

# *SL Claimants v Tesco*: High Court clarifies the confidentiality of documents referred to in separate criminal proceedings

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In *SL Claimants v Tesco Plc*,<sup>1</sup> the High Court considered a number of issues relating to disclosure during the fourth case management conference in those proceedings. Of particular interest to practitioners and parties to litigation was the Court's findings relating to the confidentiality (for privilege purposes) of documents referred to in separate criminal proceedings. This is the second recent case relating to confidentiality and privilege, following the decision in the *Raffeisen* case.<sup>2</sup>

## Summary

Two linked claims between two separate sets of claimants (the “**SL Claimants**” and the “**MLB Claimants**”) and Tesco plc are currently before the High Court. These claims are both brought under section 90A and Schedule 10A of the Financial Services and Markets Act 2000. The SL Claimants are seeking to recover substantial losses in respect of their investment decisions in relation to shares in Tesco which they made in alleged reliance on information published by Tesco which is now asserted to be false in light of certain purported accounting irregularities.

This complex case, described by Mr Justice Hildyard as “*litigation on a grand scale*” in his judgment, has seen a number of administrative matters arise. At the fourth CMC in the proceedings, which lasted three sitting days and relied on over 7,000 pages of factual documents, the Court resolved a number of administrative issues, including a specific disclosure application on the part of the SL Claimants.

Amongst other issues of specific disclosure, Hildyard J considered an application from the SL Claimants for disclosure of a meeting note (the “**Majid Note**”). It was not disputed that the Majid Note had originally been privileged (being a note of a meeting between a senior Tesco in-house lawyer and Tesco's external lawyers) and there was no suggestion that privilege in the Majid Note had been waived by Tesco. Rather, it was submitted by the SL Claimants that confidentiality in the document had been lost because of its mention in open court in separate criminal proceedings where Counsel for Tesco had quoted from the Majid Note and invited the judge to read portions of it (including first three pages in full). The SL Claimants argued that as the document had been discussed in open court, it was no longer confidential and privilege could not be

<sup>1</sup> *SL Claimants v Tesco Plc (CMC)* [2019] EWHC 3315 (Ch) [See also our previous client alert on this case](#)

<sup>2</sup> *Raffeisen Bank International AG v Asia Coal Energy Ventures Ltd & Ashurst LLP* [2020] EWCA Civ 11

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maintained over it. Tesco rejected this contention arguing that the Majid Note remained privileged and confidential despite the reference to it in open court and the fact that the criminal trial judge expressly considered it.

## The High Court decision

Hildyard J ultimately found that confidentiality had not been lost in the Majid Note, and accordingly that there was no loss of privilege in the document. He held that the question as to whether references to a document in open court constitute an exposure of the document to the public such that confidentiality in it is lost is a matter of degree to be assessed on a case by case basis. On the case before him, Hildyard J found that the references to the document did not amount to a loss of confidentiality in the document itself.

In reaching this conclusion, Hildyard J gave consideration to a number of cases, including *Serdar Mohammed v Ministry of Defence*,<sup>3</sup> *SmithKline Beecham v Connaught Laboratories*,<sup>4</sup> *Rawlinson & Hunter Trustees v Akers*,<sup>5</sup> and *Dring v Cape*.<sup>6</sup>

The SL Claimants submitted that confidentiality had been lost by virtue of sufficient publicity being given to the contents of the document such that it could no longer be regarded as confidential (per *Mohammed*). They further submitted that the principles of open justice meant that the references made in public gave a right of access to evidence which had been placed before the (criminal) court such that the basis on which a matter has been decided can be properly understood (per *SmithKline Beecham*).

Tesco relied on obiter comments of Eder J in *Rawlinson and Hunter Trustees v Akers* which drew a distinction between information contained in a document and the document itself. Public reference to the information may well cause loss of confidentiality in the information, but not necessarily in the document containing the information. Tesco conceded that this was ultimately a matter for the Court's discretion pursuant to *Dring v Cape*. Hildyard J agreed with Counsel for Tesco that there was a distinction between the document and the information contained in it, and held that the references to the document in this case did not “*either in terms of their detail or their extent, amount to a loss of confidentiality in the document itself.*”

Accordingly, Hildyard J found that the Majid Note itself remained confidential and privileged. He did, however, conclude his judgment with a warning that should the Majid Note be “*deployed or referred to*” at trial then the matter of confidentiality and privilege would need to be revisited.

## Significance of the Decision

Hildyard J's decision sets out guidance for parties as to the extent to which they are able to refer to privileged material in open court without losing the quality of confidentiality necessary for privilege to be maintained.

However, the judgment makes clear that the Court's determinations in this regard are a matter of degree, and parties should accordingly give careful consideration to any decision to make reference to privileged materials in open court.

Equally, parties considering making a specific disclosure application should be aware that a reference to a document in separate Court proceedings, even if the judge reads passages from the document, may not be enough for there to be a loss of confidentiality and privilege over that document. Such applications may therefore fail, with the party making them potentially at risk of the usual cost consequences.

Hildyard J's statement that “*open justice*” may require disclosure of a privileged document referred to in other court proceedings even if the references to the document do not, in and of themselves, mean that

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<sup>3</sup> *Serdar Mohammed v Ministry of Defence* [2013] EWHC 4478 (QB)

<sup>4</sup> *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498

<sup>5</sup> *Rawlinson and Hunter Trustees SA and others v Akers and another* [2014] 4 All ER 627

<sup>6</sup> *Dring (on behalf of the Asbestos Victims Support Group) v Cape Intermediate Holdings Ltd* [2019] 3 WLR 429 [See also our previous alert on this case](#)

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confidentiality is lost, potentially creates a risk for privilege to be lost. In such cases, the Court will have to balance the principle of open justice against the protection of a party's right to confidentiality.

Finally, along with *Raffeisen*, this case is a further reminder to parties that *deploying* privileged material in proceedings may result in a loss of privilege, and parties should be aware that they may be treading a fine line when referring to such documents in open court, even if such references will not automatically result in a loss of confidentiality and privilege.

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