

Non-Party Access to Court Documents

August 2019

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On 29 July 2019, the Supreme Court clarified the extent of the Court's discretion to grant a non-party access to court documents, by ruling that a non-party should be allowed access to documents placed before the court and referred to during a public hearing even if those documents had not been read by the judge or read out in open court. A non-party applicant seeking documents from the court record will have to demonstrate how granting access would advance open justice or show a legitimate interest in doing so.

Summary

In *Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK)*,¹ the Supreme Court clarified that in light of the constitutional principle of open justice, unless inconsistent with any statute or rules of court, all courts have an inherent jurisdiction to determine which written materials placed before them may be accessed by non-parties.

Under CPR 5.4(C)(1), a non-party has the right to obtain copies of statements of case filed by the parties and any orders and judgments made by the Court. Under CPR 32.13(1), during the course of the trial, a non-party can also inspect witness statements of witnesses, which stand as evidence-in-chief at trial. However, there is no automatic right to obtain other documents from the records of the court.

In *Cape*, the Supreme Court held that the categories of documents accessible to non-parties should not be limited only to parties' submissions or documents which have been read to or by the judge. Confidentiality in those documents is lost, in any event, under CPR 31.22. The Court, when exercising its discretion under CPR 5.4(C)(2) or pursuant to its inherent power, may allow non-parties access any document which has been placed before the court and referred to during the hearing.

Access is not automatic. The non-party applicant must explain why such access will advance the principle of open justice and/or show why it has a legitimate interest in obtaining the documents.

The Court will then carry out a fact-specific balancing exercise to take account of any countervailing principles, such as the need to protect commercial confidentiality. The practicalities and proportionality of granting the request will also be relevant, especially when the request for documents is made after proceedings have ended. Therefore, where possible, non-parties should make timely applications during trial when the documents sought are readily available.

¹ [2019] UKSC 38

Background

The genesis of the present proceedings was an application made by a non-party, Mr Graham Dring, on behalf of Asbestos Victims Support Groups Forum UK (the “**Forum**”), for access to all documents used at or disclosed in two sets of proceedings involving Cape Intermediate Holdings Ltd (“**Cape**”). Those proceedings had settled after trial but before judgment was handed down. The Forum sought access to these documents, including the trial bundles and the trial transcripts, because it believed they would contain valuable information on the dangers of asbestos as well as valuable research which industry and industry related bodies had carried out, all of which would have been of assistance and/or relevant to the Forum’s work.

The application was made under CPR 5.4C(2), which provides that a non-party to litigation may, if the court gives permission, “*obtain from the records of the court a copy of any other document filed by a party...*”.

At first instance, the Master held that it had jurisdiction, either under CPR 5.4C(2) or at common law, to order that a non-party be given access to all the material sought. The Forum was therefore granted access to most of the trial bundle, including the witness statements, expert reports, and the disclosed documents relied on by the parties.

In 2018, the Court of Appeal overturned the order made by the High Court and determined that the “*records of the court*” for the purpose of CPR 5.4C(2) were more limited. It restricted the disclosure to the statements of case, as well as to the provision of witness statements, expert reports, written submissions filed by the parties and documents, which were read out in open court, the judge was invited to read in or outside of court or which it is clear or stated that the judge has read.

Cape appealed and the Forum cross-appealed to the Supreme Court, arguing that the Court of Appeal had been, respectively, too generous and too limited.

The Supreme Court’s Decision

The Supreme Court dismissed Cape’s appeal and noted that the determination of this case was an “*important issue*”, as it related to the extent and operation of the principle of open justice. The principle of open justice allows the public to understand and scrutinise the justice system.

Traditionally, all arguments and evidence orally presented for anyone present in the courtroom to hear. Nowadays, however, litigation involves a great deal of written material, most of which is often not read out in open court. The Supreme Court considered that there were three key issues which it needed to determine in order to align the principle of open justice with modern practice, namely:

- a) the scope of CPR 5.4C(2) and, in particular, the meaning of “*records of the court*”;
- b) whether the Court has an inherent power to grant a non-party access to documents from the records of the court; and
- c) if there is such a power, how far does it extend and how should it be exercised.

While there is no definition of what comprises the “*records of the court*”, the Supreme Court held that it must refer to those documents and records which the court keeps for its own purposes. It cannot refer to every single document generated in connection with a case and filed, lodged or kept for the time being at court.

More importantly, the Supreme Court held that the provisions in the CPR are not exhaustive of the circumstances in which non-parties may access court documents. Instead, the Court’s guiding principle should be the need for open justice. Unless inconsistent with statute or the rules of court, all courts and tribunals have an inherent jurisdiction to grant access to documents or other information pursuant to that principle.²

To achieve the purposes of the principle of open justice, the public need to be in a position to properly understand the issues and the evidence adduced in support of the parties’ cases which necessitates access to the written material available to the court. The Supreme Court therefore endorsed the default position in

² Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK) [2019] UKSC 38, paragraph 41.

Guardian News & Media Ltd,³ where the Court of Appeal held that the public may be allowed access, not only to the parties' statements of case and written submissions, but also to any document which has been placed before the court and referred to during the hearing.

There is no automatic right to such documents. The Supreme Court confirmed that a non-party must explain why they seek access to the documents and how granting access will advance the open justice principle and/or show a legitimate interest in doing so. In deciding whether to allow access under its inherent jurisdiction, the Court should balance two factors:

- the advancement of the purpose of the open justice principle; and
- any risk of harm the disclosure of the requested documents may cause to the maintenance of an effective judicial process, or to the legitimate interests of others.

The Supreme Court clarified that legitimate reasons for denying a non-party access to documents would include issues of national security, the protection of the interests of children or mentally disabled adults, the protection of privacy interests, and the protection of trade secrets and commercial confidentiality.

The Supreme Court also noted that the practicality and proportionality of granting the request would be a factor taken into consideration when granting any request. A non-party seeking documents after trial may find that it is not practicable to provide the material because neither the Court nor the parties may have retained it. Any disclosure should be proportionate to the burdens placed on the parties, in identifying and retrieving the material.

Comment

Parties filing documents at Court should be aware of the risk that documents such as witness statements, expert reports and factual exhibits may be accessible by non-parties once they are placed before a judge (as part of a hearing bundle) and referred to by a party at the hearing. Even if a non-party has been unable to attend a public hearing, under CPR 39.9 it can, as a matter of right, obtain a transcript of a public hearing based on which it may be able to identify the documents referred to at the hearing.

A non-party seeking access to documents referred to by a party at trial must be able to show: (i) a good reason why it will advance the open justice principle; and (ii) that compliance with the request will not be impracticable or disproportionate. In order to satisfy the latter requirement, non-parties would be well advised to make the document requests during trial or very shortly thereafter. The non-party who seeks access will also be expected to pay the reasonable costs associated with granting that access.

Parties concerned about limiting the possibility of distribution of commercially confidential documents referred to at Court must consider applying for an order restricting access to them by non-parties and/or asking the Court to sit in private for those parts of the hearing where confidential materials are referred to by the parties. Parties may also be able to resist any application from a non-party seeking access to documents on grounds that they are commercially confidential or, at the very least, obtain an order that the documents are suitably redacted before being handed over.

Following the decision in *Cape*, set out below is a table summarising some of the types of court documents which are generally accessible by a non-party:

Document	Timing	Public Access
Judgments and Orders	At any time	Pursuant to CPR 5.4C(1), a non-party to the proceedings may generally obtain a copy of an order or judgment without prior permission of the Court.
Statements of Case (including the claim form, particulars of claim,	At any time save that a claim form can be obtained only once all defendants have filed	Pursuant to CPR 5.4C(1), a non-party to the proceedings may generally obtain copies of the statements of case without prior permission of the Court.

³ R (Guardian News & Media Ltd) v Westminster Magistrates Court [2013] QB 619.

defence and reply to the defence)	an acknowledgment of service	
Witness Statements & Expert Reports	During or after a public hearing once the witness/expert has been called to give evidence	Pursuant to CPR 32.13, a witness statement (standing as evidence-in-chief) is open to public inspection during trial, unless the Court directs otherwise. The Court may also grant access to an expert report or witness statement, under its inherent jurisdiction, if the applicant can demonstrate that it is in the interest of open justice to do so and/or the applicant has a legitimate interest in obtaining the documents.
Written Submissions and/or Skeleton Arguments	During or after a public hearing where they have been deployed	Under its inherent jurisdiction, the Court may grant access to written submissions and/or skeleton arguments. This also applies to other documents, such as chronologies, dramatis personae and reading lists filed by the parties.
Documents placed before the court and referred to during the hearing (including any underlying exhibits)	During or after the hearing	Under its inherent jurisdiction, the Court may grant access to documents placed before the court and referred to during the hearing, regardless of whether the judge has read the document, so long as the applicant can demonstrate that it is in the interest of open justice to do so and/or the applicant has a legitimate interest in obtaining the documents.
Transcripts of hearings	After the hearing	Pursuant to CPR 39.9, any person may obtain a transcript of the recording of any hearing (for which there will be a fee), unless the hearing or any part of it was held in private.

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