN13'

    It is also alleged there that the 'topics' of disclosure included:

    - 'What Cape really knew about mesothelioma'
    - 'Dust levels produced by AIB'
    - 'The industry's influence on the BOHS standards (which were subsequently used as the basis for the TLVs in TDN13"
    - 'Why it took so long for warnings to be applied to AIB'

22. In what I described to the parties by email as an 'interesting' state of affairs I was notified, entirely properly by Ms Bains by email (copying in all parties) on the morning of 26th July 2017 that:

    "I write to advise that I was telephoned on 25 July 2017 by an asbestos campaigner (who wishes to remain anonymous) who told me that she had been approached by an individual (who also wishes to remain anonymous) about some Cape documents. The individual told her that he had been handed some documents relating to the Cape case by Michael Rawlinson QC, who had told him that these documents were in the public domain. The individual told the campaigner to upload them on her website.

    Before uploading the documents, the campaigner decided to telephone me, for my opinion as to whether she should upload the documents. I advised her to send the documents to me, and not to upload them until I had spoken to Robert Weir QC.

Thereafter I emailed them on to Robert Weir QC and asked him to telephone me to advise.

Robert Weir QC advised that he had not opened the documents, but that as we were representing the non-party on this application for disclosure we should advise you how the campaigner had obtained the documents ,which had then been forwarded onto me.

I do not know whether the parties to the underlying litigation have given permission for these documents to be put into the public domain, but given the Forum's application is contested, I rather assume not and believe it is best to bring the issue to the attention of all concerned."

23. It may therefore be that in due course the documents said to have been handed over to the public already (which I gather as far as currently known consist of a few pages of historic technical testing data about fibre counts from asbestos products handled in certain ways) are the subject of argument separately from the bulk of the Trial Bundle documents but that is a matter for the parties as to whether or not they take the view it impacts at all. I do however mainly refer to the above, here, as an indication that once the litigation was over, the supposed contents of the documents at court was a topic of interest and watched by those interested in the asbestos safety and diseases field.

The Application of 6th April 2017

24. The Application notice issued on behalf of the Forum and adopted by Mr Dring as applicant sought two remedies one of which (the order for preservation of documents) was an urgent interim remedy to preserve the subject matter of the second limb (the application for copy documents from the court record):

(1) Preservation of the Claimant's and Defendant's documents under 25.1(1)(c) without notice, pursuant to CPR 25.3(1).

(2) Supply of documents to a non-party under CPR 5.4C(2).

25. The application came before me (I was the assigned master to this case) as an urgent ex parte application on 6th April. The evidence in support consisted of Ms Bains' first w/s (6/4/17) and exhibits. It outlines that the Asbestos Victims Support Groups Forum (UK) is a non-profit unincorporated association representing 12 asbestos victims support groups in the UK, groups which are described as providing support and welfare to those suffering from asbestos related disease.

26. The evidence relates a conversation said to have taken place on 3 April 2017 between Ms Bains and Mr Pugh, a partner at Keoghs solicitors representing Concept 70 in the PL litigation, to the effect that part of a confidential settlement between the parties included provision for the destruction of certain documents and that destruction of them was imminent. It appears that Ms Bains' belief was that the documents in question were those which had been filed at court including bundles for trial. Mr Pugh, it is said, was asked not to destroy the documents because the Asbestos Victims Support Groups Forum (UK) wished to obtain the documents, but was not in a position to agree to that request. There is a significant dispute over the details of the conversation, and it is no part of this judgment either to find whether or not any party agreed to destroy any documents or

whether such would in any event have been in any way wrong in law assuming the documents belonged to the party in question.

27. There were then further emails and phone calls which I need not summarise but the upshot was that according to Ms Bain's statement the Defendants' representatives did not return her messages seeking preservation of the documents and a Mr Foster of Holman Fenwick Willan LLP representing the insurers in the CDL litigation, emailed Ms Bains on 4th April saying inter alia that:

> *"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 course."*

28. There then followed an email from Ms Bains of Leigh Day informing Mr Foster that no response had been received from Cape that day. The email requested that no documents be destroyed by insurers pending receipt of Cape's confirmation that it would provide the requested documents, and if advice was given to destroy insurers' documents in the interim, Leigh Day would refer the matter to interested parties and to the Court. Mr Foster acknowledged that email within the hour. It is Concept 70's position that the communications from them gave no cause for Ms Bains to think that they for their part intended or had agreed to destroy any documents other than those which were their own (ie insurers') property.

29. Defendants' representatives on 5 April informed Ms Bains that they did not know where the documents which she sought were. It was stated that an application for an injunction to prevent destruction would be made unless confirmation was given that they would not be destroyed.

30. That afternoon Leigh Day obtained the 'as of right' documents from the court file under CPR 5.4C(1) and then on 6 April issued the application now before me relating to the remainder.

31. At the urgent ex parte hearing I heard Mr Weir QC of counsel for the Applicants and considered the evidence filed. I made an order[2] which was sealed and served immediately that:

---

[2] On 12 April following queries from the parties (in part because the order made ex parte only referred to one claim number and also was felt by the respondents to it to have a lacuna in it) I made orders by email as follows: 12/4/17 at 11am and 19.30hrs on the same day. They were as follows: Order of 11am: Order of the court's own motion as follows (I have included part of the first email for context):

> Order of 11am:
>
> There may be a lacuna in the scope of my order insofar as Bundle D may not have been 'removed' as such yet *also* not be at the RCJ any longer.
>
> "Of my own motion in order to give effect to the purpose of my decision to ensure that trial documents which were in court should be delivered to me for preservation until final decision is made under the application, I therefore make the following order:
>
> (1) No copy of Trial Bundle D (which was provided at trial in electronic form only) being currently available at court, a complete copy of Trial Bundle D must be lodged by the Respondents at court in electronic form by 4pm on Thursday 12th April 2017 at court room E117.
> (2) For the avoidance of doubt nothing in this order amounts either (a) to a decision as to the scope of 'court records' (etc) for the purposes of this application or (b) requires "Opus" or any party to make available its commercial

1. *The documents, files, trial bundles, any transcripts disclosed to the judge during the course of the hearing of the trial by way of live transcription, any other non-privileged material which was lodged or brought into court for the purpose of use by witnesses or the trial judge MUST:*

   (a) Insofar as it remains within the Royal Courts of Justice be transferred by court staff upon notice of this order to Master McCloud's court room E117, for safekeeping; and

   (b) Insofar as it has been removed must be returned forthwith by the Respondents, their servants or agents, upon notice of this order to Master McCloud's court room E117 for similar preservation.

   (c) "Documents" in this context to which this order relates include for the avoidance of doubt any electronic material, USB sticks or memory cards or other media.

2. *This case and application is reserved to Master McCloud to whom it is hereby re-assigned insofar as necessary to do so (she having dealt with the underlying litigation on previous occasions).*

3. *The application shall return to court on a return date mutually convenient to the applicant and parties, for further consideration with a suitable time limit on a Private Room Appointment form. The parties should liaise over whether the return date should be for the purpose of*

---

document management service to the court, and it shall be sufficient compliance by the Respondents if Bundle D is re-lodged in a form which is accessible by the court on a standard unencrypted medium such as an external hard disk, solid state drive, memory card or USB stick.

(3) Costs in the application."

Order of 19.30hrs:

"(1) Orders of Master McCloud dated 6 April 2017 and 12 April 2017 and varied so that each claim number for each claim or application heard by Picken J together with Concept 70 v Cape Intermediate Holdings is set out seriatim. This order is also made in each such claim.

(2) Each claim or application aforesaid is assigned to Master McCloud. The Application and the orders aforesaid shall be served by the Applicants on each party in each claim or application.

(3) The party or parties which provided Bundle D to the court in any or all of the above claims shall by 4 pm on 13 April 2017 re-lodge at court E117 a complete digital copy of Bundle D in unencrypted format on an accessible digital medium namely usb stick, SD card, external USB Hard Drive or CD/DVD,in Word or Adobe format.

(3) Costs in the application."

directions to bring this application to final hearing or whether it is suitable for final hearing without further management.

4. *This order being made without notice in the absence of the Respondents, there is permission to apply to vary or set it aside within 7 days of service.*

5. *Costs reserved.*

32. I believe that in due course my decision to make the direction especially as to para. 1(b) might be the subject of an application for permission to appeal on the basis of a lack of power to so order and that is not a matter for me save to note the court's powers to preserve evidence (CPR 25.3), to impound documents if necessary to do so in the interests of justice (CPR 39.7) and to the reliance of the Applicants in the alternative upon the inherent jurisdiction of the High Court.

33. The order as to paragraph 1(b) was in the event largely not required (the exceptions are dealt with below). The trial bundles which were as regards all but one (digital) file from the trial bundle still physically within the walls of the Royal Courts of Justice, and the court staff in the light of my order declined to release any documents in court to any party but transferred them to the custody of Central Office where they are impounded in my courtroom.

34. There were sets of files comprising the trial bundle before the trial judge. These are identified by letters ranging from A to H and are in two groups, one for the CDL claims and one for the PL claims. Each lettered set consists of a number (typically five or six) A5 lever arch files of paper trial bundles, indexed and paginated, which had been provided to the Judge and with which he had retired to consider judgment.

35. Bundles A are statements of case, Bundles B are witness statements and the like, Bundles C (marked "Core" in the CDL litigation) are selected disclosure documents, Bundles E are Expert reports for the litigation, Bundles F are correspondence between the parties in the litigation, Bundles G are copies of previous skeleton arguments and transcripts of the hearings in the litigation before trial and Bundles H are various insurance policies in the CDL claims. There are also copies in spiral bound form of transcripts of each day of the trial, which the judge retired with, and copies of such things as submissions and skeletons for the trial on paper.

The electronic bundle removed from court

36. Bundle D did not exist in paper copy. It was an electronic set of documents which comprised the combined disclosure in both the PL and CDL cases. The means by which that bundle (along with digital copies of the paper bundles) was made available was via document management software called Magnum Opus 2 and the judge had access to be able to look at documents on screen (as I take it did the parties and witnesses at trial if required).

37. Because the software used to supply the data on screen for bundle D to the court was licenced software for which fees had been payable by the parties in the litigation, I directed that the content of bundle D should be re-lodged at court on a hard disk drive in a format readable by this court without the use of proprietary software. That was done.

38. Separately from bundle D, Freshfields acting for the Defendants informed me that there was a USB stick of some documents which had been filed at court during the course of the trial but had been returned to the previous solicitors acting for the Defendants because the application for amendment of the defence (to which the documents on the USB stick relate) was in the event agreed. It is effectively the amendment application bundle. The Defendants provided it with a letter reserving their position as to whether the application bundle is a court record and as to whether this court has jurisdiction to require (or should have required) a party to re-lodge a copy of that bundle.

The return date

39. On 26th June the case came before me for directions under para. 3 of my ex parte order. This judgment is my judgment arising from that hearing.

(1) The incidence of the interested parties' legal costs

40. The Applicant Mr Dring through leading counsel Mr Weir QC on behalf of the Forum (as I shall refer to the Asbestos Victims Support Groups Forum (UK) from now on) seeks a direction from me that the other parties – whom I shall call 'Interested Parties' – should not, in the event that they desire to be heard on Mr Dring's application for copies of court documents under r.5.2C(2), be entitled to an order for costs against him in relation to the application. I am also asked by him to revoke costs orders (for 'costs in the application' which I made in my emails of 11am and 19.30hrs on 12/4/17, as part of that cost protection.

41. The Applicant argues that the substantive application is made under r.3.4C(2) and that it is not an application against any party, including Cape. It is an application to the court for the court to decide what to allow in terms of provision of copies of filed documents from the court's own record.

42. That is not a matter for resolution between Cape and the Applicant, but Cape is choosing to seek to make representations as an interested party and is being permitted to do so having been given notice. It is therefore an application in a very different category from claims and applications where one party applies for orders against another party and to which the usual rule is 'costs shifting, ie that the loser, typically, pays the winner's costs.

43. Prayed in aid by Mr Weir is CPR 5.4D(2) which states that:

> "An application for an order under rule 5.4C(4) or for permission to obtain a copy of a document under rule 5.4B or rule 5.4C … may be made without notice, but the court may direct notice to be given to any person who would be affected by its decision."

44. The Applicant accepts that Cape falls within the scope of the above, ie is a person who would be affected by the decision and says that Cape, as required by the order of the 6th April, has been given notice and is now entitled to make representations if it wishes. However it is not a <u>respondent</u> to the application, which remains an application to the

court for the court to decide what access to allow the Applicant to the court's own records.

45. As to the part of my ex parte order of 6th April which required (insofar as documents might have been removed by the parties from the court's custody) return of those documents, it was accepted that that part of the order did require Cape to take positive steps but that that order had by now run its course (ie so that all that now remains for practical purposes is the question of obtaining copies of filed documents from the court record, on application to the court). On the application under r.5.4C(2) it was for the Applicant to satisfy the court irrespective of whether any party made representations to the contrary and in such applications the Applicant was expected to bear the Applicant's cost of that and would do so.

46. I was told by reference to the evidence filed for the application that the documents were expected to be of importance to a range of asbestos victims as well as those sections of the public interested in the impact of asbestos in the UK and elsewhere over decades. I was told that the Applicant had no private interest in the application: it was made in the public interest. The Forum was an unincorporated association consisting of not-for-profit charities and it had pro bono lawyers acting for it on this application. Cape by contrast was described as a well funded PLC with assets easily sufficient to instruct City firms of solicitors.

47. In evidence for the Applicant I had the first statement of Ms Bains (6/4/17), her second statement (8/6/17) and the first statement of Mr Dring (5/6/17).

    As to the nature of the Forum and Mr Dring himself here are some extracts:

    > (Para 3, Dring): "[referring to the Asbestos Support Groups] … they offer free independent advice on the availability of social security benefits and provide free assistance to complete the application forms. They also offer free independent advice on possible claims for compensation. In addition, some groups fundraise for medical research and treatment for asbestos related diseases. The Groups have no statutory funding and therefore must raise funds to provide their services to asbestos victims. They do this in a variety of ways such as organising fundraising events, but they also receive donations from many people who support the work they do."
    >
    > (Para 4, Dring): "The main role of the Forum is to speak with one voice on behalf of all the Groups on important issues affecting asbestos victims. To that end, the Forum attends meetings of the All Party Parliamentary Occupational Safety and Health Group and is invited to inform Ministers on policy developments and to respond to Government consultations. The Forum is recognised as an authentic and legitimate representative of asbestos victims and their families. The Forum intervened in the Supreme Court case of Coventry v Lawrence and successfully pursued two Judicial Reviews against the Lord Chancellor – one relating to LASPO and the second relating to Court issue fees."
    >
    > (Para 5, Dring): "The Forum also campaigns on various issues, including: better funding for medical research and treatment; fairer benefits and compensation; the removal of asbestos from places of work and residence; an international ban on

asbestos. Each of the groups pay a small amount, ranging from £1,000 to a few hundred pounds, depending on what funds they have available, to the Forum, per year, to fund these campaigning issues."

(Para 6, Dring): "… My interest, and that of all my colleagues, is the welfare of asbestos victims. We are not motivated by any personal gain, and we have no personal or private interest in any of the advocacy work we carry out on behalf of asbestos victims. In this case, as a representative of the Forum, I have no personal or private interest in its outcome."

As to the question of the nature of the documents sought:

(Para 7, Dring): "… we consider that the documents which were preserved by Order dated 6 April 2017, and are now in the Royal Courts of Justice for safekeeping, will greatly benefit victims of asbestos related diseases to prove their claims in negligence against Defendants"

(Para 11, Dring): "… any assistance which these documents will provide in helping to establish negligence and thereby relieve the sufferers from spending time on their claims will be of an enormous benefit to them. From my understanding, the documents may greatly assist in proving negligence and therefore assisting sufferers and their families by obtaining compensation in claims where it is currently impossible to do so."

(Para 12, Dring: "There are estimated to be approximately 2,600 new mesothelioma sufferers per annum in the UK with a similar number of asbestos related lung cancer cases…. In view of this and because the right to health and safety at work and just compensation for breach of that right is of fundamental importance to society the Forum believes it is in the public interest that this matter is considered. The public have an interest in the prevention of harm occasioned by negligence and civil compensation plays an important role in deterring work-related negligence. …. there is a clear public interest in developing the fullest knowledge and understanding as to how the epidemic in asbestos-related disease arose so that institutional or individual wrongdoers can be held to account and the necessary lessons learned. There is also profound public sympathy for sufferers of mesothelioma and genuine concern that they should be treated justly and fairly."

(Para 17, Bains 2nd – referring to matters well known to this court): "A number of Courts have accepted that exposure which happened to be lower than the numerical standards contained in TDN13 would have been a 'safe' or 'acceptable' level of exposure. The documents sought will assist liability experts and the Courts to consider whether this is correct; how the numerical values contained in TDN13 came to be set and on what evidence they were based. Whether those values were set as a safety standard or merely a level acceptable to the asbestos industry is of critical importance in lower exposure cases both now and in the future."

(Para 18, Bains 2nd): "In relation to the sampling results obtained by the Asbestos Industry in relation to Asbestos Insulation Boards ("AIB") which was disclosed in the original action … the concentrations reported are much higher than have been published by the Factory Inspectorate and/or the asbestos industry and accepted by

the Courts in other cases. I had never seen this document until very recently, and to the best of my knowledge it is not in the public domain, and neither has it ever been reported upon by negligence experts."
(Para 19, Bains 2nd): "…. It means that anyone working with AIB for relatively short periods (several minutes) would have been exposed to quantities of asbestos dust at levels above those published in TDN13 (TDN 13 levels are stated as 12 f/ml averaged over 10 minutes or 2 f/ml averaged over 4 hours)."

(Para 20, Bains 2nd): sets out examples from the data forming part of the documents sought, for example that a person handling Asbestos Insulating Board for 1 minute and 35 seconds over a 10 minute period would, on the data held by Cape, be expected to exceed the TDN13 threshold.

(Para 24, Bains 2nd): "The issues around the TDN13 levels highlighted above are highly contentious arguments in numerous legal cases being brought in UK Courts at the moment. The documents sought will assist enormously in establishing the truth. It is imperative that the documents are released as a matter of some urgency as they will assist in current cases."

(Para 25, Bains 2nd): "I refer to page 10 of the judgment dated 6 April 2017 [Ms Bains I think intends 'transcript' rather than 'judgment'] when Robert Weir QC aptly stated, inter alia "All of which is bound to be of interest to the Court, not least to ensure consistency in future judgments. It would be intolerable if judges in future cases were not to make their assessments based upon evidence which has been disclosed to a previous High Court Judge, if that evidence was established as being relevant and probative."

(Para 23, Bains 1st) (I quote in part only from a lengthy passage):

"…. would assist the court to understand the knowledge within the industry about the number of asbestos related disease cases within the UK and overseas (for example in the vicinity of the mines operated by asbestos manufacturing companies…

helps for background to detail the research that the asbestos industry were carrying out and the relationship between the large asbestos manufacturing companies, both in the UK and overseas. It also helps to understand the relationship they had with other stakeholders, such as the Factory Inspectorate, the British Occupational Hygiene Society, Asbestosis Research Council, Asbestos Information Committee and any organisations undertaking research on behalf of the asbestos industry in relation to asbestos …

helps to know the dates that various asbestos materials were manufactured, their relative costs and when alternative materials were developed, their costs and any reasons why those asbestos-free materials were not developed and/or marketed earlier ….

helps to know the quantities of asbestos materials which were manufactured and, where asbestos-free alternatives were made, where and how they were made (Supalux for example was contaminated with asbestos in early supplies …)

… helps to understand what steps the manufacturers were taking to carry out research, who did that research, and the arrangements for the publication of the research – ie was it checked by the manufacturers and amended before it was published (and what organisation did the research)… helps to understand what discussions were taking place behind the scenes with other stakeholders, including the Factory Inspectorate and HSE – what research did the Asbestos Research Council ("ARC") make available to them to determine the numerical standards and other guidance which published dust concentrations TDN13 and TDN42 for example…. How did information in relation to crocidolite being the main cause of mesothelioma become published? What did they know about amosite for example. How did the ARC justify publishing information that the risk of mesothelioma was limited to crocidolite? …

What did Cape know about 'safe' levels of asbestos in the 1960s?

… did the industry put profit before safety and did the [Factory Inspectorate] let them? … may help to resolve the issue of limits and standards and availability of sampling in the 1960s. This is an area of significant disagreement between the experts."

(Para 22, Bains 1st): "The non-party hereby requests the following documents:

(i) All witness statements [she then lists witnesses]

(ii) Experts' reports.

(iii) Transcripts of evidence…

(iv) All documents disclosed by Cape and other parties, [she then gives a list of 10 specific categories]."

As to the impact of a possible adverse costs order against the Forum in the absence of costs protection:

(Para 14-15, Dring): "The Forum is a loosely constituted group which is informally structured, financed by donations from the Groups and with limited means. As a result it does not have complex financial structures. Should the Court make an order that the Forum do pay any costs, it would have a deterrent effect on the Forum and the Groups being able to continue to offer our services to asbestos related disease sufferers throughout the UK. Accordingly, if the Forum had to pay costs of the original parties we would have to seriously consider whether we would continue with this application, given the inevitable loss of services such costs would entail. In either event, asbestos victims would pay a price: potential reduction in the valuable service we and the Groups provide, or potential loss of valuable information which may be crucial in just settlements of their claims. The Forum would not wish to be placed in the invidious position of making such a hard choice."

48. Mr Weir submitted that the court was not being asked to make a 'Protective costs order' in the sense in which that term is typically used in the context of public law claims[3]. Rather

[3]Per Lloyds LJ in Eweida v British Airways PLC [2009] EWCA Civ 1025 para 38, a protective costs order cannot be made in private proceedings between parties, at least where the interest of the party seeking to be

what was being sought was an order to ensure that where the interested parties were, as here, being heard on the application in a situation where the application was not 'against' them but was a matter between the Applicant and the court, there was not a risk of the burden of the interested parties costs falling on the applicant given the evidence filed by the applicant as to its means and the impact which an adverse costs order would have on it. The order sought would preserve the default position on an application by the public to copy documents from the court file namely that the Applicant should bear his own costs in what was a matter between the court and the public and should not be at risk of paying the costs of other persons interested in his application, such as Cape.

49. Mr Weir cited Unison v Kelly [2012] EWCA Civ 1148. That was an application in the context of an appeal, and was made under r. 52.9 which permits the appeal court to impose conditions upon which an appeal may be made, if there are compelling reasons to do so. The Applicants (Respondents to the appeal in that case) sought an order under r.52.9 imposing a condition that the Appellants should only be allowed to pursue the appeal on condition that they did not seek costs from the Respondents.

> Per Elias LJ, para. 6 "The problem facing the respondents is that they are individuals who cannot afford to defend this litigation. ... they are concerned that if the appeal succeeds and they are liable in costs then they be made bankrupt … they have made it clear that unless they have some protection from a potential order for costs against them they will not be able to play any part in the proceedings."
>
> Per Elias LJ, para. 10 "… this is not a case of an applicant or appellant who is seeking protection from the risk of costs in order to be able to pursue a claim against a defendant, nor indeed is it a private party seeking to pursue litigation on a point of allegedly wider public interest, such as in [*Eweida*]. In this case the respondents are simply before the court because they are defending their position and seeking to resist the appeal."
>
> Per Elias LJ, para. 13 "… it would be stating the principle too high to say that a PCO cannot be awarded in circumstances where private interests are engaged; the jurisdiction is a flexible one and there is no absolute bar but it is right to say that where private interests are engaged that is a significant factor which will bear on the question whether a PCO should be granted or not."
>
> Per Elias LJ, para. 18 "…. very importantly, … they are willing to undertake that they will not seek costs against the appellant. There is an obvious equity in imposing a condition that the appellants, if successful, will not seek costs against them."
>
> Per Elias LJ para. 19 "… This is not strictly a protected costs order application. As I have indicated, it is a case where what is sought is a condition on the granting of permission to appeal."
>
> Per Richards LJ para. 21 "It may be that notwithstanding Eweida the wide discretion of the court in matters relating to costs would admit of the possibility of a freestanding order analogous to a PCO, even in private litigation. But it is not

---

protected is too significant to bring the case within the well known principles set out in R v (Corner House Research) SS Trade and Industry [2005] EWCA Civ 192.

necessary for us to go that far. In this case it is open to us to vary the grant of permission to appeal in the way indicated by Elias LJ so as to impose a condition that the appellant, if successful, will not seek costs against the respondents.

50. As to whether, outside the scope of r. 52.9 relied on in *Unison v Kelly* which only applies to permission to appeal, the court has a power to attach similar conditions as to costs in other situations, Mr Weir QC referred to Baker v Quantum Clothing Group Limited [2008] EWCA Civ. 823. That case was a private law appeal and a part of the matters for argument related to Ms Bakers' own private interests which were valued at around £5,000. However the appeal raised wider issues of concern to the textile industry in general which related to the historic health and safety noise limits in use in textile factories in the 1980s and before. Mrs Baker's position was that she could not proceed with the appeal unless she was protected against facing an adverse costs order by the other parties to the appeal, whose interests were wider than her own. She sought an order that her appeal be allowed to proceed but only on condition that the Respondents to the appeal should bear their own costs regardless of outcome.

51. Mr Weir referred to Baker in part as authority that the court has a power under s.51 of the Senior Courts Act 1981 and CPR r. 3.1(2)(m) to make a conditional order as to costs and in part because it was said to be close on its facts to the instant case in some respects not least because it related to health and safety regulation and was of wide interest to the industry and employees to which it related. Furthermore the respondent to the appeal was a party which had chosen to join itself to the appeal because it was affected (para. 31 of judgment), much as Cape, here, was involved as an interested party and not a conventional respondent to the application for court documents.

52. In *Baker*, the Court of Appeal granted the order:

> Per Rix LJ, para. 19 "… if this application is rejected then this appeal cannot go ahead and will be stifled, and this would be a blow, of course, to Mrs Baker, so far as her potential claim for £5,000 is concerned. But much more important than that, it would be a blow to all the interests involved in this litigation."
>
> Per Rix LJ, para. 26 " …. There is no question about our jurisdiction to make the order applied for. There has not been any discussion about where that jurisdiction or power [is] to be found, but in my judgment it is to be found in what is now the Supreme Court Act 1981, section 51 and in CPR 3.1(2)(m)." (There was then a reference to King v Telegraph Group Ltd [2005] Q WLR 2282 in which when setting out the costs capping jurisdiction of the court, the court applied r. 3.2(2)(m) and the Overriding Objective).
>
> Per Rix LJ, para. 32 "Is there to be an appeal or not? That ultimately is the question. … the answer must, in justice, be in favour of the appeal. I accept that involves some injustice to Meridian and Pretty Polly. It is the least injustice in the case, in my judgment; the least of evils. They at least are large parties acting in their own interests and they are well able to look after themselves."

Cape's position on the question of costs

53. Mr Webb QC of counsel argued that waiving the general rule as to costs would plainly be unjust, and also that the manner in which the Application had proceeded so far amounted

to an abuse because of lack of specificity. Whilst it was accepted that there was no application for a Protective Costs Order, what was sought by the applicant was in effect a PCO and those, per *Eweida*, were confined to public law proceedings, which this was not. Furthermore even if there was scope for a PCO in private law claims, a proper application of *Corner House* principles would not support the grant of one here.

54. The principles in R (Corner House Research) v SS Trade and Industry [2005] 1 WLR 2600 were described by Mr Webb in the following way, namely that the following criteria should be met:

    (a) The issues raised are of general public importance;

    (b) The public interest requires that those issues should be resolved;

    (c) The applicant has no private interest in the outcome of the case;

    (d) Having regard to the financial resources of the applicant and the respondents and to the amount of costs that are likely to be involved it is fair and just to make the order; and

    (e) If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

55. The above summary from Mr Webb appears to come from para. 74 of the *Corner House* judgment per Lord Phillips MR giving the judgment of the court. It is a fair summary but for completeness I insert here that the judgment refers to the above under number (1) and then goes on to state:

    "(2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.

    (3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above."

56. Mr Webb argued that as to points (a) and (b) in Corner House, the public interest here was effectively served by this court's expedited procedures in mesothelioma cases. (CPR Part 3D).

57. As to point (c) whilst the applicant might not have a private interest the intention appeared to be to provide any documents obtained to undisclosed litigants or potential litigants who would have private interests. These were documents which ordinarily would be sought in disclosure in the course of a case under CPR Part 31 and there was no reason put forward as to why those provisions would not enable litigants in their own claims to advance their own interests in the usual way. This was a circumvention of Part 31.

58. As to (d) the applicant had not given sufficient information, it was submitted, to enable the court to assess the parties' respective resources.

59. Accordingly it was said that the public interest was not served by the making of the type of order sought by the applicant. There was not a lack of private interest insofar as the litigants to whom the documents would ultimately be disclosed had private interests in their own claims. This was an application to circumvent Part 31 of the CPR, Cape was not

merely an 'interested party' but was a respondent who had been required to take positive steps to comply with the orders of 6 April and 12 April.

60. Furthermore Mr Webb argued that the applicant had not in any event provided sufficient identification of the documents sought from the court record and that was a requirement of r. 5.4C. It was in the circumstances fairer to keep all costs options open until the main application had been determined.

Cape's evidence

61. As to the nature of the documents sought I note the following from the evidence of Mr Isted for Cape:

> (Para 14, Isted): "The standard disclosure exercise undertaken by Cape encompassed a number of different categories, including documents relating to inter-company indemnities and insurance arrangements, marketing materials, product information and codes of practice."
>
> (Para 14, Isted): "Searches undertaken for the purposes of standard disclosure were principally focussed on documents dating from 1948 through to and including 1982. By reason of the time period in issue, the searches were confined to hard copy documents."
>
> (Para 17, Isted): "The intention behind Bundle C was to ensure that the documents being relied upon and put in evidence by the parties at trial were readily available to the parties and trial judge in one place. Bundle C was therefore intended to contain any disclosed documents referred to in Court, including those documents referred to in the parties' written and oral openings, during trial (whether by Counsel in their submissions or by experts or witnesses during examination-in-chief, cross-examination or re-examination) and in the parties' written and oral closings. To facilitate this, Bundle C was updated on a rolling basis throughout the trial."
>
> (Para 18, Isted): "All sub-bundles apart from Bundle D were available in Court in hard copy. Bundle D was not made available in Court in hard copy during the trial because of the volume of documentation involved and the fact that, as noted above, any documents from Bundle D which were referred to in Court were to be added to Bundle C in electronic and hard copy format."
>
> As to the intended use of the documents by the Forum, the general thrust of Mr Isted's evidence for Cape was to the effect that it is Cape's view that the Forum has not be clear enough about the uses to which the documents would be put or as to the categories of documents sought from the filed documents on the court record. He refers at para. 22 to Leigh Day indicating that "all the documents which were disclosed and are in the Public Domain, including experts' reports/transcripts of evidence", at para. 24 to Leigh Day indicating that the scope was "1. Pleadings, 2. Expert reports, 3. Transcripts of evidence, 4. Cape's documents disclosed as a result of numerous disclosure applications." At para. 39 he criticises the Applicant for not being precise enough as to what categories of documents the Forum seeks from the

court file, citing the 'catch all' reference by Ms Bains to "all documents disclosed by Cape and other parties".

As to intended use:

he says (Para 31, Isted) referring to Ms Bains' evidence: "These statements provide no indication of what future litigation is envisaged, whether the Forum would be a party, and against whom it might be pursued."

(Para 34, Isted): he quotes from emails/letters from Leigh Day stating inter alia "the documents will be useful in current and future litigation. It is impossible to provide identities of the parties of all relevant claims and, in fact, it is irrelevant to do so", and "the Forum proposes to make the documents available to those who ask for them. These include academics, asbestos related disease sufferers and their families, lawyers and members of the general public." At para. 36 he criticises the Applicant's indications as to the use of the documents as 'generic' and for failing to identify specific named cases to which they would be of use.

Decision as to the costs issue

62. I accept the basic proposition that an application under rule 5.4C(2) is an application made between a member of the public and the court. It is permitted to be made *ex parte* and it concerns the court's own powers over what it does with the contents of its own files and record. That is the starting point but it is of note that the court can direct that an affected person should be given notice. That is in effect what happened here of necessity.

63. The circumstance in which the order of 6th April was made was the prima facie evidence put forward to suggest that there was a likelihood that the contents of what is argued by the Applicants (but disputed by the Defendants) to be part of the court record or file were imminently about to be destroyed and perhaps that the documents had already been removed. I am not finding facts as to the underlying allegation as to an agreement to destroy, or what (if there was such an agreement) it related to, but only that the allegations in evidence *ex parte* sufficed to lead to my order. In the event as has been seen above, only one significant bundle had been removed (and there is as noted a dispute over whether that or the other files are part of the court record or file). Bundle D had been removed, by the cessation of the data feed to the court, and that was returned in hard drive form, pursuant to my order. The other documents had never in fact left the trial judge's (or his clerk's) possession and were simply moved by staff to my courtroom where they remain.

64. The parts of my order of 6th April which preserved documents and retained them at Central Office in my courtroom have therefore served their course ancillary to the main part of the application, and what remains is the application under rule 5.4C(2) for copy documents said to be part of the court record.

65. I am accordingly satisfied that the proper description of Cape (and Concept 70) is that of 'interested parties'. Whilst in the immediate interim period they did indeed have to take steps to return bundle D to court the necessity for that order was purely ancillary to the application under r.5.4C(2) and made in the light of the removal of (what turned out to be) bundle D from court.

66. An application under r.5.4C is in a class which is different from that of an application by a party to litigation. It is an application by a non party, a member of the public, to the court for permission to obtain copies of certain types of filed documents from the court's records. It is ordinarily a matter, therefore, between the public and the court and it is typically one sided and on the basis that the applicant is naturally paying his or her own costs.

67. It is of note here that at no point has there been in place any order (and I was not told that any was ever sought) for the benefit of the parties to the underlying litigation which in any way restricted the right of the public to access documents on the court file. Such an order could have been sought under r.5.4C(4) but was not. Absent such an order the application proceeds, under r. 5.4C(2), on the footing that the court may direct that notice be given to affected parties, as has happened here. It does not proceed under the inevitably more adversarial procedure inherent in r.5.4C(6) aimed at obtaining a departure from any extra restrictions imposed under r.5.4C(4).

68. In those circumstances I consider that Cape (which is now effectively the active party other than the Applicant) is properly an 'interested party'. It was given notice. It wishes to make submissions against what the Applicant asks the court to do by way of access to the court file. There is no dispute that it should be allowed to address the court if it wishes and that it is affected by the application since the documents relate to it.

69. The question for me in my judgment is (as Mr Weir QC correctly argued) not whether to make a 'Protective Costs Order'. It is clear from *Unison v Kelly* that where a PCO may not be granted nonetheless a court may in an appropriate case make use of such powers as it may have, if it has any, to impose conditions on the involvement of a party, so as to prevent injustice and especially the risk of due process being stifled by the risk of a costs order. In *Unison v Kelly* the basis for that power to impose conditions was found in CPR 52.9 which does not apply here, but I am persuaded by the case of *Baker v Quantum Clothing and others*, also a Court of Appeal decision, that the powers under r.3.1(2)(m) coupled with the general and very broad discretion of the court under s.51 SCA 1981, and the overriding objective itself, provide the power for the court to impose conditions on the involvement of interested parties or others.

70. CPR 3.1(1) and (2)(m) state:

"(1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have. …

(2)(m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective…"

72. *Baker v Quantum* amply supports the view that that extends to an order imposing a condition that an interested party may take part on condition that it may not seek its costs of doing so.

73. Should I make such an order in this case? I did not find Mr Webb's argument as to the nature of the Forum or Mr Dring's interests persuasive: the evidence I have is that the Forum is a non-profit organisation, lacks assets which would cope with a large costs order of the sort which could result from a contested argument by a

party with the enormous resources of Cape, and would face a choice whether to abandon its application if it risked paying costs, or to risk proceeding, losing, and being rendered unable to perform its functions in supporting victims of asbestos exposure in future, in the public interest.

74. The evidence of Ms Bains and of Mr Dring and indeed the whole story of the tweeting – by or on behalf of Concept 70's own former counsel - of the importance of the court documents to lawyers and others, and the documents exhibited to the witness statements concerning Cape's knowledge at different times of the likely fibre counts given off by asbestos under various handling conditions, all suggest to me that in exercising my discretion I must consider the public interest in avoiding the serious risk that the resources brought to bear by Cape, which may choose to incur considerable cost to oppose access to court records in its own commercial interest, would snuff out the application, leaving the question whether these documents should or should not be copied from the court record, and the related question as to whether they are part of the court record at all, unanswered.

75. I accept that the Applicant has no financial interest in this application, and I note that his lawyers are acting pro bono and will not themselves be seeking costs against Cape. Cape is a large party which is plainly well funded and likely to incur substantial costs in protecting its commercial interests. There might be said to be a measure of potential injustice in preventing them from looking to Mr Dring for their costs but in my judgment as in *Baker v Quantum* the public interest here is served by answering the question "is the application to be heard or is it not to be heard?" in the affirmative, which points strongly to the need for a reasonable condition to be imposed on the scope which Cape has to look to Mr Dring for its costs. I pay regard to the fact that Cape is choosing to make representations to the court in a case where:

(i) the starting point is that the application is a matter between Mr Dring and the Court, and nobody else; and

(ii) No order was sought or obtained previously to impose restrictions on the court record, and it is only at this stage after the end of the litigation that Cape raises its concerns when it did not do so before.

76. In the circumstances I therefore shall make an order under CPR 3.1(2)(m) that the Cape parties may be heard orally or in writing at the substantive hearing of the application under r.5.4C(2) on condition that they may not seek any order for costs against the Applicant.

77. I made two relevant previous costs orders in this case, both by email without a hearing and both on 12 April. I was asked by Mr Weir to vary those consistently with the above condition and I shall do so. Although the order of 6 April was in part made to preserve documents and to a limited degree it did in the event require some positive steps to be taken by Cape (namely returning bundle D to court), my judgment is that firstly the preservation and consequent impounding was ancillary to the r.5.4C(2) application and necessary to ensure that the purpose of the application was not defeated and secondly that the necessity for the order was triggered by the impression given to the applicant (and indirectly to the court

through Ms Bains' evidence) that documents were in the process of being removed and would be destroyed. Those steps were necessitated by the main r.5.4C application and fall to be treated in the same way.

Protective Costs Orders

78. I do not need to decide the question whether this court could alternatively make a Protective Costs Order of the sort referred to in *Corner House* and *Eweida* and other case or as to whether if that were the case the instant application would be seen as 'private' litigation or being *sui generis* and of a quasi-public nature. My observation is that in *Eweida* the court, albeit stating that such orders were not available in private litigation, was in subsequent paragraphs of judgment prepared to consider that there might not be an absolute bar, if a given case fell within the scope of the criteria in *Corner House*, but that on the facts of *Eweida* the extent of the private interests at stake was said to be too great. Para 21 of the judgment of Richards LJ in *Unison v Kelly*, which must surely be very persuasive even if not part of the ratio of the decision, lends support to that possibility. I need not express a view beyond this, but were I to address my mind to the strict question whether (assuming a PCO could be available in a private case and assuming the criteria in *Corner House* would then be applied), I would on the material before me in evidence have concluded that the Corner House criteria were met.

(2) Case Management

79. I do not accept the criticisms made by Cape that the rule 5.4C(2) application is too unspecific in terms of what documents are sought or their intended uses and hence I am not satisfied this can be said to be an abuse of process: the court may or may not accede to the application as drafted but I see no difficulty per se as to adjudicating on it. The categories sought are set out in the evidence and the uses to which the documents are to be put are in my judgment clear. True it is that the scope of the application if allowed and the scope of the intended use, would be wide but that makes it no less capable of adjudication by the court. Moreover absent allowing the Applicant full access to the documents it would be difficult to see how he could be more specific than he has been.

80. Cape contended that the matter should be listed for 1 to 2 days before a category B judge, preferably Picken J., and proposed that the Applicant should file and serve further evidence setting out the grounds of the application, the intended purpose of seeking the documents from the court record, to whom they would be disclosed, and any proposed restrictions accepted by the Applicant on that and as to their use. There would then be evidence from Cape in reply.

81. The Applicant wishes me to list and deal with the application swiftly. Its draft order seeks immediate disclosure of some documents (witness statements given at trial, Experts' reports at trial, transcripts of evidence at trial). Thereafter the draft envisages a revised draft order from the Applicant setting out the list of such categories of documents from the court record which it then seeks, followed by a position statement from the Interested Party if it wishes to make representations,

followed by any evidence in support from the Applicant. There would then be a half day hearing before me with skeletons prepared in the usual way.

The asbestos list

82. The asbestos list and its manner of operation by the Queen's Bench Masters was described in my judgment in *Yates* v *HMRC* [2014] EWHC 2311 (QB). There I said from 11 onwards:

> *"11 … the unusual procedural approach adopted has achieved a significant change in the way in which these types of claims proceed, and greater efficiency. We hear and dispose of large numbers of such claims.*
>
> *12. The underlying approach to asbestos claims places the doing of justice, at speed and with improved efficiency, at the forefront; formalities of procedure take second place if they interfere with that. …*
>
> *13. In very many cases (and in all cases of mesothelioma), where a person has contracted an asbestos related disease, death is the consequence often following a short period, of some months, of decline and often unpleasant medical treatment which lengthens survival only by quite short periods. Regularly we see that claims either begin during life but then become deceased claims after issue, or begin as deceased claims on behalf of estates because the victim has passed away before matters could be got in hand. It is the latter type of case with which this judgment is mostly concerned.*
>
> *14. Many claims which we hear are urgent and sometimes very much so. Most urgent are those which are 'living mesothelioma' matters where the essence of justice (for both sides) is avoidance of delay in the gathering of evidence during the life of the claimant, and if possible the resolution of the claim before the Claimant passes away.*
>
> *15. Early resolution during life is widely accepted as being in the interests of justice in its widest sense as well as narrowly benefiting claimants and insured defendants alike. Many claims even in deceased matters are quite urgent because the age profile of the affected victims tends to be such that those left behind after the death of the asbestos-exposed person are themselves elderly.*
>
> *Mechanisms of case management in asbestos claims*
>
> *16. Each delay in a living asbestos claim has a penalty associated with it which is measurable as a proportion of the claimants in the system who will die without a claim being dealt with during that delay. Weeks lost imply lives ended without resolution of the claim, and that can also mean lost evidence which could have assisted either party. Yet where there is a properly arguable defence with a real prospect of success, the Defendant is entitled to a trial and it would be a serious injustice to*

a Defendant to deny it that right merely so as to ensure speedy hearing of claims, despite the often inevitable consequence that the Claimant will pass away before trial.

17. It is therefore unsurprising that the practice has arisen of making assertive use of our case management powers to streamline the process as far as reasonably and fairly possible. One of the first considerations one gives in timetabling a claim is 'how long does the claimant have to live?' which is a salutary yardstick for any judge and gives a human context to the notion of 'proportionate case management'. It will be no surprise that budgeting is often dispensed with in these unique claims due to the delay which it would cause in our packed lists.

18. As distinct from more conventional courts, we waive most aspects of procedural formality in favour of using technology and extensive[2] direct access to the two specialist masters, by equally specialist solicitors, using email, an open-door policy, and a 'no nonsense' approach. Hearings are generally as informal as the circumstances permit (without of course departing from the law). Frequent use is made of evidence taken on commission at the home of the Claimant on an urgent basis. Almost all hearings are by telephone.

…

*21. We set directions timetables on the understanding by all involved that the timings are very challenging. Missed time limits are not unusual albeit that of course there is no question of deliberately setting the parties up to fail. Very few 'Mitchell ' applications arise because claimants and defendants alike are drawn from firms which cooperate with each other and any slippage is, bluntly, often because the timescales in such cases are exceptionally abbreviated. We usually permit parties to agree changes to timescales between themselves within reason, as long as the law permits, and this practice has also helped to avoid unnecessary cluttering of our list with relief applications.***"**

83. In this case, albeit that it relates to underlying litigation between insurers and manufacturers/suppliers of asbestos, what one sees is an application for access to court records partly for the explicit purpose of ensuring that victims of asbestos exposure can proceed with claims on an informed footing. I was told in evidence and accept that within those claims will be cases both of living victims facing death over the timescales referred to in the above quotation and also cases where often elderly dependants and family pursue claims for deceased claimants. It is appropriate given that background that this application be dealt with expeditiously but I will not impose a timetable likely to cause undue inconvenience or injustice. Having already formed the view that in my judgment the application is sufficiently set out to enable it to be determined, the extent of further case management steps required for proportionate case management before final determination is not very great. There need not be undue delay.

84. Although Cape contends for a category B judge in this case, which could include a practitioner sitting as a deputy High Court judge, the applicant seeks disposal by myself. The Masters who have expertise in dealing with asbestos cases regularly deal with all the complexities of specialist asbestos claims, and may try them. See for example the recent decision in Stacey v Triplex [2017] EWHC 1945 (QB) as a case in point where no puisne judge or s.9 judge was listed and a Master was brought in to try the matter at short notice. The issues in relation to the underlying significance of the documents and the relevance of TDN13 for example are matters which are very well known to any of the specialist masters who deal with hundreds of asbestos cases.

85. It was said that Picken J having heard the trial would be familiar with the documents, but in my judgment firstly the primary issues to be resolved are as to the scope, if any, to which the bundles form part of the court record and if so as to whether any part of this application should be allowed (essentially a type of application which is frequently referred to Masters) rather than as to the details of most of the documents as opposed to categories within them. Furthermore in the course of this application this court has become familiar with the files in any event.

86. Listing before any type of judge typically results in delay, whether that be before a Master or any other judge (a listing for up to 3 days before any non-Master judge is currently taking until June to July 2018, for example and there are typically a number of months' delay before the Masters), but in this instance the dates of reasonable availability of Cape and the Applicant's representatives indicate that the matter could be heard in October, and coincide with a period in my own list which had been set aside for hearing serious child abuse trials, but which has not at this stage been filled with a listing.

87. The delay in disposal of this application is therefore likely to be reduced by listing in my own list. In view of the unique concentration of asbestos expertise and experience on the Masters' corridor and the above considerations I shall list this on 9th and 10th October 2017 at 10.30am with a third day or part of it contingently listed on 12th October 2017 in the event that time overruns.

88. The timetable for hearing shall be:

Day 1: 10.30am to 3.30pm Applicant submissions.

Day 1: 3.30pm to 4.30pm Cape submissions if so advised.

Day 2: 10.30am to 2.30pm remainder of Cape submissions if so advised.

Day 2: 2.30pm to 3.30pm if required, reply by the Applicant.

89. To prepare for hearing the parties must follow the following directions:

(1) Applicant to file and serve a skeleton argument and list of authorities by 4pm 29th September 2017.

(2) Cape to file and serve either a skeleton argument and list of authorities (if it intends to address oral argument to the court) by 4pm 2nd October 2017 OR (if it intends only to rely on written submissions) any written submissions by the same date.

(3) In the event that Cape elects to serve written submissions then the timetable for hearing shall be reduced to Applicant's submissions only and the second and third days may be vacated with no attendance by Cape.

(4) Standard bundle directions. There shall be a bundle prepared for the hearing not to exceed 2 full size lever arch files of documents, and in addition an authorities bundle.

(5) List in open court before Master McCloud t/e up to 3 days on 9, 10 and 12 October 2017.

90. I shall leave it to the Applicant to draft an order which embodies the above and my variation of the previous costs orders, and the conditional permission to Cape to make submissions or appear on terms as to costs.

(3) Immediate disclosure?

91. The Applicant asked me to make an immediate order for disclosure of some documents. That was opposed by Cape. In my judgment it would be premature to reach a conclusion on those documents and the matter will be determined at the final hearing in October as a whole.

MASTER VICTORIA MCCLOUD

10/8/17