Can non-parties obtain copies of documents from the records of the court in England and Wales?

Introduction

In *Cape Intermediate Holdings Ltd v Dring (for and on behalf of the Asbestos Victims Support Group)* [2018] EWCA Civ 1795, the Court of Appeal set aside an Order giving a non-party unprecedented access to documents held in court at the end of a trial. It clarified the extent of a non-party's right to obtain copies of documents filed in court proceedings and the principles to be applied when a non-party seeks access to such documents.

In summary, the Court's power to allow non-parties access to documents under CPR r5.4C is very limited but it may permit access to certain categories of documents pursuant to its inherent jurisdiction if the open justice principle is engaged.

CPR r5.4C

CPR r5.4C governs the provision of documents to a non-party from court records. Rule 5.4C(1) and (3) contain the general rule, which is, broadly, that a non-party may obtain from the court records copies of statements of case and judgments or orders given or made in public, but not until an acknowledgement of service or defence has been filed.

The application made by Mr Dring was, however, made pursuant to r5.4C(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."

Background to the appeal

This was an application for access to all documents used at or disclosed for a trial about asbestos-related damages. The litigation had settled after trial but before judgment was handed down.

At first instance, the Court found that "*records of the court*" meant all documents filed with the court, including trial bundles and documents, such as skeleton arguments, held with them. It found that Mr Dring had a legitimate interest in accessing them, and made an Order granting him permission to obtain copies of the following documents from the records of the court:

1. The witness statements including exhibits
2. Expert reports
3. Transcripts
4. Disclosed documents relied on by the original parties at trial contained in the paper bundles only
5. Written submissions and skeletons arguments
6. Statements of case to include requests for further information and answers if contained in the bundles relied on at trial.

Did the Court have the power to permit access?

On Cape's appeal, the Court of Appeal considered the issue of the Court's jurisdiction in the context of the principle of open justice and the provisions of the CPR.

Open Justice

The constitutional principle of open justice enables the rule of law to be policed through "the transparency of the legal process"[1]. It requires the Court to try and put non-parties in a position equivalent to that which they would have been in if they had been sitting in the Court's public gallery and the trial had been conducted orally, as trials used to be[2].

It was argued that the open justice principle will not apply where, as here, a case settles before judgment. The Court of Appeal did not take such a narrow view, but held that there must be an effective hearing for the open justice principle to be engaged.

The CPR gives effect to the open justice principle in a number of ways, for example the provision that witness statements are available for inspection during the course of the trial (CPR r32.13); and the exception to the rule that disclosure documents may only be used for the purposes of the proceedings in which they are disclosed – the exception applies once a document has been read to or by the Court or referred to at a public hearing (CPR r31.22).

"Records of the court"

So, when an application is made under rule 5.4C(2) to obtain documents from the "*records of the court*", what does "*records of the court*" mean? That was a key question in the appeal.

Lord Justice Hamblen, who gave the lead judgment, with which Sir Brian Leveson and Lord Justice Newey agreed, held that "*records of the court*" are formal documents which provide a record of the proceedings and are kept by the court office. Hamblen LJ said that the principal documents which will satisfy this description are those listed in the Practice Direction "Court Documents"[3], plus any communications with the court (as set out in r5.4C(2)). Crucially, "*filing is not synonymous with becoming a court record*".

Accordingly, it was held that the following are not "*records of the court*" and therefore cannot be obtained under r5.4C:

1. Trial bundles
2. Trial witness statements
3. Trial expert reports
4. Trial skeleton arguments or opening and closing notes or submissions
5. Trial transcripts.

The Court's inherent jurisdiction

The Court of Appeal also had to consider whether the Court had power to permit access to the documents sought pursuant to its inherent jurisdiction. Following a review of authorities, it held that the Court has inherent jurisdiction to allow non-parties inspection of:

1. Witness statements of factual and expert witnesses, whose evidence stands as evidence in chief and which would have been available for inspection during the course of the trial under CPR 32.13.
2. Documents in relation to which confidentiality has been lost under CPR 31.22 and which are read out in open court; which the judge is invited to read in open court; which the judge is specifically invited to read outside court, or which it is clear or stated that the judge has read.
3. Skeleton arguments/written submissions or similar advocate's documents read by the court provided that there is an effective public hearing in which the documents are deployed.
4. Any specific document or documents which it is necessary for a non-party to inspect in order to meet the principle of open justice.

1 Toulson LJ in *R (Guardian News & Media Ltd) v Westminster Magistrates Court* [2013] QB 619, quoted by Hamblen LJ at para 28.

2 Hamblen LJ at para 103.

3 specifically at paragraph 4.2A of CPR 5APD.4. The list includes, largely, procedural documents such as acknowledgements of service, but includes application notices and written evidence filed in support.

But not:

1. Trial bundles.
2. Exhibits to trial witness statements and experts' reports, unless they are read or treated as read in open court.
3. Documents which have been referred to in skeleton arguments/written submissions, witness statements, experts' reports or in open court simply on the basis that they have been so referred to.[4]

Hamblen LJ stated that "the Court may order that copies be provided of documents where there is a right to inspect", usually on the non-party undertaking to pay reasonable copying costs[5].

Principles to be applied where access is sought

The following are likely to be relevant factors when the Court is deciding whether and how to exercise its discretion pursuant to both CPR r5.4C(2) and its inherent jurisdiction:

1. The extent to which the open justice principle is engaged;
2. Whether the documents are sought in the interests of open justice;
3. Whether there is a "legitimate interest" in seeking copies of the documents and, if so, whether that is a public or private interest;
4. The reasons for seeking to preserve confidentiality;
5. The harm, if any, which may be caused by access to the documents to the legitimate interests of other parties.

What is a "legitimate interest"?

A legitimate interest can include academic interest; use by a pressure group; use in some journalistic form and any number of other uses which are ulterior but legitimate.[6]

Whilst Mr Dring's interest was of a public nature, the authorities make clear that an entirely private or commercial interest in a document can qualify as a legitimate interest. Often it will be an interest in related litigation.

Comments

Although the Order permitting access was struck out, the Court of Appeal expressed the wish that the parties would be able to agree an Order in the light of the guidance it had provided as to the categories of documents which a non-party may be permitted to inspect.

This guidance should help those wishing to obtain documents from the court and those who anticipate that access to their documents may be sought.

So, for example, if considering whether and when trial witness statements or experts' reports may be obtained by a non-party, the Court of Appeal has clarified that the Court does not have power to permit copies of these to be provided pursuant to CPR r5.4C(2) at all, and only has power to permit inspection during trial or afterwards.

Where a party wishes to prevent documents from being disclosed by the court, there are some measures which the Court can use to protect certain categories of documents, at different stages of the proceedings. This judgment suggests that such measures would not necessarily be conclusive on a future application for non-party access, particularly if the open justice principle were engaged, but should be taken into account when the Court is exercising its discretion on the access application.

4 Hamblen LJ, para 100 and 112.
5 Hamblen LJ, para 113.
6 Potter LJ in *GIO Personal Investment Services Ltd v Liverpool & London Steamship P&I Ass. Ltd* [1999] 1 WLR 984, quoted by Hamblen LJ at para 68.

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