Neutral Citation Number: [2005] EWHC 2101 (TCC)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/08/2005

Before:

HIS HONOUR JUDGE DAVID WILCOX

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Between:

	HT-04-238
CLEVELAND BRIDGE UK LIMITED	**Claimants**
- and -	
MULTIPLEX CONSTRUCTIONS (UK) LIMITED	**Defendants**
	HT-04-314
MULTIPLEX CONSTRUCTIONS (UK) LIMITED	**Claimants**
- and -	
CLEVELAND BRIDGE UK LIMITED	**Defendants**

APPLICATION BY SARAH CURNOW
AND AUSTRALIAN BROADCASTING CORPORATION

- -
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MR. ANDREW NICOL QC (instructed by **Messrs. Finers Stephens Innocent**) for the Applicants
MR. PAUL DARLING QC (instructed by **Messrs. Clifford Chance**) for the Respondents

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

JUDGE DAVID WILCOX:

1. This is an application by Sarah Curnow and the Australian Broadcasting Corporation 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 Technology and Construction Court, entitled Multiplex Construction UK Limited and Cleveland Bridge UK Limited.

2. Multiplex Construction UK Limited is a wholly owned subsidiary of Multiplex Limited which is listed on the Australian Stock Exchange. Multiplex Limited is part of the Multiplex Group which has interests all over the world which include property funds, the management of them, property development, facilities and infrastructure management and construction.

3. One of Multiplex Construction UK Limited's construction projects is the new Wembley Stadium. Cleveland Bridge UK Limited are well known steel fabricators and designers who were employed as subcontractors on the project.

4. The consolidated actions have been listed for a 42-day hearing commencing on 24th April 2006. Multiplex has filed and served its consolidated particulars of claim, its reply to defence and counterclaim and Cleveland Bridge UK have filed and served defence and counterclaim.

5. The present proposed timetable is for the factual witnesses to be served and filed by 14th October, that each party have liberty to file statements in reply by 18th November and experts to exchange and file their reports by 12th December. There are clearly a number of complicated factual and legal issues arising in the action requiring extensive factual witness evidence and detailed expert evidence.

6. I note that it is Multiplex's stated intention to file and serve approximately 20 witness statements and expert evidence from steelwork experts, quantity surveyors, a programmer and structural engineer; doubtless there will be similar expert and factual evidence from Cleveland Bridge.

7. The pleadings will continue to evolve and the issues be refined up to the time of trial. The present pleadings are the assertions and allegations made by the parties representing their present positions albeit supported by sworn statements of truth and belief. The documents identified by the applicants, of which copies are sought, fall within the provisions of Civil Procedure Rule 5.4.

8. The claim forms have already been provided, it seems, by the court registry under CPR 5.4(4). The detailed pleadings fall within the description “other documents filed by the parties” within 5.4(5) which provides, in so far as it is relevant:

> "Any other person may" and I go to (b): "if the court gives permission, obtain from the records of the court a copy of any other document filed by a party ...."

9. This application was made on notice under CPR 5.4(9). The court directed that Multiplex UK Limited and Cleveland Bridge should be served with the application and any supporting evidence.

10. An informal application was made by the first applicant on 26th July by e-mail asking for the matter to be dealt with on paper. I instructed my clerk to notify the parties to the action and they were also sent a copy of the relevant e-mail.

11. Cleveland Bridge UK Limited indicated they had no objection to a paper determination and consented to the application. Multiplex UK, by their solicitors Clifford Chance, indicated that they would seek to resist the application. That led therefore to this hearing and to the directions I gave as to the filing of evidence and written submissions.

12. Miss Curnow is the producer of a television programme called "Four Corners" which is broadcast by the Australian Broadcasting Corporation. In her first contact with the court she made it clear that she wanted to see the detailed pleadings because she was producing a programme on Multiplex, the group, and Multiplex Limited, including the activities of Multiplex UK Ltd. That in turn would lead to covering the dispute relating to the Wembley project. Her subsequent correspondence with Multiplex (UK) Ltd. and Cleveland Bridge has confirmed this and is further supported in her sworn statement before the court supporting the application. She refers to public interest considerations in support of her application.

In a letter of 18th August 2005 Clifford Chance explained the reasons for resisting the application. I quote from that letter:

> "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".

They went on to make the point that they had given their co-operation.

13. The letter went on to say:

> "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".

14. It is evident to me that there has been a great deal of press and media interest about this dispute. The documentation put before me and exhibited to the witness statement of Mr. Panayides on behalf of Multiplex UK Ltd. shows comment and reportage in the trade press such as "Construction News and Contract Journal", "The Daily Telegraph", "The Independent", "The Times", "The Sunday Times", "The Financial Times" and "The Guardian". Extracts from the "Australian Journal", "The West Australian" and "The Sydney Morning Herald" have been exhibited. Such comment ranges from comment in the financial and business sections to mention in the sporting and home pages of those publications. The public in the United Kingdom, Australia and elsewhere is interested in the development of the Wembley project.

15. The pleadings have been read extensively by me as the allocated trial judge case managing the consolidated actions. I indicated at the outset of this hearing that I had read the pleadings extensively and prior to the specific disclosure applications made and heard before me on 27th May and 16th June 2005 respectively. Extensive reference was made to them.

16. The hearings for specific disclosure were interlocutory hearings to which the public had access and, in all probability, strangers to the litigation, as they are entitled to, had access. In any event, 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.

17. It is 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.

18. In **Dain AO v Davis Frankel and Mead** [2005] 1 All ER 1087, Moore-Bick J said:

> "I think that in the case of documents read by the court as part of the decision-making process, the court ought generally to lean in favour of allowing access in accordance with the principle of open justice as currently understood, notwithstanding the view that there may have been the view that may have been taken in the past about the status of hearings in chambers".

19. Mr. Nicol Q.C., on behalf of the applicants, submits that the applicants have 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 is 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".

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

> "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".

21. Mr. Darling Q.C. on behalf of Multiplex accepts that the applicants have a legitimate interest. He submits that the requirement of open justice is an essential feature of the trial process as opposed to the interlocutory process and that the public access to documentation is a means by which the conclusions reached by the judges at trial can be the subject of informed public scrutiny. Mr. Darling submits that the trial is the final adjudication on the merits. He refers to all the reported cases he could find and comments that they were all concerned with public disclosure, either during or after trial or compromise. All cases concern of course the operation of CPR 5.4(5).

22. Mr. Nicol contends that the requirement for open justice must equally apply to interlocutory proceedings. He relies upon a passage in **Hodgson & others v Imperial Tobacco Ltd.** [1998] 1 WLR 1056. at page 1073 paragraph H in the judgment of the Master of the Rolls, as he then was:

> "In litigation of this sort, it is difficult if not impossible for the court to seek or to prevent direct or indirect communication with the media. In our judgment in this case the court should not have attempted to do so. The best way of avoiding ill-informed comments in the media in the case of this nature when the interest of the public is high, is for the court to be as open as is possible and practicable, not only in relation to the trial but also in relation to the interlocutory proceedings which have to take place prior to that trial. The other action which can be taken to reduce the risk of trial by media and the absence of cooperation between the parties affecting the conduct of the proceedings is to ensure that as soon as is practical a timetable is laid down for bringing the case to trial as early as possible, giving any directions to the parties which are necessary in order to require them to co-operate in achieving this".

23. In my judgment Mr. Nicol is right. 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.

24. Mr. Darling further submits 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. The attendant prospect of trial in the press in advance of a trial in court would place commercial parties under a significant additional burden. He submits that Multiplex would be under such a burden. He contends that should this application be permitted, the floodgates would open. There would be such applications which could be made any time after new documents were filed with the court. I do not accept that this scenario would obtain. It would not be the case since an applicant would have to demonstrate a legitimate interest and the documents would have to be shown to have been judicially deployed.

25. Mr. Darling posited the spectre of tactical delays to the filing or amending of pleadings or the extravagant employment of material in pleadings to serve the ends of what could be a press trial. The power of the court to prevent vexatious and embarrassing pleading and the robust control of untimely applications to amend are sufficient to safeguard against such imagined breaches.

26. Mr. Nicol in my judgment properly placed emphasis on the passage I cited above in the judgment of Moore-Bick J in **Dain** as justifying the proposition that once a document is judicially employed in a public hearing a persuasive burden confronts the party seeking to prevent disclosure of the document.

27. Mr. Darling contends that real prejudice to Multiplex could flow should a disclosure order be made in this case. He submits that if the court acceded to the applicant's application there would be a real risk of injustice to Multiplex. He contends that the public perception of Wembley is out of all proportion to its role in Multiplex's business activities as a whole which is apparently the subject of the ABC programme. He contends that Multiplex's reporting obligations to the stock exchange in Australia 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.

28. I have considered the witness statement of Mr. Garrick Higgins, an Australian commercial lawyer with extensive experience in company work and dealings with the Australian Stock Exchange and the application of its Listing Rules. He exhibits to his statement the relevant disclosure rules and the guidance notes, as did Mr. Panayides on behalf of Multiplex.

29. The General Rule set out in Listing Rule 3.1 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 Australian Stock Exchange that information".

Listing Rule 3.1.A goes on to set out the exceptions to the General Rule contained in the Listing Rule.

30. If information that is known to the Australian Stock Exchange listing entity is disclosed in the public forum, and a reasonable person would expect that information to have a material effect on the price or value of the entity's securities, that entity is obliged both under the Listing Rules and the Corporations Act to immediately disclose the information to the Australian Stock Exchange. I accept the evidence of Mr. Higgins.

31. He goes on to say in his witness statement, referring to the letter from Clifford Chance that I made reference to earlier:

> "The statement made in the second sentence of point 1 of the letter from Clifford Chance .... does not properly reflect the operation of Listing Rule 3.1 or its exception. The exception contained in listing rule 3.1.A only deals with the issues which must be satisfied if an entity is to be exempted from complying with its obligation of disclosure as required by Listing Rule 3.1. Listing Rule 3.1.A does not, by its operation, make documentation or information disclosable".

32. In my judgment it is 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 the Stock Exchange in any event. I do not therefore accept that the effect of the Australian Stock Exchange Rules upon Multiplex would impose an additional and onerous obligation over and above those already placed upon a publicly created company in Australia. Mr Panayides in his witness statement on behalf of Multiplex does not accept the position put forward by the writer of the letter of 18 August 2005.

33. If material changes to Multiplex’s pleadings were warranted, the substrate of fact warranting those changes would itself have triggered the reporting obligations and not the disclosed pleadings.

34. I have made reference to the extensive press coverage of this case. There has been detailed reference to the claims and to the counterclaims and defences, particularly in the trade press. It is evident to me from the language and detail that the conclusion is warranted that at least some of the contents of the pleadings and their details are already known to the press.

35. Whilst Mr. Darling submits that the pleadings may continue to be refined, none the less at this stage both parties have by their claims and responses -- I use that general term to include reply and defence -- authoritatively set out their respective positions at the present. I do not accept Mr. Darling's submissions that because the consolidated action is complex and the pleadings are long and detailed that disclosure at this stage could give rise to selective and therefore unfair coverage. I do not accept this to be the case.

36. In any event, the position would be the same were the trial to be reported and the final adjudication of the issues. This 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.

37. I also reject 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, took account of the whole pleaded case. It would not be appropriate and it would be artificial, to embark upon an editing exercise, giving only partial disclosure of pleadings.

38. This is essentially a matter of discretion relating to this case and the state of the pleadings at this time. I have considered with care the careful and well argued submissions of Mr. Darling as to the reasons why there should not be disclosure at this stage because of apprehended prejudice. I am unable to accede to those submissions. I am satisfied that it would be fair and just to order disclosure of the documents sought. I so order.